



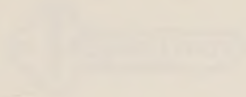
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CALIFORNIA REPORTER

PACIFIC STANDARD

WEEKLY



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THE PACIFIC STANDARD WEEKLY

OF THE

PACIFIC STANDARD

WEEKLY

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER

SECOND SERIES



3 P.2d — 4 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.

1941

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Pacific Reporter, Second Series, Vol. 3, Nos. 1-5;
Vol. 4, Nos. 1-4.

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213 Cal. 632

Ito et al. v. SCHILLER et al.
L. A. 11288.

Supreme Court of California.
Sept. 1, 1931.

1. Estates ⇨10(1).

Merger does not always follow union of greater and lesser estates in same ownership.

2. Estates ⇨10(1).

Merger of greater and lesser estate in same ownership is question of intention of person in whom interests are united.

3. Estates ⇨10(1).

Evidence held to support finding of lack of intention to effect merger of estates, where lessor secured lessee's consent to use portion of leased premises at agreed rental.

Premises were leased for a term of five years, and subsequently lessee gave one of lessors consent to temporarily use gasoline station and washrack located upon front portion of leased premises. It was shown that premises were so used upon a month to month basis, until terminated by notice from lessees. Lessors paid rental therefor by crediting agreed rental against rental due lessors for entire premises.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by H. M. Ito and another against William T. Schiller and another. Judgment for the plaintiffs, and the defendants appeal.

Modified and, as modified, affirmed.

Porter O. Blackburn, of Los Angeles, for appellants.

Jerry Glesler and Bingham Gray, both of Los Angeles, for respondents.

PRESTON, J.

Appeal from judgment for plaintiffs in an action to recover possession of premises held under a written lease and damages suffered through their ejectment therefrom.

Plaintiffs' first amended complaint set forth three causes of action based upon a five-year written lease to them of certain premises, alleging that defendants entered upon the property some eight months after execution of the lease, removed buildings therefrom, and withheld possession from plaintiffs, wherefore they prayed for restitution of the premises, damages for waste and the unlawful withholding, and for value of rents and profits and costs of suit. Defendants answered and also cross-complained, alleging their termination of the lease upon written notice to plaintiffs for nonpayment of rent, praying that plaintiffs take nothing and that defendants have judgment in the sum of \$867, with interest, representing the balance alleged to be due upon rentals covering the period of occupation of the premises by plaintiffs.

The court found that defendants executed to plaintiffs, for a period of five years from September 1, 1926, at a monthly rental of \$200 for the first three years and \$225 for the two years following, a written lease of said premises, which lease was a valid and subsisting leasehold interest which had not been canceled, surrendered, or otherwise terminated; that on December 1, 1926, defendant Gonzales secured the consent of plaintiff Ito to use temporarily the gasoline station and washrack located upon the front portion of the premises and thereupon used the same from December 1, 1926, to July 1, 1927, upon a month to month basis, terminated by notice from plaintiffs to defendants served on or about May 23, 1927, paying therefor \$875 by crediting the sum of \$125 per month against the \$200 accruing monthly as rental due from plaintiffs to defendants pursuant to said five-year lease; that said temporary arrangement did not result in a cancellation or surrender of the

plaintiffs' five-year leasehold interest nor in a merger, either in whole or in part, of said leasehold interest in defendants' reversionary interest; that plaintiffs paid defendants the sum of \$2,000 covering rentals in full from September 1, 1926, to July 1, 1927, plus \$225 deposited by them as security for the payment of rent; that defendant Gonzales wrongfully dispossessed plaintiffs of the entire premises on said July 1, 1927, and has wrongfully withheld the possession thereof from plaintiffs since said date; that the rental value of the premises is \$400 per month. The court thereupon concluded that plaintiffs were entitled to receive from defendant Gonzales the sum of \$2,400, being \$200 per month from said July 1, 1927, to time of judgment, and restitution of the premises, defendants to take nothing by reason of their cross-complaint. Judgment was entered accordingly and defendants appealed.

The evidence, although conflicting, offers ample support for the findings and judgment in every respect. The main controversy centers around said so-called month to month occupancy of a portion of the leased premises by appellants, who testified that upon respondents' complaint of inability to live up to the requirements of the lease, it was thereupon terminated; appellants repossessed themselves of the gasoline station and washrack and allowed respondents to retain the rear portion of the property on a month to month basis, rental \$75 per month, which tenancy was also terminated by appellants, upon notice, on July 1, 1927, solely because of non-payment of rent. To the contrary, respondents and their witnesses testified that the expressed intention of the parties was that appellants should sublease the washrack and gasoline station for \$125 per month, which amount was to be credited upon the \$200 due monthly from respondents. In fact, there was evidence that respondents had a satisfactory subtenant whose occupancy was terminated because of appellants' desire to take over the station and washrack. It is also significant that appellants based their cross-complaint upon allegations that \$2,000 was due them under said written lease for the 10 months from September, 1926, to July, 1927, and so stipulated upon the trial, of which sum \$1,133 only was alleged to have been paid. Had the lease terminated in December, 1926, and had respondents thereafter rented only the rear of the premises at \$75 a month the amounts paid and due would undoubtedly have been computed on that basis. There was also evidence that the rent alleged to be in arrears had in fact been paid in full, including Plaintiffs' Exhibit 2, a receipt dated May 1, 1927, showing payments, in addition to said \$125 per month credit, for March, April, and May, followed by the clause, "Rent Paid in full Juan M. Gonzales."

[1-3] A merger does not always follow the union of a greater and lesser estate in the same ownership. The question is one of intention, actual or presumed, of the person in whom the interests are united, the evidence in this cause being sufficient to show the true intention of appellants to have been as found by the court. The rule is stated in *Jameson v. Hayward*, 106 Cal. 682, 688, 689, 39 P. 1078, 1080, 46 Am. St. Rep. 268, as follows: " * * * Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties. * * * In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent so to do will ordinarily be implied." See, also, *Rumpp v. Gerkens*, 59 Cal. 496; *Security, etc., v. Willamette*, 99 Cal. 636, 34 P. 321, 10 Cal. Jur. pp. 606-608, and cases cited; *Tiffany on Landlord and Tenant*, vol. 1, pp. 88, 90, § 12. It appears from the circumstances here that in December, 1926, when the estates were united in appellants, their interests would not have been subserved by a merger as they would have been faced with possible loss of the rentals payable under the lease for the remainder of the term. Their desire, in July, 1927, to terminate the lease, due perhaps to a change of circumstances, is not sufficient to imply an intent to merge the estates which is not shown to have existed at the earlier date.

Respondents' notice to appellants to quit their month to month tenancy, found by the court to have been served on or about May 23, 1927, was stipulated to have been served May 18th, and it purported to terminate the tenancy on June 19th, 30 days from May 20th. Citing authority to the effect that a month to month tenancy must be terminated by notice to quit on one of the recurring periods of the letting, appellants claim said notice was insufficient. This contention is inconsistent with appellants' position that they were occupying the premises in their own right through a merger and not as tenants of respondents. The fact is that they continued their occupancy for a full forty-two days after the notice, namely, until July 1, 1927, when they themselves wrongfully evicted respondents. Furthermore, the clause in the findings relative to service of the notice on or about May 23d is really immaterial in view of the circumstances as above set forth.

We have examined with care all points raised by appellants, but we find abundant evidence in support of the findings and judgment and no justification for appellants' entry upon the premises, eviction of respondents, and demolition of the shop used by them.

These parties have stipulated that in the event of an affirmance of the judgment, this

court may include therein the damages suffered by respondents for the value, use, and occupation of the premises from date of rendition of judgment in the trial court to date of affirmance of same by this court, pursuant to section 936a of the Code of Civil Procedure, and have further stipulated that the sum of \$6,625 is the correct amount which has accrued on said lease pending the appeal.

Therefore, it is hereby ordered that respondents receive from appellants the said sum of \$6,625, in addition to the award made to them by said judgment, which is hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LANGDON, J.

213 Cal. 637

PEOPLE by WEBB, Atty. Gen., ex rel. CONKLIN v. CITY OF SAN BUENAVENTURA et al.
L. A. 13065.

Supreme Court of California.

Sept. 1, 1931.

1. Constitutional law ☞35.

Constitutional declaration that its provisions are mandatory and prohibitory applies to all sections of Constitution (Const. art. 1, § 22).

2. Constitutional law ☞35.

Constitutional declaration that provisions of Constitution are mandatory and prohibitory, unless otherwise expressed, is binding on all departments of state government (Const. art. 1, § 22).

3. Municipal corporations ☞48(1).

Legislative resolution approving freeholders' charter together with charter which it establishes is conclusive as to facts so recited in preamble.

4. Municipal corporations ☞48(1).

City clerk's casual request to newspaper reporters to run news item to effect that copies of proposed charter were available for distribution held not substantial compliance with Constitution requiring advertisement (Const. art. 11, § 8).

The word "advertise," as used in Const. art. 11, § 8, requiring council to advertise in one or more of papers of general circulation notice that copies of proposed charter might be obtained in pamphlet

form on application therefor, required council to give officially directed public notice.

[Ed. Note.—For other definitions of "Advertise; Advertising," see Words and Phrases.]

5. Municipal corporations ☞48(1).

Voters' adoption of municipal freeholders' charter held ineffectual notwithstanding legislative approval, where no advertisement was made that copies of proposed charter were available for distribution to voters (Const. art. 1, § 22; art. 11, § 8).

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Ventura County; Pat. R. Parker, Judge.

Quo warranto proceeding by the People, by U. S. Webb, Attorney General, on the relation of Oscar Conklin, against the City of San Buenaventura, and others. From judgment for relator, defendants appeal.

Affirmed.

Merle J. Rogers, Robert M. Sheridan, and Sheridan, Orr, Drapeau & Gardner, all of Ventura, for appellants.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Jess E. Stephens, of Los Angeles, for respondent.

WASTE, C. J.

Oscar Conklin, a resident and taxpayer of the city of San Buenaventura, with the consent of the Attorney General, brought this action in quo warranto in the superior court, attacking the validity of the proceedings relating to the adoption of a freeholders' charter for that city. Demurrer to the complaint, interposed by the defendants, was overruled. Defendants declined to answer, and judgment was entered for the plaintiff.

After the charter was prepared and signed by the freeholders. It was filed in the office of the clerk of the city council, duly printed in the official papers, and submitted to the electors of the city, together with the required notice fixing the date for the election to be held thereon. Copies of the charter were printed in convenient pamphlet form, but the council did not, as required by section 8 of article 11 of the state Constitution "until the date fixed for the election upon such charter," or at all, "advertise in one or more papers of general circulation published in said city a notice that such copies [might] be had upon application therefor."

A majority of the qualified electors of San Buenaventura voted in favor of the charter, and at the succeeding session of the state Legislature (1931) it was approved (Assembly

Concurrent Resolution No. 7), and was filed with the secretary of state January 23, 1931. The city of San Buenaventura claims to be now existing under the purported freeholders' charter, and the personally named defendants claim to be members of the city council under the new charter. No fraud is alleged nor attempted to be proved. No claim is made that the failure to "advertise," as required by the Constitution, prevented any voter from intelligently exercising his or her franchise, or that a different result would have obtained if the alleged defect had not existed. The sole contention of plaintiff is that the failure to "advertise" the charter, as required by the Constitution, is a fatal defect, making the action of the Legislature in approving the instrument an idle act, and rendering the purported charter of no effect. The appellants argue that the action of the Legislature "approving" the purported charter is binding and conclusive in the matter, and cannot be inquired into, and that, granting that the required publication or "advertisement" was not had, there was, in effect, a substantial compliance with the provisions of the Constitution which was sufficient, under the circumstances, to render the omission harmless.

We do not need to go behind the action of the Legislature, for the facts in the case definitely and fully appear in the recitals, or findings, contained in the concurrent resolution approving the charter. Two questions, therefore, present themselves for our consideration: First, may any of the provisions of the Constitution of this state relating to the organization of municipal corporations be dispensed with? Second, may "substantial compliance" with such provisions be substituted for actual performance of any of the steps required by the Constitution as prerequisite to some action authorized by the provisions? Both of these questions must be answered in the negative.

[1, 2] The Constitution (article 1, § 22) makes its provisions "mandatory and prohibitory, unless by express words they are declared to be otherwise." This declaration applies to all sections of the Constitution alike, and is binding upon any department of the state government, legislative, executive, or judicial. *People v. Calif. Fish. Co.*, 166 Cal. 576, 138 P. 79. In *People v. Gunn*, 85 Cal. 238, 24 P. 718, 720, this court followed its decision in an earlier case, and said: "The language of Judge Cooley in his work on Constitutional Limitations, page 78, quoted and adopted in *State v. Rogers*, 10 Nev. 253 [21 Am. Rep. 738], is directly in point, and shows that, even in the absence of a clause making its provisions mandatory and prohibitory, the courts will not hold the provisions of a constitution to be directory or unessential, but will rather hold that wherever it prescribes a mode, that mode is the measure of power."

In *Blanchard v. Hartwell*, 131 Cal. 263, 264, 63 P. 349, 350, the above doctrine laid down in *People v. Gunn*, supra, was approved, and it was held that the provisions for the adoption of a municipal charter were, under constitutional provisions, expressly declared to be mandatory and prohibitory; and it was again said, "under such provisions the mode is the measure of the power." "Such mode," said the court, "is exclusive. Under such a constitution this seems indisputable. The one mode * * * is commanded, and all others are prohibited." To the same effect is the decision in *Doran v. Foster*, 189 Cal. 610, 209 P. 548.

[3, 4] Whatever confusion may have existed in the past relative to the status of a freeholders' charter and the resolution of the Legislature approving it, the question seems to be now set at rest by the decision of this court in *Taylor v. Cole*, 201 Cal. 327, 257 P. 40, in which the court held that a legislative resolution approving a freeholders' charter, together with the charter which it establishes is the law of the state, and is conclusive as to the facts so recited in the preamble. It is recited in the preamble to the resolution of the Legislature here under consideration, supra, that, after the proposed charter was filed in the office of the city clerk of the city of San Buenaventura, it was, by order of the city council, printed and published in full in certain newspapers circulated in the city. It was then printed in "convenient pamphlet form," but no advertisement or other official notice was ordered, had, or given that such copies might be had upon application therefor. What actually occurred, as further recited in the preamble, was that the city clerk "advised" certain reporters of papers published in the city, who were casually in her office, that copies of the charter were ready for distribution, "and then and there suggested and requested that such reporters cause to be published in said newspapers a story or notice (and the city clerk does not remember which word was used) to the effect that such pamphlet copies of the proposed charter were in the office of the city clerk available for distribution and might be had upon application therefor." The newspapers, circulating in the city, carried such information as a news item. It further appears from the preamble that, prior to the election for the approval of the charter, fifteen hundred copies of the charter in pamphlet form were applied for and distributed, and the question of the adoption of a new charter was discussed throughout the city. On these facts, last recited, the appellants contend that there was a sufficient substantial compliance with the mandate of the Constitution regarding the "advertising" of the charter to render the omission to "advertise" harmless. In *Weill v. Kenfield*, 54 Cal. 111, 117, this court directly held that it was not at liberty to say that

any constitutional prerequisite to the validity of a law is of no practical service, or to consider the policy of a provision when the language seems plain and positive. The parties have gone at length into definitions and refinements of the use of the word "advertise." But to us, in the light of the context and of the purpose of the provision as a whole, the effect, and meaning as well, of the word as used in the Constitution are that the "legislative body" (in this case the council), after the filing with the clerk and the publication of the proposed charter in the official newspaper of the city, was required to literally "advertise"; i. e., give officially directed public notice "in one or more papers of general circulation published in said city" that copies of the charter might be had upon application therefor. See the language of this court in *Clark v. Los Angeles*, 160 Cal. 30, at pages 40, 41, 116 P. 722. An undirected casual request by the city clerk to newspaper reporters looking for news, to run a "story" or news item to that effect is not even a substantial compliance with the Constitution. Aside from such conclusion, the cases which hold that a rule of substantial compliance may be invoked under some circumstances arising under the application of mere statutory enactments do not apply to the fulfillment of mandatory constitutional requirements.

Section 22 of the Constitution of 1879, making its provisions mandatory, was deliberately inserted by the framers because of certain earlier decisions holding that the provisions of the Constitution of 1849 relating to certain matters were only directory. *Clark v. Los Angeles*, supra, at page 41 of 160 Cal., 116 P. 722. The reason the framers of the later Constitution insisted on making its provisions mandatory is so well illustrated by the remarks of this court in *People v. Johnson*, 6 Cal. 499, 504, that we quote from the opinion written by Mr. Chief Justice Murray: "If a Court were at liberty to say at pleasure, that the organic law of the State was directory, then the whole Constitution could be frittered away by judicial decisions, involving in its abrogation the social and political rights of the citizen. Such a power is too dangerous ever to be committed to the arbitrary will of any man or set of men."

[5] As it appears on the face of the Assembly concurrent resolution approving the charter that one of the essential steps required by the Constitution to be taken for the adoption and approval by the voters of a municipal freeholders' charter was not taken in this instance, we are compelled to hold that the freeholders' charter of San Buenaventura, submitted to the electors of the city, not having been legally adopted, its purported approval by the Legislature amounts to nothing. Neither the city of San Buenaventura nor the other defendants who claim to hold

office under the provisions of the board of freeholders' charter have any corporate rights, privileges, or franchises under its provisions.

The trial court properly overruled the demurrer of the defendants, and the judgment thereafter entered in favor of the plaintiff is affirmed.

We concur: CURTIS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.

LANGDON, J. (dissenting).

I dissent. In my opinion the case of *Taylor v. Cole* is controlling here, and compels a conclusion contrary to that reached in the foregoing opinion. In that case we upheld the adoption of a charter in spite of failure on the part of the proper officials to advertise the notice of availability of copies. The basis of the decision is best expressed in the language of Mr. Justice Preston, as follows (201 Cal. 338, 257 P. 40, 44): "In the case before us, the Constitution placed upon the Legislature the plain duty of seeing that the proceedings by which the charter amendments were proposed were regular in all respects. If jurisdictional defects existed, it was the duty of the Legislature to reject the documents tendered as a whole and withhold ratification. The Legislature saw fit to accept the certificate of the defendant board and such other evidence as it may have taken and its conclusion that the election was regular is not open to question in court proceedings, at least in the absence of fraud." See, also, *Fragley v. Phelan*, 126 Cal. 383, 403, 58 P. 923.

This proposition necessarily follows from the view that a municipal charter is a statute of the state, and as such is clothed with a presumption of validity. The courts will not, by a resort to evidence outside the act, attempt to determine whether the Legislature was warranted in finding that it had been validly adopted. *Stevenson v. Colgan*, 91 Cal. 649, 27 P. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 P. 207; *Taylor v. Cole*, supra; *Allen v. State*, 14 Ariz. 458, 130 P. 1114, 44 L. R. A. (N. S.) 468.

The majority opinion considers this rule inapplicable because of certain facts recited in the explanatory statement or certificate of the mayor and clerk, which certificate was printed with the act. The recitals, it is said, constitute a defect which appears on the face of the statute. I am unable to agree that the certificate, which is not an essential part of the act, has any such effect; and the preamble shows that the steps leading to the adoption of the charter were considered and found to be correct by the Legislature.

I am moreover, satisfied that the legisla-

tive determination was correct, in that there was in this case a sufficient compliance with the constitutional requirements. Conceding that the provision in question is mandatory, there is nothing to indicate that an absolutely literal compliance is necessary, or even possible. The requirement is that a certain fact be advertised, and its purpose is obviously to give notice to the people of the community that they may secure copies of the charter. The Constitution does not prescribe the form of the advertisement, its size, or its content; it provides for publication in one or more papers, and consequently permits the insertion of a single, small, and unimpressive announcement in one newspaper. It is not even stated that there must be a paid advertisement. In the instant case there were printed in several papers the facts required to be brought before the people by the constitutional provision; and almost the entire stock of printed copies of the charter was exhausted by distribution to persons calling for such copies. In view of the vague phraseology of the provision, and its manifest purpose, is it reasonable to say that the proceedings taken in this case were fatally defective? I think not. There was a substantial compliance with the mandatory requirement, and the net result of the method employed was to carry out the purpose of the requirement much more effectively than by an insignificant paid advertisement in one paper, which latter notice would admittedly be sufficient.

I am convinced that the charter was validly adopted and that the attack upon it is groundless.

213 Cal. 544

POSTAL TELEGRAPH CABLE CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 12455.

Supreme Court of California.

Aug. 31, 1931.

1. Master and servant ⇨385(1).

Ability of workman to do exact work for which he had been employed is not the sole measure of disability under Compensation Act (St. 1917, p. 831, and amendments thereto).

2. Master and servant ⇨385(17).

Employer *held* not entitled to credit against award of compensation for wages earned by employee subsequent to injury, which eventually left employee totally disabled (St. 1917, p. 839, § 9(b), as amended by St. 1919, p. 914, § 4).

Credit was not allowable, since the payments made to the employee subsequent to his injury and for which the employer sought credit as against the award of compensation were not intended nor accepted as disability compensation or gratuities, but represented wages for services performed.

3. Master and servant ⇨385(16).

Employee, although permanently disabled, is entitled to medical and hospital treatment required to relieve him from effects of injury.

4. Master and servant ⇨416.

Where Industrial Commission made timely award giving injured employee permanent total disability rating, commission's order after expiration of 245 weeks, providing for future medical and hospital treatment, *held* justified as making fully effective award previously made (St. 1917, pp. 850, 873, 877, §§ 20 (d), 63(a), 69(a); Const. art. 20, § 21).

In Bank.

Proceedings under the Workmen's Compensation Law by Jack J. Coen, an incompetent minor, employee, by Henry Coen, his guardian ad litem and trustee, opposed by the Postal Telegraph Cable Company, employer. To review an order of the Industrial Accident Commission awarding compensation for injuries, the employer brings certiorari.

Award affirmed.

Superseding and adopting in part original opinion in 294 P. 1071, which superseded opinion of District Court of Appeal in 288 P. 726.

Walter F. Haas, H. C. Johnston, and Haas & Dunnigan, all of Los Angeles, for petitioner.

Edward O. Allen and A. I. Townsend, both of San Francisco, for respondents.

WASTE, C. J.

On rehearing we are satisfied with and reassert the views expressed in our former opinion filed December 27, 1930, except as to one point. On the question of the jurisdiction of the Industrial Accident Commission, after the two hundred and forty-five weeks of continuing jurisdiction had expired, to make the award of "further medical and hospital treatment as (the injured employee) may reasonably need from time to time," we have reached a different conclusion as will presently be made to appear, from that first announced. As to all other matters, we adopt our former opinion, viz.:

Jack J. Coen, a minor, suffered a fracture of the skull on July 16, 1924, while acting within the scope and course of his employ-

ment as a messenger for petitioner, the Postal Telegraph Cable Company. Three months later he returned to his employment, and continued therein until June 1, 1926, receiving full wages during all of this period. On the latter date he left the employ of petitioner and engaged in other work. Application for adjustment of claim against petitioner was filed April 29, 1927, and the respondent commission, after hearing, found that temporary total disability had been caused from July 16, 1924, the date of the injury, to September 21, 1924, and from April 28, 1927, continuing indefinitely thereafter. Based on this finding, an award of \$8.55 a week was made in accordance with the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, and amendments thereto). Subsequently, and on March 7, 1929, pursuant to further petitions and hearings, the commission filed its amended findings and award, whereby it was determined, upon competent evidence, that the injury had resulted in the mental derangement of the applicant causing permanent disability, the percentage being 100. The applicant was awarded \$20.83 a week for 240 weeks, beginning July 24, 1924, which was 8 days after the date of the accident, as required by section 9(b) of the act, as amended by St. 1919, p. 914, § 4, and a pension thereafter at the rate of \$12.82 a week for the remainder of his life. Credit was allowed for all payments theretofore made as disability compensation and attorney's fees, but was refused as to all payments of wages subsequent to the injury. The commission filed its second amended findings and award on June 28, 1929, the amendments relating only to attorney's fees and to provisions for further medical and hospital treatment.

The employer, being self-insured, seeks to have the award annulled and set aside, contending that credit should have been allowed to it for all wages paid to the applicant upon his return to work subsequent to the injury. Reference is made to section 21 of article 20 of the Constitution and to section 1 of the Workmen's Compensation Act, supra, wherein it is provided that: "A complete system of workmen's compensation includes adequate provisions * * * to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment." Petitioner asserts that this language precludes the employee "from the benefit of an award for 240 weeks following July 24, 1924, as during such period was included a period from September 22d, 1924, until April of 1927, during which no consequences of the injury were sustained by the respondent Coen." Concisely stated, the question confronting us is this: Is an employer entitled to credit against an award of compensation for wages earned by and paid to an employee subsequent to an industrial accident, which accident eventually leaves

the employee permanently and totally disabled?

Section 9(b) of the Workmen's Compensation, Insurance and Safety Act provides that an injury to the brain resulting in incurable imbecility or insanity is conclusively presumed to be permanent and total in character for which the compensation shall be "sixty-five per cent of the average weekly earnings for a period of two hundred forty weeks and thereafter forty per cent of such weekly earnings during the remainder of life." The award in the present case was computed on this basis, and is, therefore, in strict accord with the letter of the statute.

[1] In our opinion it was not error for the respondent commission to refuse to credit the employer with payment of wages made to the employee for services performed subsequent to the date of the injury. These payments were not made as disability compensation and were not intended as gratuities, but represented money earned by the employee. Primarily, the question is, Has the workman's physical and mental efficiency been substantially impaired, and, if so, to what extent, and for what period of time will this impairment extend into the future? The statute is plain, and recovery is allowed for total disability because the employee is unfitted by his injury to follow any occupation. In *Burbage v. Lee*, 87 N. J. Law, 36, 93 A. 859, it is held that "the term 'disability' is not restricted to such disability as impairs present earning power at the particular occupation, but embraces any loss of physical function which detracts from the former efficiency of the body or its members in the ordinary pursuits of life." The injured employee in *Case of Clark*, 120 Me. 133, 113 A. 51, 52, lost the use of certain of his fingers by reason of an injury to the nerves of his arm, but he did not lose any time from his employment. The court there held: "Nor does the fact that there has been no loss of wages afford an answer to the application. By the injury to his hand, resulting in the permanent impairment of its usefulness the applicant has sustained a distinct loss of earning power in the near or not remote future." Some of the decisions go farther. The following appears in *Williams v. Industrial Comm.*, 303 Ill. 352, 135 N. E. 758, 759: "While the evidence shows that Paluch at the time of the hearing was earning more than he was earning at the time he was injured, it does not follow, as a proposition of law, that his capacity to earn has not been reduced. The statute does not require that there shall be a showing of loss of earning power before compensation can be made for a disfigurement, and we are not authorized to read such a provision into the statute." The ability of the workman to do the exact work for which he had been employed is not the sole measure of disability. *Frankfort General Ins. Co. v. Pillsbury*, 173

Cal. 56, 58, 159 P. 150. See, also, *Harvey v. Eldridge, etc., Co.*, 128 Kan. 403, 278 P. 16, 17. The United States Supreme Court in *New York, etc., Ry. Co. v. Bianc*, 250 U. S. 596, 602, 40 S. Ct. 44, 46, 63 L. Ed. 1161, held it could not "concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. * * * And we see no constitutional reason why a state may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not."

In the case of *Mercury Aviation Co. v. Ind. Acc. Comm.*, 186 Cal. 375, 377-379, 199 P. 508, the employee involved had been paid his regular wage for a period of time subsequent to his injury. Following his discharge by the employer, he filed an application for adjustment of claim, and the employer claimed credit for the payments made. It was claimed that as the employee did not in fact earn the full weekly payments received by him after the impairment to his arm, such sums, or at least some considerable portion thereof, were not paid in return for labor, but should be regarded as payments of compensation due under the Workmen's Compensation, Insurance and Safety Act. The court said: "An employer cannot escape the payment of compensation for a permanent partial disability solely upon the ground that the employee returned to work prior to the termination of the period covered by the payments and for the same wages received by him before the injury." After discussing subdivision g of section 11 of the Workmen's Compensation Act, the opinion continues:

"Under the provisions of section 11, subd. 'g', * * * where payments have been made by the employer during the period of incapacity without any agreement between the parties as to the application of the same, the Commission may take the voluntary payments into consideration to the extent that it sees fit in fixing the amount of compensation, but the employer cannot complain if the Commission declines to make deductions on account of such payments. In the instant case it is admitted that there was no express agreement that the payments were made in discharge of any legal liability of the employer. * * * Inasmuch as petitioner chose to continue full payments during the period of total disability in the absence of any agreement, and thereafter to accept services from the employee and make regular payments to him without any understanding that the services rendered were not worth the sums paid and that some portion thereof was paid as compensation, it is not entitled, as a matter of legal right, to insist upon the deduction

of the payments from the amount of the award. * * *

"The extent to which the payments should be considered, if at all, was entirely in the discretion of the Commission. It was logical for the Commission to deduct the amount of compensation payable during the period of total disability to offset the payments made by the employer when it received no return whatever from the employee. There was no abuse of discretion in the refusal of the Commission to credit the employer with the amount by which payments actually made during the period of total disability exceeded the payments called for by the act, nor in refusing to make any allowance for payments made after the employee returned to work."

In the case of *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 A. 278, 279; *Id.*, 88 N. J. Law, 382, 96 A. 1102, the principal question argued was whether the petitioner should receive an award for the permanent impairment of the function of his right arm, when it was shown that he had been earning the same pay as he had earned before the accident. The opinion states, in part: "Next it is argued that, because the petitioner worked for the prosecutor for 55 weeks at full wages, these 55 weeks should be deducted from the 60 weeks for which the award was made. The answer is that the prosecutor was under no obligation to employ the petitioner at \$20 a week or any other sum, and that inasmuch as he chose to do so without any understanding, express or implied, that petitioner was not worth those wages, or that part of them should be treated as moneys paid under the compensation act, he must be presumed to have paid the money as wages and because he thought the petitioner was worth that amount. Indeed, it was optional to petitioner to continue working for the prosecutor, just as it was optional with the prosecutor to employ him, and, if the petitioner had chosen to do no work, he would have been entitled to his compensation under the act just the same. We see no force whatever in this argument."

[2] We are of the view that it definitely appears from these cases, which indicate the trend of judicial decision, that the right to compensation is not lost or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him. The statute does not require a showing of loss of earning power as a prerequisite to the payment of compensation for a permanent disability, but, on the contrary, provides for the payment in installments of a fixed and definite sum of money therefor. As stated in the early part of this opinion, mental derangement resulting from an industrial accident is conclusively presumed by section 9(b) of the act to be permanent and total in character, for which the definite

rate of compensation prescribed was properly applied by the Commission. The payments made to the employee subsequent to his injury, and for which the employer now seeks credit as against the award of compensation, were not intended nor accepted as disability compensation or gratuities, but represented wages for services performed. The authority of the commission to refuse to allow credit therefor is beyond question.

Petitioner attempts to distinguish the present case from the decisions above referred to on the ground that in each of the cited cases there was present immediately following the date of the injury, and at all times thereafter, including the subsequent period of employment, a total permanent disability of some kind or nature, for which the award was later made. We cannot conceive of a more severe permanent disability than that resulting from a mental derangement which entirely unfits the person to follow the ordinary pursuits of life. The impairment of one's mental faculties certainly results in as great a detriment to the individual as the loss of feet or arms or fingers, even though the mental derangement does not follow immediately upon the happening of the accident.

Section 20 of the Workmen's Compensation Act, after dealing with what the commission shall do after final hearing, and what matters may be included in an award, provides in subdivision (d) that the commission "shall have continuing jurisdiction over all its orders, decisions and awards made and entered under (the general sections relating to compensation) and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power including the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by (the) act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury. * * *

The order of June 28, which directed the telegraph company to furnish the employee such further medical and hospital treatment as he may reasonably need in the future "to cure and relieve him from the effects of said injury," was made by the commission more than two hundred and fifty-eight weeks subsequent to the date of the injury. While we cannot say whether or not the denial of the right of the commission to make the questioned order in this case will work a hardship on the mentally incapacitated employee some time in the future, the legal question involved is of such importance by reason of its rela-

tion to the whole system of compensation for industrial injuries that we granted a rehearing for the sole purpose of examining into this particular phase of the present case.

The order of March 7, which gave the applicant a permanent total disability rating, granted him a weekly compensation for two hundred and forty weeks, and a pension at the rate of \$12.82 per week for the rest of his life; but made no provision for future medical and hospital care. The employer petitioned for a rehearing, protesting against the compensatory features of the award. The applicant, in his answer to this petition, set out the facts establishing his lapses of speech and memory, and submitted that the award "should be amended to provide for such hospital and medical attention as his condition might require * * * in the future." The record discloses that both the petition and the answer were filed with the commission within the two hundred and forty-five weeks' period, but were not acted upon by the commission until after that period had expired.

The commission relies upon language of this court in the case of Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195, where the court, referring to the enlargement of the powers of the Industrial Accident Commission, if exercised within the period of "continuing jurisdiction," brought about by the amendment to the Workmen's Compensation Act adopted by the Legislature in 1917 (Stats. 1917, p. 831 et seq.), said (page 537 of 203 Cal., 265 P. 195, 201): " * * * Placing within the discretion of the commission the power to modify prior awards on equitable grounds is not uncommon." The commission contends that the present case presents a case of "equitable grounds" which should clothe it with power to correct a mistake in an order made within the two hundred and forty-five weeks' period. Granting that there may be some plausibility in that theory under some appropriate procedure adapted to that end, we are not inclined to attach much weight to it in the present situation. But we are of the opinion that there is a theory upon which the action of the Commission in this case may yet be sustained.

[3, 4] The Legislature is vested by the state Constitution with plenary powers, unlimited by the Constitution itself, to create and enforce a complete system of workmen's compensation by appropriate legislation. Const. art. 20, § 21. The Legislature has done so, and one of the provisions of the Workmen's Compensation Act declares that whenever any of the provisions of the act are to be "interpreted by a court, it shall be liberally construed * * * with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Workmen's Compensation Act, § 69(a). One of the purposes of the act is to

make "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of (an) injury" sustained by workmen in industry. *Const., supra.* An injured employee, although permanently disabled, is entitled to such medical and hospital treatment as may be reasonably required to relieve him from the effects of his injury. *U. S. Fidelity, etc., Co. v. Dept. of Ind. Rel., 207 Cal. 144, 152 et seq., 277 P. 492.* Consequently, in making the order here questioned, the commission was within its jurisdiction as to the subject-matter, and, under the rule announced in the *U. S. Fidelity Case*, just cited, we are of the view that it may be regarded merely as an order intended to make fully effective the award previously made. If we are correct in this view, the commission was acting wholly within its powers, for, by section 63(a) of the Workmen's Compensation Act, it is "vested with full power, authority and jurisdiction to do and perform any and all things, whether (therein) specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction conferred upon it under (the) act."

The question of medical and hospital treatment appears, from the record of this case of serious injury to the employee, to have been constantly in the minds of the parties and of the Industrial Accident Commission and its referees who conducted the various hearings. Following the making of the first order and award in the case, in which the previously incurred and future medical treatment for the employee was held to be necessary, there were supplemental hearings for the purpose of determining whether or not the employee was permanently injured, and to determine the extent to which he would require future medical treatment and hospital care. The diagnosis or finding of the commission in the so-called final award, that the injury to the employee "caused permanent disability consisting of psychoneurosis, psychasthenia, hysterical anaesthesia, and periods of amnesia," would seem to convey to one of common knowledge that a patient in that condition would not only be apt to need medical treatment and hospital care in the future, but would, in all likelihood, be certain to require it. The reasoning in the *U. S. Fidelity Case, supra*, seems to persuasively apply to the facts now under consideration. If, as seems quite probable, the failure to carry into the order of March 7, 1929, the finding and provision for the future medical treatment for the employee, which was under consideration all the time the commission had continuing jurisdiction, was caused by inadvertence and mistake, that fact was "good cause" and a sufficient ground upon which to grant the rehearing of the order

of March 7. *Standard, etc., Co. v. Industrial Acc. Comm., 208 Cal. 532, 536, 282 P. 948.*

The award, including the order of June 28, 1929, is affirmed.

We concur: CURTIS, J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

213 Cal. 650

STAFFORD v. GEARY et al.

S. F. 14279.

Supreme Court of California.

Sept. 22, 1931.

Appeal and error ⇐659(3).

On appeal from judgment holding that third party claimant owned automobile free from mechanic's lien awarded in claim and delivery action, order in claim and delivery action reciting that judgment therein had been fully satisfied should be made part of record on appeal (Code Civ. Proc. § 953, and § 689, as amended by St. 1929, p. 661).

Order was material to the present appeal, as it tended to indicate that appellant's original judgment had been satisfied and his mechanic's lien lost.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Chris Stafford against M. E. Geary and others. From an adverse judgment, plaintiff appeals. On motion for diminution of record.

Motion granted.

See also 98 Cal. App. 84, 275 P. 865.

Rudolph J. Scholz and Joe Mannix, both of San Francisco, for appellant.

Gus C. Ringole, of San Francisco, for respondents.

WASTE, C. J.

Motion for diminution of record.

In the year 1926 the defendant Geary brought an action in claim and delivery against the plaintiff and appellant Stafford to recover a Pierce-Arrow automobile which had been duly seized and held by the sheriff. Stafford cross-complained for the value of services rendered in repairing the automobile, and judgment in the sum of \$849.51 was entered in his favor and against the cross-de-

defendants Skinner, Arnold, and Ringole. Stafford was also awarded a mechanic's lien on the automobile to the extent of his judgment, but possession of the machine was not restored to him. He subsequently located it in the possession of Hammond, and caused an execution to issue against it as an aid to the enforcement of his mechanic's lien. Hammond thereupon filed a third party claim, asserting ownership and right of possession. Upon a petition to try title filed by Stafford pursuant to the amendment of section 689 of the Code of Civil Procedure (Stats. 1929, p. 661), an order was issued by the trial court directing Hammond to produce evidence, if any he had, in support of his claim of ownership. At the conclusion of the hearing on the petition the court below entered its judgment declaring, in part, that "there is no mechanic's lien now existing upon the said automobile by virtue of the judgment (theretofore procured by Stafford) and that said E. L. Hammond has been since August, 1923, in possession of and entitled to the possession of the said automobile * * * and is the owner of the said automobile free and clear of all liens and encumbrances in favor of the plaintiff (Stafford). * * *" From this judgment the present appeal was prosecuted by Stafford.

The appeal on the merits is not now before us, but the defendant Ringole seeks, by this motion, to have incorporated in and made a part of the record on the appeal a certified copy of an order made in the action in claim and delivery reciting that he (Ringole) has fully paid, satisfied, and discharged Stafford's judgment for \$849.51, which order was entered November 27, 1929, upon an order of examination directed against Ringole, and antecedates the judgment here appealed from.

The order should be made a part of the record to be considered when the appeal on the merits is reached. Section 953 of the Code of Civil Procedure provides that if "there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal."

The order here sought to be made a part of the record tends to indicate that appellant's original judgment has been satisfied, and his mechanic's lien lost. If this be so, it is determinative of this appeal, which would necessarily be moot. The order is therefore material to the present appeal, and furnishes some

explanation for the judgment here complained of.

We are not now concerned with the propriety of the order sought to be included in the record. That is a matter more appropriately associated with the consideration of the appeal on its merits. If the order was an improper one, or was improvidently made, a matter on which we express no opinion, it was for the appellant to start the legal machinery by which such an error, if any, might be rectified.

The motion is therefore granted.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

213 Cal. 644

PAGE et ux. v. MAZZEI.
L. A. 13068.

Supreme Court of California.
Sept. 21, 1931.

Rehearing Denied Oct. 19, 1931.

1. Automobiles ⇨ 171 (13).

Motorist entering intersection before another approaches it may rightfully assume that he will be given right of way and that other driver will slow down if necessary.

2. Automobiles ⇨ 245 (14).

Whether motorist first entering intersection, after observing position and speed of approaching automobile, was justified in proceeding on rightful way across intersection, held for jury.

3. Trial ⇨ 142.

Question on which reasonable minds might differ presents jury issue.

In Bank.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by E. C. Page and wife against R. Mazzei, also known as Romeo Mazzei. From a judgment for plaintiffs and an order denying a new trial, defendant appeals.

Affirmed.

Superseding opinion of the District Court of Appeal in 299 P. 119.

Chester O. Hansen, Christian Hoepfner, and Wakefield & Hansen, all of Fresno, for appellant.

N. Lindsay South, of Fresno, for respondents.

WASTE, C. J.

[1-3] Under proper instructions, and on ample evidence to support its verdict, the jury awarded the plaintiffs substantial damages for injuries sustained by Mrs. Page when the automobile of defendant crashed into the automobile of plaintiffs at the intersection of two roads. The case, in all material respects, is so similar to the case of *Couchman v. Snelling* (Cal. App.) 295 P. 845, 847, recently decided, that we approve and adopt the language of Mr. Presiding Justice Tyler in the opinion handed down in that cause, viz.: "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. *Keyes v. Hawley*, 100 Cal. App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. *White-law v. McGilliard*, 179 Cal. 349, 176 P. 679. Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine. [Citing cases.]"

The judgment and order denying a new trial are affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

213 Cal. 653

SKULICH et al. v. SKULICH et al.
L. A. 11238.

Supreme Court of California.
Sept. 22, 1931.

f. Husband and wife §272(4).

Where real purpose of action for partition of community property was specific enforcement of property settlement, form of action held proper (Code Civ. Proc. § 752, as amended by St. 1919, p. 319).

2. Partition §19.

Neither actual possession nor right there-to is necessary to enable cotenant to maintain action in partition, if he otherwise falls within statute (Code Civ. Proc. § 752, as amended by St. 1919, p. 319).

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by Ahmet Skulich and another against Erzi Skulich, also known as Eni Skulich, and others. From a judgment for plaintiffs, the named defendant appeals.

Affirmed.

Kennicott & Williams, of Los Angeles, for appellant.

George D. Higgins and Benjamin Elconin, both of Los Angeles, for respondents.

WASTE, C. J.

While ostensibly this is an action for partition of community property on the theory that the parties are tenants in common unable to agree as to the management and disposition thereof, the real purpose of the action appears to be to enforce specific performance of a property settlement between Ahmet Skulich and Erzi Skulich, whose marriage had been annulled on the ground that the wife had another husband living from whom she was not divorced at the time of her marriage to Skulich. Their marital troubles culminated in 1925, and Ahmet Skulich executed an assignment of his interest in the property to Erzi. Ahmet claimed that he was coerced into executing this assignment by Erzi. Immediately after it was executed, a second property settlement agreement was entered into between the two at a time when both parties were represented by counsel, and the terms and conditions of the agreement appear to have been explained to and thoroughly understood by all of the parties.

The trial court made adequate findings, which sufficiently dispose of all of the contentions made by the appellant. It found that Mrs. Skulich, who is the appellant, understood the nature and terms of the property settlement agreement, which, it also finds, is neither unfair nor inequitable as to her. The trial court, in its judgment, endeavored to carry out the terms of the settlement agreement between the parties by its decree, which, we think, sufficiently does so, and it did not, as the appellant contends, make a new agreement between the parties.

[1, 2] In answer to the contention that plaintiffs did not bring the right form of action, it is definitely settled that, under section 752 of the Code of Civil Procedure, as amended in 1919 (St. 1919, p. 319), neither ac-

tual possession nor the right to actual or immediate possession is necessary to enable a cotenant to maintain an action in partition, if he otherwise falls within the provisions of that section. 20 Cal. Jur. 601; Geary v. De Espinosa, 51 Cal. App. 52, 196 P. 90; Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082.

The judgment is affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

Action by the Big Boy Drilling Corporation against I. B. Rankin and another, doing business as Rankin, Campbell & Company, and J. J. Doyle and J. W. Clune, doing business as the Doyle-Clune Oil Company. Judgment for plaintiff, and the Doyle-Clune Oil Company appeals.

Affirmed.

Thomas A. Wood and Michael F. Shannon, both of Los Angeles, for appellant.

Walters & Mauk and C. S. Mauk, all of Los Angeles, for respondent.

WASTE, C. J.

Plaintiff, as assignee, brought this action to foreclose four mechanic's liens. The complaint is in four counts, each being substantially the same, except as to the name of the assignor and the amount involved. Some of the defendants defaulted, and as to others the action was dismissed. The defendant Doyle-Clune Oil Company, a copartnership, is the sole appellant. As originally filed, the complaint requested that judgment be entered against the owners of the property involved for the aggregate amount of the four liens, that said liens be foreclosed, and that certain defendants, including the appellant, be required to set up their interests in the property or be barred from thereafter claiming any right, interest, or lien therein.

Upon the trial, it appeared that plaintiff's assignors had been employed by Rankin, Campbell & Company, one of the defaulting defendants, to sink an oil well on lots 47 and 48 in Havana Avenue Tract, Alamitos Heights, city of Long Beach, and that on or about May 4, 1927, the appellant Doyle-Clune Oil Company, apparently by way of exercising an option it held, had taken over and assumed control of the well-drilling operations, and had undertaken to pay and discharge all claims for wages thereafter accruing in favor of plaintiff's assignors. The trial court allowed plaintiff to amend its complaint to conform to the proofs, and judgment was entered against the appellant for \$2,352, the amount of wage claims accruing subsequent to the taking over of the work by it, and against the defendant Rankin, Campbell & Company for \$352. The judgment further provides for the foreclosure of the liens as against any interest Rankin, Campbell & Company might have in the property.

[1, 2] Upon this appeal the Doyle-Clune Oil Company urges that the complaint fails to state a cause of action because it is nowhere alleged therein that the oil well occupied the entire or any particular parcel of the property sought to be foreclosed, nor that any portion of the land was necessary for the convenient use and occupation of the well. Examination of the complaint, as originally

213 Cal. 646

BIG BOY DRILLING CORPORATION v. RANKIN et al. L. A. 11299.

Supreme Court of California.

Sept. 22, 1931.

1. Pleading ⚡252(2).

Complaint in suit to foreclose mechanic's liens *held* not superseded by amendment thereto, but merely augmented by additional allegations.

2. Pleading ⚡240.

That amendment to complaint in suit to foreclose mechanic's liens was filed instead of amended complaint *held* immaterial.

3. Pleading ⚡250.

Where original complaint sought collection of wages due by foreclosure of mechanic's liens, amendment seeking personal judgment against defendant *held* not to change cause of action.

4. Pleading ⚡237(1).

Great latitude is accorded trial court in matter of allowing amendment to conform to proofs.

5. Pleading ⚡237(6).

Where complaint sought foreclosure of mechanic's liens, amendment seeking personal judgment, to conform to proofs, *held* proper.

6. Work and labor ⚡28(2).

Evidence sustained finding that defendant had exercised an option and had assumed control of oil well drilling operations and had undertaken to discharge claims for wages thereafter accruing, thereby rendering defendant personally liable.

In Bank.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

filed, discloses that it specifically alleged in each count "that all of said described premises were actually used in the drilling of said well and the work was so performed on all of said premises." This disposes of appellant's first point, which is apparently based on the erroneous assumption that the "Amendment to Complaint," filed by leave of court to conform to the proofs, was an amended complaint which superseded the original containing the quoted allegation. That is not the case. The complaint, as originally filed, was not superseded by the amendment thereto, but was merely augmented or supplemented by the addition of allegations pertinent alone to the appellant's liability, and necessary to cause the complaint to conform to the proofs in this regard. It is not important that an amendment to the complaint was filed instead of an amended complaint. *Maddux v. Mora*, 99 Cal. App. 695, 699, 279 P. 467.

[3-5] Appellant's second point is to the effect that the complaint, as amended, sets forth a separate and distinctly different cause of action than that originally pleaded and is for an additional claim or demand. This contention is also without merit. The cause of action remained the same, merely a different and additional form of relief, warranted by the evidence, being sought by the amendment of the complaint. Plaintiff's action has for its sole purpose the collection of wages due for services performed by its assignors. Whether plaintiff accomplishes this purpose by the foreclosure of mechanic's liens or by way of a personal judgment, or both, is immaterial. Both demands having arisen out of the same transaction, there is but one cause of action with two forms of relief. The seeking of different kinds of relief does not establish different causes of action. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 556, 41 P. 495, 29 L. R. A. 839; *Hutchinson v. Ainsworth*, 73 Cal. 452, 455, 15 P. 82, 2 Am. St. Rep. 823. The "cause of action" is to be distinguished from the "remedy" and the "relief" sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right. *Beronio v. Ventura Lumber Co.*, 129 Cal. 232, 235, 61 P. 958, 79 Am. St. Rep. 118. Great latitude is accorded a trial court in the matter of allowing amendment to conform to the proofs. *Armstrong v. Lassen Lumber Co.*, 204 Cal.

529, 531, 269 P. 453; *Glougie v. Glougie*, 174 Cal. 126, 131, 162 P. 118. The amendment here allowed was a proper one.

[6] The final contention challenges the sufficiency of the evidence to sustain the trial court's finding "that on said date Doyle-Clune Oil Company took charge of the affairs of said well and had a superintendent representing them in the drilling of said well; that at the time said J. W. Clune, as one of the members of the firm of Doyle-Clune Oil Company, and on behalf of said company agreed to pay the men for the labor from that time, to-wit, on and from May 5, 1927, up to and including June 22, 1927, and that said Doyle-Clune Oil Company did exercise their option and did continue the drilling of said well up to and including June 22, 1927."

There is ample evidence in the record tending to show that the appellant partnership had assumed control of the well-drilling operations on or about May 4, 1927. On that day a Mr. Murchie, who represented himself to be the appellant's superintendent in charge of the work, stated to the workmen, among them plaintiff's assignors, that "they were now on the Doyle-Clune pay roll, and that there would be no further trouble over their wages." This statement was made in the presence and hearing of Clune, one of the members of the appellant partnership, who voiced no objection thereto. In fact, Clune himself, at or about this same time, stated to one of the workmen that Murchie was appellant's superintendent and that henceforth the men were on the Doyle-Clune pay roll. The evidence further shows that the appellant partnership completed the drilling of the well and issued at least one of its checks in part payment of wages accruing during the drilling operations. This evidence is amply sufficient, in our opinion, to warrant the conclusion that the appellant partnership had elected to exercise its option and pursuant thereto, had taken over and completed the drilling work, at the same time assuming responsibility for the payment of the wages of the men engaged therein. The judgment against the appellant is unquestionably a proper one.

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

116 Cal.App. 541

PIGGLY WIGGLY YUMA CO. v. NEW YORK INDEMNITY CO.

Civ. 412.

District Court of Appeal, Fourth District, California.

Sept. 10, 1931.

Rehearing Denied Oct. 6, 1931.

1. Evidence ☞250.

In action on bond indemnifying against employees' embezzlement, defaulting employee's statement of amount of loss, made when first accused by employer, held admissible (Code Civ. Proc. §§ 1850, 1851, and § 1870, subd. 7).

2. Insurance ☞665(4).

Evidence warranted holding that note defaulting employee gave employer for amount of defalcations did not constitute "settlement" avoiding surety's liability on indemnity bond.

Surety's liability on indemnity bond, providing that no loss should be settled without the written consent of the surety first obtained, was not avoided where the evidence contained nothing to show that any settlement was made at the time the note was executed, that it was given in payment of the amount due the employer, or that there was any agreement on the part of the employer that it would take the note in payment, or that the defaulting employee so understood it; the term "settle" having a double meaning, and being used alike to denote an adjustment of a demand, and a payment.

[Ed. Note.—For other definitions of "Settle; Settlement," see Words and Phrases.]

3. Insurance ☞645(2).

To recover on bond indemnifying against employees' embezzlement, plaintiff must allege and prove parties' contractual relations, loss within bond, and damages.

4. Insurance ☞661.

In action on embezzlement indemnity bond, objection that plaintiff's books, introduced to show amount of loss, were faultily kept, only affected weight of evidence.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Piggly Wiggly Yuma Company against the New York Indemnity Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hickcox & Trude, of El Centro, for appellant.

S. P. Williams and Dorsey Whitelaw, both of El Centro, for respondent.

ALLEN, Justice pro tem.

The defendant in this action appeals from a judgment on a bond which it issued to plaintiff. On February 25, 1927, defendant issued this bond indemnifying plaintiff against any loss it might sustain after February 9, 1927, by reason of any act of larceny or embezzlement by any of its employees set forth in the schedule attached thereto, of which the employee named in the complaint was one.

[1] On December 23, 1927, the employee was called before a meeting of the officers of plaintiff, where he confessed to a shortage of four small items and made a general statement that to the best of his knowledge he had appropriated to his own use the total sum of \$6,240. Appellant complains that the trial court erred in admitting the statements of the employee made by him after his employment ceased. There is no testimony to show the discharge of the employee prior to the conversation testified to.

Section 1850 and subdivision 7 of section 1870, Code of Civil Procedure, set out the law governing the admission of such testimony between the parties to the suit, while section 1851, Code of Civil Procedure lays down the rule as to the statements of third persons. The testimony offered was the statement made by the defaulting employee at the time he was first accused by plaintiff of his embezzlement. His appropriation of plaintiff's funds was the foundation for this suit and his statement in relation thereto comes within the rule announced.

In the case of Butte County v. Morgan, 76 Cal. 1, 18 P. 115, 117, wherein a suit was instituted against Morgan, who held both offices of county treasurer and tax collector and his bondsman for misappropriation of county funds, it was held that there was no error in the admission of a receipt to him by the auditor. This receipt contained an admission against interest by Morgan and was held admissible against him and his bondsman. The court said: "He accepted without any question the certificate of the auditor, which contained an express statement that he then had in his hands, to be at once paid into the treasury, the amount in question; and he acted upon this statement by depositing it in the treasury. This conduct certainly amounts to an admission that the statement was true. This admission was evidence against the other defendants; for 'where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is prima facie evidence between the parties.'"

Ellsworth v. Bradford, 186 Cal. 316, 199 P.

535, and Greve v. Echo Oil Company, 8 Cal. App. 275, 96 P. 904, lend support to this rule.

[2] The next error complained of is that the trial court erred in finding that there was not a settlement between the employee and plaintiff. The bond provided, among other things, that "no act giving rise to a claim hereunder shall be condoned, nor any loss settled without the written consent of the surety first obtained."

At the time the employee was called before the officers of plaintiff he made confession to his defalcations and stated that to the best of his knowledge he had appropriated to his own use, without the knowledge of his employers, the total sum of \$6,240. He gave the plaintiff a note for such an amount which was not necessarily such a settlement as contemplated in the bond. There can be little doubt but that the term "settle" has a double meaning, and is used alike to denote an adjustment of a demand and a payment. *Auzerais v. Naglee*, 74 Cal. 60, 67, 15 P. 371.

The giving of the note must be construed in the light of the other facts in evidence. There is nothing to show that any settlement was made at the time the note was executed, nor that it was given in payment of the amount due plaintiff; there was no agreement on the part of the plaintiff that it would take the note in payment, and the defaulting employee did not so understand it. He explained how he arrived at the amount and how he came to execute the note. He testified that after he signed the note "they brought me up and threw me in jail." Without some evidence to show that the parties intended that the note be a payment of the debt and a settlement, the court was justified in holding that it was given as evidence of a debt rather than a payment. 20 Cal. Jur. 920, and cases cited. In the light of all the circumstances of the case it would be most unusual for a corporation conducting the extensive business the plaintiff was transacting to accept a note for \$6,240 from a defaulting clerk, who was making \$40 per week, in payment of his defalcations when it held defendant's indemnifying bond in the sum of \$2,000.

[3] In order for the plaintiff to recover in this action it is necessary for it to allege and prove by competent evidence the contractual relations between the parties, the loss, according to the terms of the bond, and the amount of damages sustained, all of which were done by it.

[4] The defendant objects to the evidence as to the amount of loss sustained by plaintiff. The books of the company were admitted in evidence over its objection, to show the amount of such loss. The question of the method of keeping these accounts and their correctness are seriously objected to by the

defendant, but such objections only go to the weight of the evidence. There is nothing tending to show that the books were not properly kept nor that the entries therein were not correct, its argument going to the unreasonable and faulty bookkeeping system of the plaintiff.

The findings of fact are supported by the evidence, and, there being nothing which stamps such evidence as not being worthy of belief, it supports the findings.

We find no error in the record of the trial court. The judgment therefore is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 596
TAYLOR v. COCKRELL.

GOFF v. SAME.
Civ. 7927.

District Court of Appeal, First District,
Division 2, California.
Sept. 15, 1931.

As Amended on Denial of Rehearing Oct. 15,
1931. Hearing Denied by Supreme Court
Nov. 12, 1931.

1. Automobiles ⇨242(1).

Under Vehicle Act, automobile guests suing for injuries sustained, allegedly through host's negligence, must show gross negligence or willful misconduct (*Deering's Gen. Laws Supp.* 1929, Act 5128, § 141½).

"Gross negligence" is the want of slight diligence, an entire failure to exercise care; that entire want of care which would raise a presumption of a conscious indifference to consequences.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Negligence ⇨136(14).

When liability attaches only for gross negligence, whether such negligence exists is for jury under proper instructions.

3. Automobiles ⇨244(20).

Evidence that automobile host passed car going in same direction at over 60 miles per hour on sharp curve, crashing into bridge, warranted finding of gross negligence, authorizing guests' recovery (*Deering's Gen. Laws Supp.* 1929, Act 5128, § 141½).

4. Appeal and error ⇨1064(1).

In automobile guests' action against host, instruction that violating speed statute is negligence per se held not prejudicial, under facts

(Deering's Gen. Laws Supp. 1929, Act 5128, § 141¾).

Facts were that jury was instructed as to what constituted simple and gross negligence, and that it was not sufficient to find defendant guilty of simple negligence, and the instruction in question, read with the instruction upon gross negligence, advised jury that violation of the speed statute was simple negligence, but that that alone was not sufficient to constitute gross negligence.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Actions by Gertrude Taylor and by Theophile Goff against David Cockrell, which were tried together. Judgments for plaintiffs, and defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Kilpatrick & Goodman, of Oakland, for respondents.

NOURSE, P. J.

The two plaintiffs sued separately for damages for personal injuries. By stipulation the causes were tried together before the same jury. The plaintiff Taylor had a verdict for \$1,000; the plaintiff Goff a verdict for \$3,000. The defendant has appealed on typewritten transcripts, and, by order of court, these appeals have been heard jointly.

The two plaintiffs were guests of the defendant, who was driving an automobile owned by him along the public highway running from Dublin to Walnut Creek at about midnight of September 18, 1929. The paved portion of this highway is banked in the middle for a width of about four feet to a height of four inches. Defendant was driving at a high rate of speed, in excess of sixty miles an hour, passing other cars on the highway, to show his guests "what this Lincoln will do." On approaching a sharp curve in the road beyond which a concrete bridge was maintained, defendant passed another car going in the same direction and crashed into the bridge, causing the injuries complained of. Defendant was thoroughly familiar with the highway, knew the conditions of the curve, and the location of the bridge. He refused to heed the frequent pleas of his guests to slacken his speed, but took the curve at the same high rate of speed and did not see the bridge until the car struck it.

On this appeal two points are raised—that the evidence does not show gross negligence, and that the trial judge erroneously instructed the jury that violation of the California Vehicle Act was negligence *per se*.

[1, 2] As the respondents were both guests of the appellant, it was necessary for them to show gross negligence or willful misconduct under the provisions of section 141¾ of the California Vehicle Act (Deering's Gen. Laws, 1929 Supp., Act 5128, p. 3470), and under the issues framed by the pleadings. "Gross negligence is the want of slight diligence * * * an entire failure to exercise care * * * that entire want of care which would raise a presumption of a conscious indifference to consequences." *Redington v. Pacific P. T. C. Co.*, 107 Cal. 317, 324, 40 P. 432, 434, 48 Am. St. Rep. 132; *Krause v. Rarity* (Cal. Sup.) 293 P. 62; *Malone et al. v. Clemow et al.* (Cal. App.) 295 P. 70; *Kastel, etc., v. Stieber* (Cal. App.) 297 P. 932; 19 Cal. Jur. p. 554. When liability attaches only for gross negligence, it is for the jury, under proper instructions, to pass upon the question whether such negligence exists. *Krause v. Rarity*, *supra*; *Malone et al. v. Clemow et al.*, *supra*.

[3] The jury was fully instructed as to the necessity of finding the appellant guilty of gross negligence before it could give a verdict for respondents. Gross negligence was defined in the language approved in the decisions above cited. The evidence which we have recited in the statement of facts is alone sufficient to warrant a finding of gross negligence—"an entire failure to exercise care." It is not necessary to refer to the evidence offered by appellant to combat this issue. It is sufficient to say that it is pitifully weak and that the jury was not bound to follow it. In the testimony of the witnesses this curve is described as a "sharp" curve. Diagrams and plats were in evidence showing the physical conditions of the highway where the accident occurred. From all these facts the jury could reasonably conclude that appellant's manner of operation of the vehicle was with "an entire failure to exercise care." Thus if the jury concluded from this evidence, and we may presume from its verdict that it did so, that the appellant did not exercise any care, there was ample evidence to support such conclusion. And this in turn would warrant the finding of gross negligence.

[4] The instruction that violation of the state statute regulating speed of motor vehicles was in accordance with the rule of the decisions holding that violation of a statute, where damage has followed the infraction, is negligence of itself, or negligence "*per se*." *Benjamin v. Noonan*, 207 Cal. 279, 283, 277 P. 1045; *Kastel v. Stieber* (Cal. App.) 297 P. 932. Here the jury was instructed as to what constituted simple negligence; it was then advised as to what constituted gross negligence; and, finally, that it was not sufficient to find the appellant guilty of simple negligence. As to the particular instruction complained of, reading it with the instruction upon gross negligence, the jury was advised that the viola-

tion of the speed statute was simple negligence, but that that alone was not sufficient to constitute gross negligence. The instructions as a whole were fair to appellant, and he has no cause for complaint.

The judgments are affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

116 Cal.App. 558

BUIS v. LINDAUER CORPORATION et al.
Civ. 4298.

District Court of Appeal, Third District,
California.

Sept. 12, 1931.

Rehearing Denied Oct. 10, 1931. Hearing Denied by Supreme Court Nov. 9, 1931.

1. Appeal and error ☞117.

Order relieving party from failure to timely present and settle proposed bill of exceptions *held* not appealable (Code Civ. Proc. §§ 473, 650).

2. Exceptions, bill of ☞43(1).

Order relieving from failure to timely present proposed bill of exceptions upon application made more than six months after default *held* void, since not within court's jurisdiction (Code Civ. Proc. §§ 473, 650).

3. Exceptions, bill of ☞39(1).

Presentation of proposed bill of exceptions eight months after amendments to bill were served was not presentation within reasonable time (Code Civ. Proc. § 650).

4. Appeal and error ☞870(2).

Defendants appealing from void order, objected to, which was not appealable, could raise question of invalidity of order on plaintiff's appeal from judgment.

5. Appeal and error ☞907(3).

Where order settling proposed bill of exceptions was invalid, judgment of nonsuit must be deemed fully supported by evidence.

This is so, since, the order settling the proposed bill of exceptions being invalid, the appeal from the judgment of nonsuit is unsupported by any authenticated record of evidence or proceedings.

Appeals from Superior Court, Orange County; E. J. Marks, Judge.

Action by Alvah D. Buis against the Lindauer Corporation and others. From the judgment, plaintiff appeals, and, from an order, defendants appeal.

Defendants' appeal dismissed, and judgment affirmed.

R. T. Walters, of Whittier, and C. N. Mozley, of Santa Ana (Arthur G. Wray, of Whittier, of counsel), for plaintiff.

Head, Wellington, Jacobs & Scovel, of Santa Ana, for defendants.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment of nonsuit which was rendered against the plaintiff in an action for damages for personal injuries sustained as a result of alleged negligence.

The appeal is presented upon a purported bill of exceptions which was settled by the trial judge, over the objection of the defendants, fifteen months after the judgment was entered. The plaintiff failed to present his proposed bill of exceptions to the judge for settlement within the time limited by the provisions of section 650 of the Code of Civil Procedure. Upon plaintiff's application pursuant to the provisions of section 473 of the Code of Civil Procedure, relief from that default was granted by the court, and the bill of exceptions was thereupon settled.

It is contended the court was without jurisdiction to grant the relief sought under section 473, *supra*, for the reason that the application was not made within six months of the time of default. It is also asserted the court was without jurisdiction to settle the bill of exceptions, and that the judgment of nonsuit should therefore be affirmed, since the record of proceedings lacks due authentication and the presumption follows that the judgment is fully supported.

May 16, 1927, the judgment of nonsuit was rendered and entered against the plaintiff. June 25th of the same year notice of appeal was served and filed. July 16th a stipulation of respective counsel was made which recites "that the time for serving and filing the bill of exceptions * * * may be extended thirty days." October 31, 1927, one of the attorneys for the defendants died. January 3, 1928, amendments to the proposed bill of exceptions were served on the plaintiff. July 6, 1928, a substitution of attorneys for the defendants was duly made. August 3, 1928, the plaintiff served and filed an application under the provisions of section 473 of the Code of Civil Procedure for relief from his default in failing to present his proposed bill of exceptions for settlement within the time allowed by law. It was his contention that Mr. Clyde Bishop, one of the attorneys for the defendants, who died October 31, 1927, verbally agreed, before the expiration of the time allowed by section 650 of the Code of Civil Procedure, to extend the time for presenting and settling the bill of

exceptions. The plaintiff also alleged that Mr. Heck, the other attorney for the defendants, had disappeared, and that his whereabouts was unknown. These assertions were supported on the motion for relief by affidavits. August 24, 1928, over the objection of the defendants, the court granted the relief prayed for. On September 12, 1928, over the objection of the defendants, the court settled and filed the bill of exceptions upon which this appeal was taken. The minute order regarding the settlement of this bill of exceptions contains the following recital: "The defendant duly objected to the signing by the court of plaintiff's bill of exceptions, which objection was overruled, and whereupon the defendant duly excepted to the signing of said bill of exceptions." The defendants then presented and procured the settlement of a bill of exceptions of the record and proceedings affecting the plaintiff's application and order for relief from default, pursuant to section 473, supra. The defendants also gave notice of appeal from the last-mentioned order.

[1] The defendants' effort to appeal from the order granting plaintiff relief under section 473 of the Code of Civil Procedure from his failure to present and settle a bill of exceptions within the time prescribed by section 650 of the Code of Civil Procedure is ineffectual. An order relieving a party from default in failing to serve a draft of a proposed bill of exceptions within the time specified in section 650 of the Code of Civil Procedure is not an appealable order. *McWilliams v. Hudson*, 98 Cal. App. 185, 276 P. 598, 277 P. 529; *Lake v. Harris*, 198 Cal. 85, 243 P. 417.

[2] The court was, however, without jurisdiction to entertain the motion or grant relief from plaintiff's failure to present his proposed bill of exceptions within the time limited by the provisions of section 650 of the Code of Civil Procedure, for the reason that this application was not made within six months from the time of default. 14 Cal. Jur. 1062, § 109; *In re Morehouse*, 176 Cal. 634, 169 P. 365; *Title Ins. & Trust Co. v. King Land & Imp. Co.*, 162 Cal. 44, 120 P. 1066; *Estate of Grivel*, 208 Cal. 77, 81, 280 P. 122; *Jones v. Superior Court*, 78 Cal. App. 163, 248 P. 292. It follows that the order granting relief in the present case, which was applied for and made more than a year after the default occurred, is without authority of law and therefore void. No motion for new trial was ever made in this case. No order was made extending the time in which to present a proposed bill of exceptions. The stipulation extending the time for one month

in addition to the time allowed by law is the only record evidence of any such extension of time. The alleged oral stipulation extending time was made some time in June, 1927. The attorney who is alleged to have made this oral agreement died October 31, 1927. The plaintiff was then in default more than three months. There was then ample time to have asked for relief pursuant to the provisions of section 473 of the Code of Civil Procedure. No such application was made for many months thereafter. The court had no jurisdiction to entertain the motion for relief.

[3] Assuming, in accordance with the authorities of *Houghton v. Superior Court*, 128 Cal. 352, 60 P. 972, and *Gay v. Torrance*, 143 Cal. 14, 76 P. 717, that when amendments to a proposed bill of exceptions are served, the appellant is not confined to a period of ten days thereafter, but may present the bill and amendments to the judge for settlement "within a reasonable time thereafter," it may not be said such presentation is made within a reasonable time when eight months is permitted to elapse after the serving of amendments before the proposed bill of exceptions is presented. An expiration of eight months before a proposed bill of exceptions is presented to the judge for settlement without explanation is unwarranted and shows a lack of diligence. The proposed amendments were served in the present case January 3, 1928. The proposed bill of exceptions was not presented to the judge until August 30th of that year. The proposed settlement of the bill of exceptions was therefore not prosecuted with diligence.

[4] In spite of the fact that the defendants' effort to appeal from the order granting relief was ineffectual, the court was without jurisdiction to make the order, and it is therefore void. This order was made over the objection of the defendants. The invalidity of this order may therefore be raised by the defendants on plaintiff's appeal from the judgment of nonsuit.

[5] Since the order granting relief from the default and the order settling the proposed bill of exceptions are invalid, it follows that the appeal from the judgment of nonsuit is unsupported by any authenticated record of evidence or proceedings, and the judgment must be deemed to be fully supported by the evidence.

The defendants' appeal is dismissed. The judgment is affirmed; defendants to recover costs.

We concur: PRESTON, P. J.; PLUMMER, J.

116 Cal.App. 516

BURNS v. LOS ANGELES RY. CORPORATION.

Civ. 7688.

District Court of Appeal, First District,
Division 1, California.

Sept. 5, 1931.

1. Railroads $\hookrightarrow$ 352.

Findings *held* to show that motorist negligently drove on crossing and that interurban car was operated with due care.

2. Railroads $\hookrightarrow$ 352.

Findings that motorist negligently drove on crossing and that interurban car was operated with due care showed last clear chance doctrine was inapplicable.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Waldo P. Burns against the Los Angeles Railway Corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

R. T. Lightfoot and J. J. Hughes, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for respondent.

TYLER, P. J.

Action to recover damages for personal injuries alleged to have been sustained in a collision claimed to be due to defendant's negligence. The injuries suffered consisted of the destruction of plaintiff's automobile, medical services, and loss of time. The answer and amendment thereto denied the negligence charged and specifically alleged contributory negligence on the part of plaintiff. Upon the issues thus framed the cause went to trial before the court sitting without a jury. At the conclusion thereof judgment was rendered in favor of the defendant, from which judgment plaintiff appeals.

[1, 2] It is here claimed that the findings of fact and conclusions of law are not supported by and are contrary to the evidence. The appeal is entirely devoid of merit. From the findings it appears that on the 22d day of September, 1923, at the intersection of Division street with the private right of way of the Los Angeles-Eagle Rock Interurban Railroad line, the plaintiff negligently and carelessly and without exercising ordinary care or caution and without stopping or listening or looking, or exercising any care to ascertain if an interurban car was approaching, drove his automobile in a westerly direction on Division street upon the defendant's car track

immediately in advance of an approaching interurban car which was moving in a northerly direction on the private right of way of defendant, and that the injuries received by plaintiff were directly and proximately caused by and contributed to by his own carelessness, recklessness, and negligence. It was further found that the interurban car was not carelessly or negligently operated but, on the contrary, was operated with due care; that it was not run at an unlawful rate of speed nor did it fail, as claimed, to slow down or slacken its speed on the first appearance of danger of a collision with plaintiff, but, on the contrary, every effort was made to stop the car and avoid a collision and that warning of its approach was given. These findings, which are fully supported by the evidence, dispose of appellant's claim that defendant was guilty of negligence and that such negligence was the proximate cause of the injury, as also the claim that the doctrine of last clear chance is applicable to the case. It is unnecessary to review in detail the evidence supporting the findings.

The judgment is affirmed.

We concur: KNIGHT, J.; PARKER, Justice, pro tem.

116 Cal.App. 513

WEAVER v. RATCLIFFE et al.

Civ. 461.

District Court of Appeal, Fourth District,
California.

Sept. 5, 1931.

1. Reformation of Instruments $\hookrightarrow$ 36(2).

Complaint in action for reformation should allege what real agreement was, what agreement as reduced to writing was, and where writing fails to embody real agreement.

2. Reformation of Instruments $\hookrightarrow$ 36(3).

Complaint in action for reformation must aver facts showing how mistake was made, whose mistake it was, and what brought it about.

3. Reformation of Instruments $\hookrightarrow$ 45(3).

Evidence regarding mistake *held* insufficient to justify reformation of instrument conveying interest in land and in mineral rights.

4. Appeal and error $\hookrightarrow$ 1071(6).

Failure to make findings on issue *held* not prejudicial to appellants, where finding, if made, would necessarily have been adverse to them.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by J. T. Weaver against J. H. Ratcliffe and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Frank Erzinger, of San Diego, for appellants.

H. C. Gardiner, of San Diego, for respondent.

MARKS, J.

This action grew out of a written agreement between the parties hereto for the sale of a one-half interest in land in San Diego county, California, and a one-quarter interest in the minerals and oils therein, which contract was in words and figures as follows:

"March 21, 1927.

"This agreement entered into by and between J. H. Ratcliffe and L. A. Ratcliffe of Chula Vista, of the first party and J. T. Weaver of Pacific Beach, second party, witnesseth: For and in consideration of the sum of Five Hundred (\$500.00) Dollars, receipt of which is hereby acknowledged, we J. H. and L. A. Ratcliffe do hereby bargain, sell and convey to J. T. Weaver a one-half interest in the following described property and a one-fourth interest in all mineral and oil values which may be contained therein; lots 12 and 13 in block 69 Tp 18 R. W. being a part of the National Ranch (Rancho de la Nacion) also described as the San Diego Acres and being the location of what is known as the Todd oil well, San Diego County Cal.

"It is understood and a part of this agreement that this land is now held by option by the first party from H. J. Adams and that there is due him the sum of \$150.00 per acre which is to be borne and paid for by the parties of this contract share and share alike. The amount due Mr. Adams is \$3,000.00 and the First party is to pay one-half and J. T. Weaver one-half of this amount.

"Signatures:

"J. H. Ratcliffe
"First Party
"L. A. Ratcliffe
"First Party
"J. T. Weaver
"Second party."

"Witnesses to Signatures:

"_____
"_____"

The court found that the parties executed the foregoing contract, and that respondent paid appellants the \$500 mentioned therein, and that within a reasonable time thereafter respondent was ready, able, and willing and offered to pay appellants the balance of his portion of the purchase price of the property. It further found that the appellants' interest

in said property was evidenced by an option which they did not exercise; that they failed and refused to accept the added payment from respondent; and "that the defendants have refused to perform their part of said contract and have refused to pay back to plaintiffs the said sum of Five Hundred Dollars (\$500.00) paid on the purchase price of said property. That after demand made by the plaintiff upon the defendants to carry out the terms and conditions of said agreement or to repay to plaintiff the said sum of Five Hundred Dollars (\$500.00), the defendants caused all their right, title and interest in and to said real estate to be conveyed to other parties and put it out of their power to carry out the terms of said agreement." Judgment was rendered in favor of the respondent for the \$500 paid to appellants. From this judgment they prosecute this appeal.

As the sole ground for reversal of the judgment, appellants urge that the findings are insufficient to sustain the judgment. The only insufficiency pointed out by them is the failure of the court to find upon an issue which they attempted to tender by their pleadings, namely, mutual mistake in the contract. They urge that they did not intend to convey a one-half interest in the land and a one-quarter interest in the oil to respondent, but merely to sell to him an undivided one-half interest in the option which they held upon it.

[1, 2] The rules of pleading governing actions to reform a written instrument upon the ground of mistake are clearly set forth in the cases of *Auerbach v. Healy*, 174 Cal. 60, 161 P. 1157, 1158, and *Coneland Water Co. v. Nickalls*, 75 Cal. App. 212, 242 P. 518. In the *Auerbach* Case the Supreme Court held as follows: "The rules of pleading in actions for the reformation of contracts are well established and should be familiar. The complaint should allege 'what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement.' 34 Cyc. 972. If the complaint seeks the correction of a description of land, 'the pleading must describe the premises so as to render certain the location and boundaries.' 34 Cyc. 973. It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear. 34 Cyc. 974; 14 Ency. Plead. & Prac. 42; *Wright v. Shafter*, 48 Cal. 275. In this state mutuality is not always necessary. It is sufficient if there was 'a mistake of one party, which the other at the time knew or suspected.' Civ. Code, § 3399. But the facts showing a mistake of that character in such a case must likewise be alleged."

[3] When measured by the rules laid down in these cases, appellants' pleadings do not

state a cause of action for the reformation of a written instrument because of mistake. However, if we assume that a good cause of action was stated by them, still there is no evidence in the record to support such allegations. As stated by counsel for appellants in his brief, the only evidence in support thereof "consists of the written agreement itself introduced in evidence." While this agreement is not in itself a model, its terms would not support a finding by the trial court of mistake between the parties, nor would it have supported a judgment reforming it.

[4] If we assume the issue of mistake properly pleaded, the failure of the trial court to find upon this defense was not prejudicial to appellants and cannot furnish any ground for a reversal of the judgment. If a finding had been made, it must have been adverse to them; and they suffered no prejudice by the failure of the trial court to make such a finding.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.;
FINNEY, Justice pro tem.

116 Cal.App. 447

WESSLING v. SOUTHERN PAC. CO.
Civ. 7869.

District Court of Appeal, First District, Division 2, California.

Sept. 1, 1931.

Rehearing Denied Oct. 1, 1931. Hearing
Denied by Supreme Court Oct. 29, 1931.

1. Railroads $\S$ 350(28).

Driver failing to "stop, look and listen" is not negligent as matter of law, where railroad company gives assurance by signals or otherwise that danger is removed.

2. Railroads $\S$ 351(16).

Instructing that motorist was negligent if failing to stop so that he could be sure railroad crossing could be made in safety held error.

Such instruction was error where it was conceded that motorist had stopped before approaching tracks of crossing to let another train pass, in that instruction further required motorist to ascertain as a matter of certainty that crossing could be made in safety irrespective of the presence or nonpresence of a flagman; there being nothing in the case which required

motorist to exercise a greater quantum of care than that required of a reasonably prudent person under the circumstances.

3. Trial $\S$ 253(7).

Instruction directing verdict if jury finds certain facts to be true must embrace everything necessary to show legal liability of losing party and to warrant direction of verdict.

4. Trial $\S$ 296(4, 5).

Error in instructing that motorist was negligent if failing to stop so that he could be sure railroad crossing could be made in safety held not cured by other instructions.

Other instructions stated in effect that, where railroad company maintains a flagman or other signals of warning, the public has a right to assume that such safeguards will be reasonably maintained, and that if the flagman is absent from his post or fails to give the usual warning of danger, this is an assurance of safety upon which a driver may rely, provided he uses such precautions as a prudent person would under like circumstances; also, that there is no positive rule of law requiring the driver to again "stop, look and listen" at any particular place upon the crossing.

5. Railroads $\S$ 330(2).

Person crossing tracks guarded by safety devices or flagman need not exercise quantum of care required if safeguards are absent.

6. Trial $\S$ 260(1).

Refusing instructions covered by given instructions is not error.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Julia M. Wessling against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals.

Reversed.

See, also, 3 P.(2d) 25.

Charles A. Wetmore, Jr., and Treadwell, Van Fleet & Laughlin, all of San Francisco, for appellant.

Dozier & Kimball, Christian F. Kimball, and Thomas B. Dozier, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for the death of her adult son, Lester G. Wessling. The cause was tried with a jury, which returned a verdict for the defendant. From the judgment on the verdict plaintiff has appealed upon typewritten transcripts.

On July 1, 1926, at about 5:45 p. m. Albert and Lester Wessling left the latter's home in the city of Richmond in an automobile owned by Lester Wessling and his mother and driven by Lester. The brothers were on their way to the post office in the business section of the city, and their route took them over Barrett avenue to the crossing of defendant's tracks. As they approached the crossing from the east they stopped to let train No. 48, which was proceeding northerly, pass. They then drove slowly over the crossing and when they reached the westerly track they were struck by train No. 7, which was traveling to the south into the Richmond station. The driver of the car, Lester Wessling, had passed over this crossing frequently and was thoroughly familiar with the surroundings. An automatic "wigwag" was maintained on the northeast corner of the crossing. A flagman was housed at the southwest corner. This flagman ordinarily stood near the westerly track when a train was passing from the south and near the easterly track when a train was passing from the north. He signaled the danger of an approaching train by holding upright a stop disc by day and a lantern by night. The "wigwag" was controlled by an electric switch. The current was cut off by the operation of the train at a point a few feet beyond the crossing, but this "wigwag" continued to oscillate from ten to twenty seconds after the electric current was cut off. As the Wesslings started to cross the tracks, this "wigwag" was moving; but, whether the movement was caused by the passing train or from a new contact made by the approaching train No. 7, was, of course, impossible to determine.

Plaintiff rested her case upon the alleged negligence of defendant in the operation of train No. 7 at an excessive speed and the failure of the flagman to be in his accustomed place and to give the usual or any warning of the approach of this train. Defendant denied both alleged acts of negligence and set up contributory negligence on the part of the deceased. The cause was tried jointly with cause No. 7870 [3 P.(2d) 25], so that both were left to the jury upon the same evidence and upon the same instructions. The evidence upon both issues was sharply conflicting. On behalf of plaintiff it was shown that deceased had crossed at that point frequently and was accustomed to watch the flagman for his usual signal of danger, but that, at this time, the flagman was standing some ten or fifteen feet from his usual position with his foot upon the running board of a truck which was stopped in the street and with his head inside the cab of the truck, where he was in conversation with the truck driver. On the part of the defendant evidence was offered to show that the flagman was in his accustomed place giving the usual warning of the approaching

danger and that the deceased disregarded these signals of danger and drove directly in the path of the approaching train.

[1] Manifestly if the evidence of the plaintiffs was believed they made a case for the relaxation of the "stop, look and listen" rule to the extent that the failure to stop, look, and listen is not in such cases negligence as matter of law. Under such circumstances, "the extent to which a traveler may rely upon the assurance of safety arising from the absence of a flagman from his post of duty on the presumption that it is safe for him to cross a railroad track which he is familiar with is generally held to be a question of fact for the jury." *Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 224, 223 P. 553, 558. In another portion of the opinion the Supreme Court in the *Gregg* Case say (page 222 of 193 Cal., 223 P. 553, 557); "But it is also true that a railway company will not be permitted to encourage the public to relax its vigil as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices and measures and at the same time hold a person to the same quantum of care as if no such safety measures had been provided." And at page 224 of 193 Cal., 223 P. 553, 557, the court quoted with approval from *Elias v. Lehigh Valley R. Co.*, 226 N. Y. 154, 123 N. E. 73, as follows: "The danger is obvious. It is like in kind to that caused by raised and untended gates. To some extent it is an assurance that the way is safe. That the railroads recognize the danger is seen by the familiar sign at country crossings giving notice that the flagman is absent after 6 p. m." To the same effect are *Wyseur v. Davis, etc.*, 58 Cal. App. 598, 601, 602, 209 P. 213, where many authorities are cited, and *Sheets v. Southern Pacific Co.* (Cal. Sup.) 299 P. 71.

With these qualifications of the "stop, look and listen rule" in mind, we may approach the consideration of the instructions of which the appellant complains. At the request of respondent the jury was instructed: "If you believe from the evidence that there was a place of safety at which the automobile could have stopped, and from which the driver of the automobile could have seen Train No. 7 approaching from the north and traveling southerly, and that solely because of the neglect of the driver the said automobile was not stopped in such place, then I instruct you that your verdict must be for the defendant." "If you believe from the evidence that the automobile was driven to and upon the crossing while the view of the occupants thereof was obscured by Train No. 48 traveling northerly so that they could not see the approach of Train No. 7 traveling southerly on the further tracks, your verdict must be for the defendant."

[2, 3] The appellant criticizes these instructions on the ground that they are "formula" instructions which fail to take into consideration her claim that the flagman was not performing his duty. The respondent defends them upon the ground that they present its theory of the case that the flagman fully performed his duty. The performance or nonperformance on the part of the flagman was a question of fact for the jury. To instruct the jury that they *must* find for the defendant if they found that the driver had failed to stop at a place of safety where he could have ascertained whether another train was approaching from the north was tantamount to directing a verdict for the defendant notwithstanding the question of the acts of the flagman. It being conceded that the driver had stopped before approaching the first tracks of the crossing in order to let train No. 48 pass, this instruction further required him to ascertain as a matter of *certainty* that the crossing could be made in safety irrespective of the presence or nonpresence of the flagman. There was nothing in this case which required this driver to exercise a greater quantum of care than that required of the reasonably prudent person under similar circumstances. But the jury was not permitted to determine that such reasonable care was exercised, but was told that the driver was negligent if he failed to stop at a time and at a place where and when he could be *sure* that the crossing could be made in safety. The rule is settled that when an instruction directs a verdict for one of the parties, if the jury finds certain facts to be true, it must embrace all things necessary to show the legal liability of the other and to warrant the direction that such party is entitled to a verdict. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184, 118 P. 700; *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 278, 201 P. 599; *Robinet v. Hawks*, 200 Cal. 265, 272, 252 P. 1045; *Sinan v. Atchison, etc., Ry. Co.*, 103 Cal. App. 703, 716, 284 P. 1041; *Hodge v. Weinstock, Lubin & Co.* (Cal. App.) 293 P. 80. The error noted in the foregoing instructions is emphasized by the part beginning on line 16, page 734, of the typewritten transcript, wherein the jury was instructed that it was the "duty" of the driver when he started to cross the tracks to look for an approaching train "from a point where looking would be effective, before crossing *any* railroad track on which a train might be approaching from either direction." Thus, the jury was told that, notwithstanding the presence of the flagman, it was the duty of the driver to stop at each track of the crossing and ascertain if a train was approaching.

[4] The suggestion is made, though not seriously argued, that the error of these instructions was cured by the instructions

given at the request of the appellant to the effect that where the railroad company maintains a flagman or other signals of warning the public has a right to assume that such safeguards will be reasonably maintained and that if the flagman is absent from his post of duty or fails to give the usual warning of danger this is an assurance of safety upon which a driver may rely provided that he uses such precaution as a prudent person would use under like circumstances. In the same connection it is suggested that the instructions objected to were cured by the one given at the request of the appellant to the effect that, "There is no positive rule of law requiring the said decedent or the said plaintiff to again stop, look or listen at any particular place upon the said crossing." These instructions, however, do nothing more than create a conflict, and it is impossible to say which instruction the jury followed in arriving at its verdict. This being so, they cannot cure the error complained of. *Keena v. United Railroads of San Francisco*, 57 Cal. App. 124, 127, 207 P. 35; *Rathbun v. White*, 157 Cal. 248, 253, 107 P. 309; *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 394, 264 P. 237, where numerous authorities are cited.

[5, 6] The appellant further complains of the refusal of the trial court to give her proposed instruction reading as follows: "A person crossing a railroad track guarded by safety devices, or flagman, is not required to exercise the same quantum of care which would be required of him if he were crossing an unguarded track, but in the case of a guarded crossing the traveler is required to exercise only ordinary care for his own safety. The railroad company will not be permitted to encourage the public to relax its vigilance as to the dangers that lurk in railroad crossings by assurances that the danger has been removed or minimized by the adoption of safety devices or other measures, such as a flagman, and at the same time hold a person to the same quantum of care as if no safety measures had been provided." The proposed instruction correctly states the law (*Gregg v. Western Pac. R. R. Co.*, 193 Cal. 212, 222, 223 P. 553), and should have been given. As to the other proposed instruction which the trial judge refused to give, we are satisfied that the subject matter was fully covered by the instructions which were given.

Complaint is also made of the reading in evidence of the testimony of the witness Edward Aurswald, who was the flagman on duty at the time of the accident and who testified at the first trial of these actions. Judgment here on appeal comes from the fourth trial. In the second trial the testimony of this witness was read under the stipulation of the parties. Following the second trial counsel

for the plaintiff secured information which they believed would impeach the testimony of this witness. He was not produced at the third trial and his testimony was not read. Before the fourth trial appellant's counsel offered to permit the reading of the testimony if certain facts which might be shown on cross-examination would be stipulated to. This offer was not accepted and some suggestion was made that the deposition of the witness be taken which it is agreed might have been done. During the course of the trial respondent offered to read the testimony given on the first trial and presented to the court a letter from the witness to the effect that he was ill and unable to appear and testify. Over the objection of the appellant this letter was received in evidence and the testimony read. On this appeal respondent defends its action on its interpretation of section 1870, Code of Civil Procedure, which permits the reading of the testimony of a witness in a former trial if "deceased, or out of the jurisdiction, or *unable to testify*." Subdivision 8. The appellant insists that the meaning of this expression is not limited to the inability of the witness to testify in the courtroom, but if, as it is admitted here, the deposition of the witness might have been taken then that course should be followed and his former testimony should not be read. No authorities are cited directly to the point, though *Butcher v. Vaca Valley R. R. Co.*, 56 Cal. 598, is authority for the point that the expression "out of the jurisdiction" used in this section does not permit the reading of the testimony of the witness at a former trial who resides out of the county and more than thirty miles from the place of trial if her deposition could be taken. *Rose v. Southern Trust Co.*, 178 Cal. 580, 174 P. 28, cited by respondent, is not in point. There the Supreme Court was considering the inhibitions upon the competency of witnesses under subdivision 3 of section 1880, Code of Civil Procedure. The argument was made that under subdivision 8 of section 1870 testimony of a witness "unable to testify" might be read notwithstanding that such witness was incompetent to testify under the provisions of subdivision 3 of section 1880. The court very properly ruled that the words "unable to testify" related to the physical inability and not to the legal incompetency of the witness. In stating this proposition the court used the expression "physical inability to appear upon the witness stand and there to give testimony." The last portion of the sentence was wholly unnecessary to the opinion as the question whether the language of section 1870 related to appearance upon the witness stand or appearance for the taking of a deposition was not before the court. It is not incumbent upon us to decide the question here, as the cause must be reversed for a new trial; and

as it is agreed that the testimony of this witness can be taken by deposition, there is no reason for the controversy to arise again.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.

116 Cal.App. 455

WESSLING v. SOUTHERN PAC. CO.

Civ. 7870.

District Court of Appeal, First District, Division 2, California.

Sept. 1, 1931.

Rehearing Denied Oct. 1, 1931. Hearing
Denied by Supreme Court Oct. 29, 1931.

1. Negligence §93(1).

Driver and passenger having nothing in common except destination, and a common purpose, negligence of driver cannot be imputed to passenger.

2. Negligence §93(1).

Negligence of driver can be imputed to passenger only when passenger has control or legal right to control driver in operation of vehicle.

3. Negligence §93(1).

Where there was no evidence of plaintiff's control or right to control brother driving car which collided with train, doctrine of imputed negligence held inapplicable.

Facts disclosed that the brothers were ministers; that they had each prepared tracts to be used at a convention of Sunday school teachers and were riding to post office to mail them in a car owned jointly by their mother and the brother, who was driving when the collision with the train occurred.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Albert H. Wessling against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals.

Reversed.

Charles A. Wetmore, Jr., and Treadwell, Van Fleet & Laughlin, all of San Francisco, for appellant.

Dozier & Kimball, Christin F. Kimball, and Thomas B. Dozier, all of San Francisco, for respondent.

NOURSE, P. J.

In addition to the errors noted in the foregoing decision [3 P.(2d) 22], the appellant in this case complains of the application to him of the rule of imputed negligence.

The facts upon which this defense rested are simple. This appellant and his deceased brother were ministers, the appellant located in the city of Lodi and the deceased in the city of Richmond. While appellant was a guest in his brother's house, the two prepared some tracts to be used at a forthcoming convention of Sunday school teachers. They left the brother's house together, entered an automobile owned jointly by the brother and his mother, and were on their way to the Richmond post office to mail the tracts when the collision occurred. The deceased brother drove the car throughout the journey, and selected the route traveled. There is no evidence that this appellant had any control or right of control over his brother's operation of the car at any stage of the journey to the post-office. The theory of joint adventure rests solely on the fact that they were both riding together to the post office to place these tracts in the mail.

The trial court instructed the jury that if they found that the brothers united in a joint enterprise, "and that they were, at the said time of said accident, utilizing the automobile in which they were riding as an agency for the furtherance of such enterprise and each had an equal voice in the management of such agency, then the negligence of the driver may be imputed to this appellant and the verdict must be for the defendants in both cases." As we have said, there was not the slightest evidence of "an equal voice in the management of the agency," hence this issue was improperly submitted to the jury. But, aside from this, the language of the instruction is a too loose application of the doctrine of imputed negligence by reason of a joint adventure.

It is true that the decisions are not in accord as to what constitutes a joint adventure, but there is no inharmony in the decisions of this state that "the passenger must exercise some control over the driver thereof, or, in law, may be said to possess the right of such control." *Pope v. Halpern*, 193 Cal. 168, 174, 223 P. 470, 473, citing *Bryant v. Pac. Elec. Ry. Co.*, 174 Cal. 737, 164 P. 385, and *St. Louis, etc., Ry. Co. v. Bell*, 58 Okl. 84, 159 P. 336, L. R. A. 1917A, 543. And the court says: "It will be seen from these two decisions that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in

common, such as a 'joy ride,' but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle. * * *

The better view is expressed by *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114: "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies.' Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care 'except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.'" (Italics ours.)

[1-3] To the same effect is *Thompson v. Fitzgerald*, 205 Cal. 563, 567, 271 P. 1072, and *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715, 717, 23 A. L. R. 643, where the Minnesota court says: "The rule is founded on the theory of partnership or a relation akin to partnership. * * * The question is, were they in joint control of the instrumentality that caused the injury, that is, in this case, were they jointly operating or controlling the movements of this automobile at the time of the collision? 29 Cyc. 543." The true rule in this state, as we understand it, is that where there is nothing in common between the passenger and the driver of the vehicle except a common destination and a common purpose in going there the negligence of the driver is not to be imputed to the passenger, but the passenger must control or have some legal right to control the actions of the driver in the operation of the vehicle. With no evidence that the appellant did control or that he had any legal right to control the actions of the driver in this instance, the doctrine of imputed negligence was a false issue and the question of the contributory negligence of this appellant should have been left with the jury upon the well-settled rules defining the responsibility of a guest riding in a vehicle driven by another found in *Marchetti v. Southern Pacific Co.*, 204 Cal. 679, 681, 682, 269 P. 529; *Cate v. Fresno Traction Co.* (Cal. Sup.) 2 P. (2d) 364; and *Williamson v. Fitzgerald et al.* (Cal. App.) 2 P.(2d) 201, where numerous authorities are cited.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENOE, J.

116 Cal.App. 544

COOKSON et al. v. FITCH.

Civ. 466.

District Court of Appeal, Fourth District,
California.

Sept. 10, 1931.

1. Pleading ⇨52(1).

Where several counts in complaint alleged negligence in varying forms, each count constituted complete cause of action.

2. Negligence ⇨119(6).

Where some of counts in complaint alleged negligence generally, *res ipsa loquitur* doctrine could apply, notwithstanding other counts alleged specific negligence.

3. Negligence ⇨121(2).

Where *res ipsa loquitur* doctrine applies, proof of accident and consequent injury places burden of explaining accident upon defendant.

4. Automobiles ⇨242(2).

In automobile guest's action for injuries sustained when car overturned, allegation that automobile was negligently constructed from old parts did not preclude application of *res ipsa loquitur* doctrine.

This was so, since the particular defective parts and the particular manner in which the construction was careless or negligent was not alleged, and an explanation of the cause of the accident was not given, nor did the allegations show that plaintiff possessed information as to the particular defects in the construction of the automobile which might have caused the accident.

5. New trial ⇨70.

Motion for new trial for insufficiency of evidence to sustain verdict is addressed to trial court's sound discretion.

6. Appeal and error ⇨979(1).

Trial court's ruling upon motion for new trial for insufficiency of evidence to sustain verdict is conclusive, absent clear abuse of discretion.

7. Automobiles ⇨242(2).

Res ipsa loquitur doctrine applied to automobile guest's action for injuries sustained when automobile overturned.

8. Negligence ⇨136(6).

New trial ⇨159.

Whether defendant's evidence overcame inference of negligence raised by *res ipsa loquitur* doctrine was primarily for jury and

secondarily for trial judge on motion for new trial.

9. New trial ⇨159.

Trial judge, in ruling on motion for new trial for insufficiency of evidence to sustain verdict, becomes judge of weight and sufficiency of evidence, and witnesses' credibility.

10. New trial ⇨70.

In automobile guest's action for injuries sustained when car overturned, granting new trial because evidence insufficiently supported verdict for defendant held not abuse of trial court's discretion.

11. Appeal and error ⇨933(1).

Reviewing court must consider all reasonable inferences from evidence supporting order granting new trial because evidence insufficiently supported verdict.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Helen Cookson and another against David Fitch. From an order granting plaintiffs' motion for a new trial, defendant appeals.

Affirmed.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for appellant.

Chester A. Smith, of San Diego, for respondents.

MARKS, J.

This action grew out of an automobile accident which occurred on E street in the city of Coronado, Cal., on the 9th day of July, 1929. David Fitch was the owner and operator of an automobile in which Peter Cookson was riding as his guest at the time of the accident. The engine and chassis were those of a 1924 model T Ford. The remaining portions of the car had been obtained by Fitch from various sources and were all from old used automobiles and had been assembled by him into his automobile. At the time of the accident, Fitch, Cookson, and two others were returning from the Coronado city dump, where they had gone to inspect a Ford body. They returned to the place of the accident on E street with Fitch driving at a speed estimated at about twenty-five miles per hour. The car suddenly swerved to its right and rolled over, injuring Cookson. E street was a smooth improved road with no obstructions in it.

The case was tried before a jury which returned a verdict against the respondents and in favor of appellant. The trial court granted respondents' motion for a new trial upon the ground that the evidence was insufficient to

Justify the verdict of the jury, and appellant appealed therefrom.

Peter Cookson was, at the time of the accident, a minor of about the age of 16 years, and Helen Cookson, his mother, was appointed his guardian ad litem.

The complaint contains seven causes of action. The first is for actual damages sustained by the mother on account of the injuries to her son. In it the negligence of appellant is alleged in general terms. The other six causes of action are for damages resulting from injuries to the minor. In the second cause of action it is alleged that the appellant built and constructed the automobile which he was driving at the time of the accident "from certain old or used parts from various second-hand cars; that he, the defendant, so negligently and carelessly constructed said motor vehicle that the same was not in a fit and proper condition to drive upon the public highways of the State of California; that the plaintiff, Peter Cookson, did not know of this condition when he accepted a ride in said motor vehicle with defendant." The other five causes of action allege specific acts of negligence on the part of appellant.

It has been repeatedly held in California that the doctrine of *res ipsa loquitur* applies to a guest in an automobile who is injured in an accident, the cause of which he is not able to explain. In the case of *Ireland v. Marsden* (Cal. App.) 291 P. 912, 915, it was held as follows:

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of care." *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 P. 1020, 1021, 29 L. R. A. 718, 48 Am. St. Rep. 146.

"This rule has been uniformly followed in this state.

"The first question presented in this case is: Do the facts proved (admitted) bring the case within this rule? Many of the older cases holding the rule applicable are reviewed by our Supreme Court in *Judson v. Giant Powder Co.*, supra, and need not be again reviewed here. The automobile has given rise to many new conditions, and the courts have passed on a number of circumstances arising from the operation of automobiles where the rule has been applied. The review of some of them seems necessary to the understanding and a determination of this appeal. It is conceded by the appellant that the doctrine applies to guest cases in the same manner as in cases of common carriers; further, that the automobile was under the control of the defendant.

In *Brown v. Davis*, 84 Cal. App. 180, 257 P. 877, plaintiff's wife, deceased, and others were riding in an automobile at the time of the accident, which occurred late at night. Mrs. Brown was riding as an invited guest. The defendant testified that immediately before the accident 'there was a car coming * * * on the other side and what made me pull out of the road, the car was coming on the other side of the road with no lights'; that he thereupon pulled off the graveled part of the road, and as he attempted to pull back again the right rear wheel collapsed and his automobile overturned; the wheel had broken off at the hub; that before turning off the graveled road he was traveling at the rate of 25 to 30 miles per hour; and that he continued at that speed until after the accident. The court held in such action the doctrine of *res ipsa loquitur* is applicable notwithstanding the deceased was an invited guest. See, also, *Crooks v. White*, 107 Cal. App. 304, 290 P. 497. The general rule is settled that the overturning of a vehicle operated by a common carrier raises an inference of negligence under the doctrine of *res ipsa loquitur*. *Seney v. Pickwick Stages*, 82 Cal. App. 226, 255 P. 279. In *Leitert v. Pickwick Stages*, N. D., 68 Cal. App. 504, 229 P. 889, 890, the court in applying the doctrine of *res ipsa loquitur* said that 'an automobile in perfect mechanical condition, which the driver is having no difficulty in operating, running upon a paved highway with ample room, does not suddenly leave the highway and run 200 feet into the bottom of a gulch if it is being operated with due and proper care.'

"In *Mansfield v. Pickwick Stages*, N. D., 68 Cal. App. 507, 229 P. 890, 891, the court says: 'Proof of the derailment of a train or of an automobile leaving the highway and going into the gulch, or other similar accident, calls for an explanation by the defendant or a possible inference of negligence upon its part.'

"In *Morris v. Morris*, 84 Cal. App. 599, 258 P. 616, plaintiff was injured while riding in an automobile of the defendant. Defendant's car came to an intersection of highways. Plaintiff was riding in the rear seat of the car, which was being driven in a westerly direction; the intention of the parties being to turn south. Plaintiff was unable to explain the cause of the accident. She testified that when the automobile entered the intersection its course was directly toward an electric light pole which was situated between the curb and sidewalk, at the southwest corner of the intersection; when the driver attempted to turn south, the speed of the car suddenly increased and a collision with the pole occurred, causing the damage alleged. She further testified that as the automobile approached the intersection she looked to the south along the avenue and saw no automobiles approaching from that direction. The court

held that the doctrine of *res ipsa loquitur* applied. * * *

"Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 143 P. 718, 719, relied upon by defendant, is a case where the plaintiff was injured while getting off a street car, and claimed the car had suddenly started before she had time to get off. The court said: 'It is not necessary for the passenger to prove the cause of the collision, derailment, or other accident. It is sufficient for him to prove that it occurred, and such proof makes a *prima facie* case of negligence on the part of the carrier, which throws upon it the duty of explaining how it occurred, and showing that it was the result of causes beyond its control, and so relieving it from responsibility. The wisdom of this rule is apparent.'"

[1-4] It has been held in California that, where there are several counts in a complaint alleging negligence in varying forms, each count is independent of the other and is a complete cause of action in itself. *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 P. 747. It therefore follows that, if any of the causes of action in the complaint allege negligence in general terms, the doctrine of *res ipsa loquitur* may be applicable, and, if it is, proof of the happening of the accident and consequent injuries to the minor places the burden of explaining the accident upon appellant.

The verdict of the jury was general and found against respondents without reference to any specific cause of action. The order granting the motion for a new trial was equally general.

There can be no question but that the first cause of action alleges negligence in general terms. Appellant maintains that the second and all of the other causes of action allege specific acts of negligence. We have not been able to agree with this contention as to the second cause of action. While it is therein alleged that the automobile was negligently and carelessly constructed from old parts of secondhand cars, and that it was not in a fit and proper condition to be driven upon the public highways, the particular defective parts or the particular manner in which the construction was careless or negligent is not alleged. An explanation of the cause of the accident is not therein contained, and the allegations of this count of the complaint do not show that the plaintiff possessed information as to the particular defects in the construction of the automobile which might have caused the accident and the consequent injuries. The case of *Vertson v. City of Los Angeles* (Cal. App.) 2 P.(2d) 411, supports our conclusion that this cause of action alleges negligence in general terms.

In the case of *Marovich v. Central California Traction Co.*, 191 Cal. 295, 216 P. 595, 600, the court said: "The general rule is that 'where the plaintiff in his complaint gives the

explanation of the cause of the accident, that is to say where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of *res ipsa loquitur* does not apply.' *Connor v. Atchison, T. & S. F. Ry. Co.*, 189 Cal. 1, 26 A. L. R. 1462, 207 P. 378, and cases cited. The foregoing statement of the rule in the cited case was followed by the qualification that 'where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine.'"

We therefore conclude that the second cause of action alleged negligence in general terms, and that the doctrine of *res ipsa loquitur* may be applied under its allegation and the evidence offered in support thereof.

It has been held that, where the complaint alleged negligence in general terms as well as specific acts of negligence, the doctrine of *res ipsa loquitur* would apply. *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, 111 P. 519, 524, 527; *Bourguignon v. Peninsular Ry. Co.*, 40 Cal. App. 689, 181 P. 669; *Burke v. Dillingham*, 84 Cal. App. 736, 258 P. 627. In the *Roberts Case*, it was held as follows: "It has been held, and we think rightly, that, where general allegations of negligence are followed by an enumeration of specific facts, the plaintiff will not be confined to proof of specific acts, unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts, and the rule, we think, should be equally applicable where the specific acts pleaded precede the general negligence alleged."

[5,6] A motion for new trial upon the grounds of insufficiency of the evidence to sustain the verdict and judgment is addressed to the sound discretion of the trial court. Its order will not be disturbed on appeal except in a clear case of the abuse of such discretion. As was said in the case of *Smith v. Royer*, 181 Cal. 165, 183 P. 660, 663: "In a jury trial a party is entitled to two decisions on the evidence—one by the jury and one by the trial court, and the trial court is not bound by a conflict in the evidence. *Dickey v. Davis*, 39 Cal. 565; *Curtiss v. Starr*, 85 Cal. 376, 24 P. 806; *Bates v. Howard*, 105 Cal. 173, 38 P. 715; *Condee v. Gyger*, 126 Cal. 546, 59 P. 26; *Green v. Soule*, 145 Cal. 96, 78 P. 337."

[7-11] In the instant case two of the causes of action in the plaintiffs' complaint allege negligence in general terms. The courts have held an automobile a dangerous instrumentality as the term is used in connection with the *res ipsa loquitur* doctrine. The automobile which caused the injury to Peter Cookson was under the management and control of appellant, and the accident was one which does not ordinarily happen if due care be

used by the one operating the car. These facts bring those portions of the case in which general negligence was alleged squarely within the doctrine of *res ipsa loquitur* and establish a *prima facie* case of negligence against the appellant which he must meet by evidence. Whether or not he has successfully overcome this *prima facie* showing of negligence on his part is a question to be determined first by the jury and second by the trial judge on a motion for new trial. The judge having resolved this question against appellant, we cannot disturb his decision, as, under such circumstances, he becomes the judge of the weight and sufficiency of the evidence and the credibility of the witnesses.

There is also evidence in the record which, if believed by the trial court, would support the order under certain of the causes of action where specific acts of negligence were alleged. There is evidence that the automobile suddenly swerved to its right before it turned over. This would support the inference contended for by respondents that some portion of the steering gear locked, causing the car to swerve and roll. Appellant contends that the swerving was caused by a front tire blowing out. There is evidence to the effect that the explosion did not occur prior to the swerving of the car. All reasonable inferences which may be drawn from the evidence must be considered by us in support of the order granting the motion for new trial.

The order appealed from is affirmed.

We concur: JENNINGS, Acting P. J.; ALLISON, Justice pro tem.

116 Cal.App. 532

MAGNUSON v. CITY OF STOCKTON.

Civ. 4188.

District Court of Appeal, Third District,
California.

Sept. 10, 1931.

Rehearing Denied Oct. 10, 1931. Hearing
Denied by Supreme Court Nov. 9, 1931.

1. Municipal corporations ☞857.

In action for drowning of minor son in park lake, instruction limiting evidence of previous drowning of other children in same lake to show knowledge of city authorities of dangerous condition in lake *held* error.

Such instruction was error, since evidence was properly admitted as tending to show dangerous condition existing at the lake, the cause of the boy's death, and as tending to bring home to city knowledge of the dangerous condition existing at the lake.

2. Municipal corporations ☞857.

Testimony of previous accidents to establish municipality's knowledge of dangerous condition is admissible though circumstances are not precisely the same, if they are similar in their general nature.

3. Municipal corporations ☞857.

In action to recover for drowning of minor son in park lake, facts *held* sufficient as basis for admission of evidence of previous drownings of children.

Facts disclosed that three children were drowned in lake involved which was under management and control of defendant city and which was a place where children were invited to play, and that banks of lake were steep, slippery, and absolutely unprotected.

4. Trial ☞139(1).

Weight and conclusiveness of evidence is for jury.

5. Trial ☞165.

On motion for nonsuit, evidence should be interpreted most strongly against defendant.

6. Trial ☞165.

Motion for nonsuit admits truth of plaintiff's evidence, and every legitimate inference drawn therefrom.

7. Municipal corporations ☞857.

In action for drowning of minor son in park lake, evidence *held* to show existence of dangerous condition and defendant's failure to remedy same within reasonable time after knowledge thereof (St. 1923, p. 675, § 2).

Facts disclosed that at least one member of defendant's council knew of previous drownings, and that before drowning of plaintiff's son some one appeared before defendant's council at a regular meeting and advised council of dangerous condition existing at lake, and that defendant failed to remedy the condition within a reasonable time after notice.

8. Municipal corporations ☞857.

Evidence showed deceased boy met his death by falling from unprotected banks of park lake into water below.

9. Municipal corporations ☞849.

City owning and improving banks of lake within corporate limits *held* liable for dangerous condition of banks, notwithstanding lake might be navigable water under paramount control of the United States.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Edith Magnuson against the City of Stockton. Verdict for defendant, and defendant appeals from an order granting a new trial.

Affirmed.

J. Le Roy Johnson and Clarence A. Grant, both of Stockton, for appellant.

Gumpert & Mazzeri and C. H. Hogan, all of Stockton, for respondent.

PRESTON, P. J.

The plaintiff, Edith Magnuson, brought this action to recover damages for the death of her minor son, Kenneth Charles Harrison, charging that his death was caused by the negligent manner in which the defendant, city of Stockton, maintained in said city a public park and playground surrounding a body of water known as "Yosemite Lake."

It is the claim of plaintiff and respondent that the boy, while playing along the shores of said lake, met his death by falling from the bank into the water below and drowning, and that the fall was caused by the lack of a fence, guard rails, or other barriers along the shores of said lake.

The cause was heard before a jury and resulted in a verdict and judgment in favor of the defendant, city of Stockton. The plaintiff made a motion for a new trial, which was granted; the order granting the new trial reading in part as follows:

"Upon the one and sole ground, that the giving of the instruction hereinafter set forth, constituted error, said instruction being as follows, to-wit:

"Instruction No. III. Certain evidence has been permitted, concerning other accidents than the one complained of in the complaint, at Yosemite Lake. This evidence is not to be considered by you to establish the fact that the City may have been at fault or liable for the death of Kenneth Charles Harrison. That evidence was permitted to be introduced for the limited purpose of showing that the governing board or the officers of the City may have had knowledge or notice that a dangerous condition may have existed at Yosemite Lake."

[1-4] The plaintiff proved that prior to the drowning of her son in Yosemite Lake, three other children had been accidentally drowned in said lake. This evidence was properly admitted as tending to show the dangerous condition existing at the lake, the cause of the boy's death, and, furthermore, as tending to bring home to appellant, knowledge of the dangerous condition existing at said lake, and the jury had a right to consider the testimony for these three purposes, and the court erred in giving to the jury the foregoing instruction. *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083, 1085; *Dyas v. S. P. Co.*, 140 Cal. 296, at page 305, 73 P. 972; *Malone v.*

Hawley, 46 Cal. 409; *Rafferty v. City of Marysville*, 207 Cal. 657, at page 662, 280 P. 118; 10 Cal. Jur. 827; 65 A. L. R. 381-387.

Appellant argues "that there is no evidence in the record to show the place where the other three children were drowned, nor the manner in which they met their death," etc. It is true that more of the facts and circumstances surrounding the three prior accidents might well have been shown, but the rule is well settled that in order to permit the admission of testimony of previous accidents it is not necessary that it be shown that such accidents occurred under circumstances *precisely* the same as those characterizing the accident in question, but it is sufficient *that they are similar in their general character*. *Robison v. Western States Gas & Elec. Co.*, 184 Cal. 401, 194 P. 39; *Long v. John Breuner Co.*, 36 Cal. App. 630, 172 P. 1132. This rule must necessarily be true, for it would be very difficult, if not impossible, to show that two persons were drowned in *exactly* the same place and in the same manner. Accidents do not happen that way. The record shows that these three children were all drowned in Yosemite Lake, which is under the control and management of the appellant, and which is a place where children are invited to play and the banks of the lake were steep and slippery and absolutely unprotected. These facts are sufficient as a basis for the admission of the evidence that prior to the death of the Harrison boy, three other children were drowned in said lake. Furthermore, it must be remembered that we are here considering only the admissibility of evidence of previous accidents at this lake, and not the weight and conclusive effect to be given to such testimony. That was a question for the jury.

[5, 6] Appellant next contends that the order granting a new trial should be reversed for the reason that the trial court should have granted appellant's motion for a nonsuit. The court's power and limitations with reference to the granting of a nonsuit are clear and well defined. The motion admits the truth of plaintiff's evidence and every inference which can legitimately be drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. The authorities supporting this rule are legion and we need only cite the following: *Estate of Arnold*, 147 Cal. 583, 82 P. 252; *Bakos v. Shell Company*, 94 Cal. App. 243, 271 P. 127; *Berger v. Lane*, 190 Cal. 443, 213 P. 45; *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077.

This action is based upon the act of 1923, section 2, Statutes of 1923, page 675, *Deering's General Laws, Act 5619*, which provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways,

buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Kenneth Charles Harrison, at the time of his death, was of the age of seven years and nine months, in good physical condition, and in full possession of his faculties. He resided with his mother and stepfather at 1815 Elizabeth avenue, Stockton, Cal., within five blocks of Yosemite Lake. On the day of the accident, the boy attended school and returned home about 2:30 in the afternoon, played with other children in the neighborhood until about 4:15 p. m. When his mother called him for supper he did not answer. A search of the neighborhood was made, but the boy could not be found. Yosemite Lake was dragged and his body was discovered at the southwest corner of the lake shore in about 15 feet of water. Yosemite Park, in which the lake in question is situated, was owned and controlled by appellant; the water in said lake varied in depth from 6 to 15 feet; the banks on all sides were steep and slippery. Due to the condition of the banks it was difficult for experienced swimmers to get out of the lake except at a few advantageous points. There were no fences, barriers, or guard rails of any kind or description along any of the banks or slopes of said lake, but the entire shores of said lake were open and unprotected. The city had leveled the ground surrounding the lake up to the edge of the banks and had planted the same to grass, and made it attractive to children. Prior to the drowning of the Harrison boy, three other children had been accidentally drowned in said lake. Notice of the dangerous condition existing at the lake had been brought to the attention of the superintendent of playgrounds of said city of Stockton, prior to the accident in question. At least one member of the city council of appellant admitted that he had actual knowledge of the actual drowning of other children in said lake prior to the death of the Harrison boy.

It was also testified that at least one person appeared personally before the city council of the city of Stockton, at one of its regular meetings, prior to the death of plaintiff's son and advised the city council of the dangerous condition existing at said lake, and asked them to take steps to remedy such con-

dition. At the point where plaintiff's son's body was recovered from said lake the banks were precipitous.

[7] From the foregoing brief statement of the facts it is clear that plaintiff not only proved that a dangerous condition existed at Yosemite Lake, but that appellant had both knowledge and actual notice of the existence of such dangerous condition and did not remedy such dangerous condition within a reasonable time after obtaining knowledge and notice of its existence, or at all.

The only remaining fact to be proved by plaintiff to establish at least a prima facie case against appellant is that her son met his death as a result of the dangerous condition of the banks of said lake.

[8] Appellant insists "that there is no specific testimony as to the cause of the boy's death, other than that he was found drowned in the lake * * * and not one word of testimony to show that the alleged dangerous condition of the banks of said lake caused the boy's death."

There were no eyewitnesses to the accident. In the very similar case of *Gorman v. County of Sacramento*, supra, this court said:

"It is true, as contended by appellant, that by proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. *Union Investment Co. v. San Francisco Gas, etc., Co.*, 168 Cal. 58, 141 P. 807. This rule, however, does not require demonstration of the connection between the proved or admitted negligence and the resulting injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be proved," citing *County of Alameda v. Tieslau*, 44 Cal. App. 332, 186 P. 398; *Ross v. San Francisco-Oakland T. R. Co.*, 47 Cal. App. 753, 191 P. 703.

"There is also another well-recognized rule of law applying to accidents like the one in the case at bar, to wit, that deceased is presumed to have exercised ordinary care for his own safety. This rule is fully and clearly stated by Mr. Justice Henshaw in the case of *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, at page 506, 143 P. 714, 716, as follows: 'Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4. * * * This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide.' See, also, *Boyle v. Coast Imp. Co.*,

27 Cal. App. 714, 151 P. 25; Kreitzer v. Southern Pacific Co., 38 Cal. App. 654, 177 P. 477; section 1961, Code Civ. Proc.; Ross v. San Francisco-Oakland T. R. Co., supra.

"In applying this principle of law to personal injury cases the Supreme Court of the United States, in the case of Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 48 L. Ed. 262, 24 S. Ct. 137; see, also Rose's U. S. Notes, said: 'The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation, none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience, that have surer foundation. * * *'

"When recourse must be made to this rule of human conduct in determining the question of responsibility in cases of accident like the one in the case at bar, it is fair to assume, there being no evidence in the record to the contrary, that when deceased met his death he was exercising due and proper care for the protection of his person and the preservation of his life. This presumption is sufficient to constitute prima facie evidence that the deceased at the time he was drowned was free from contributory negligence. Fleenor v. Oregon Short Line R. Co., 16 Idaho, 781, 102 P. 897; Ross v. San Francisco-Oakland T. R. Co., supra."

In fact, the Gorman Case answers practically all of the arguments advanced by appellant. See, also, Tyson v. Burton (Cal. App.) 294 P. 750, and cases there cited; Larrabee v. W. P. R. Co., 173 Cal. 743, 161 P. 750; Ross v. Railways, 47 Cal. App. 753, 191 P. 703; Hatzakorjian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; Smellie v. S. P. Co. (Cal. Sup.) 299 P. 529.

While it seems to us that more of the circumstances surrounding the drowning of the Harrison boy might well have been detailed to the court and jury, the evidence does reveal, however, that the boy was fully clothed when his body was found; his shoes and stockings were on and no marks of violence of any character were found on his body. No evidence appeared that he had attempted to go in swimming or get into any rowboat on the lake. There is also some evidence that the fishing tackle found on the banks of the lake near where the body was recovered belonged to the boy's stepfather with whom he was living at the time he met his death. We think that the only reasonable inference which can be drawn from all the facts and circumstances revealed by the record is that the deceased met his death by falling from the banks of Yosemite lake into the water below and drowning, and that the fall was occasioned by the lack of protection along the shores of said lake.

Appellant lays great stress upon the case of Scott v. City of Long Beach (Cal. App.) 292 P. 664. We think the facts in that case are very different from those in the case at bar. There the deceased knew the dangerous condition of the water and was expressly warned of the depth of the water a few moments before the accident.

[9] We find no merit in the contention of appellant that Yosemite Lake is a navigable body of water and, therefore, under the paramount jurisdiction of the United States government. The lake with its steep slippery banks was and is just as dangerous if it be navigable water as it would be if it were not. Appellant admitted that it owned and controlled the ground up to the edge of the banks of the lake and also the banks above high tide. It is also admitted that it had leveled the ground up to the edge of the lake and planted it to grass and shrubbery and made it attractive to children.

Regardless of who had paramount control of the water in the lake, the edge or banks of this lake were dangerous, because it was left by appellant unprotected and there was nothing to prevent children or adults who might venture near the edge of the bank from slipping or falling into the water of the lake. Furthermore, appellant had assumed domination and control over the lake and it was within the corporate limits of said city.

We are therefore of the opinion that the court did not err in denying the motion for a nonsuit and did not err in granting a new trial.

The order granting a new trial is, therefore, affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

116 Cal.App. 599
HUMES v. WALKER.
Civ. 7988.

District Court of Appeal, First District, Division 2, California.
Sept. 15, 1931.

Rehearing Denied Oct. 15, 1931. Hearing Denied by Supreme Court Nov. 12, 1931.

1. Brokers ⇨49(2).

Conditional acceptance of offer to exchange realty held insufficient to bind offeror, precluding recovery of commissions by broker (Civ. Code, § 1585).

Offer to exchange realty was conditioned on acceptance "within five days of the date hereof by the due and legal execution of the acceptance in writing hereinafter appearing," and by the delivery of the acceptance to named agent, all within the five-day period. Instrument also appoint-

ed agent irrevocably within time limited for written acceptance of offer on terms and conditions specified. Acceptance of offer was conditional; that is, "subject to the approval of" acceptor's lessor.

2. Trial ⇐388(3).

Findings of fact and conclusions of law *held* properly made, though judgment was ordered for defendant, in view of pleadings and evidence (Code Civ. Proc. §§ 590, 632).

3. Brokers ⇐86(3).

In broker's action to recover commission on exchange of realty, evidence *held* to support finding that broker did not perform things required, precluding recovery of commissions.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Tom Humes against Winnifred E. Walker. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

Earl A. Everett, Robert E. Austin, and John N. Helmick, all of Los Angeles, for appellant.

Leonard J. Meyberg, of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff sued to recover broker's commissions alleged to have been earned in negotiating an exchange of tracts of real estate in Los Angeles county. The defendant answered and the action was heard before the trial court sitting without a jury. The court made findings in favor of the defendant and from the judgment entered thereon the plaintiff has appealed.

[1] On the trial of the case the plaintiff was called as a witness in his own behalf and produced a document which he claimed to be the contract of exchange. That document is quite long. It is unnecessary to quote it in full. It consists of an offer by the defendant to exchange her property, describing it, for other property, describing that. Among others, it contains passages as follows: "Unless this offer shall be accepted within five days of the date hereof by the due and legal execution of the acceptance in writing hereinunder appearing, and by the delivery of said executed acceptance to my agent hereinafter named, all within the time aforesaid, this offer shall thereupon immediately be and become revoked, null and void without notice * * * I hereby appoint Tom Humes my agent irrevocably within the time above limited for the written acceptance of this offer to negotiate an acceptance of this offer on the terms and conditions hereinafter specified and on no

other terms and conditions. * * *" The offer of the defendant was signed by her. That portion of the instrument was dated June 27, 1927. Below the foregoing document is an acceptance dated Los Angeles, Cal., July 9, 1927. The acceptance is also quite long. The last paragraph is as follows: "I hereby acknowledge delivery to me of the foregoing offer to exchange and declare that this exchange agreement is now on my part in full force and effect, *subject to the approval of Seth B. Maupin.*" The acceptance was signed by Anna Gish Kimball and C. G. Kimball. The defendant asserts that the words italicized being added after the defendant had signed and the defendant never consenting to the same constituted a conditional acceptance and therefore no acceptance at all. Civ. Code, § 1585; 6 Cal. Jur. p. 62; *Cameron v. Ayres*, 175 Cal. 662, 666, 166 P. 801. After the plaintiff had introduced in evidence the writings above mentioned, he also introduced in evidence a part of the escrow instructions which were in the possession of an officer of a local bank. From those instructions he offered in evidence a passage reading as follows: "Pay commission of \$2,075 to Tom Humes whose address is 7101 Sunset Boulevard, Hollywood." The trial court thereupon asked plaintiff's attorney if he had any more documentary evidence to offer. The attorney replied that he had not. It had already been stipulated that the proposed exchange was never carried into execution by the parties to the exchange. Under that condition of the record the defendant's attorney objected to the introduction of any further evidence by the plaintiff. The objection was sustained and the court ordered judgment for the defendant. Because there was no absolute acceptance on the part of the Kimballs, we think that the ruling of the trial court was clearly correct. Unquestionably the Kimballs had the right and it was possibly their duty to obtain permission from Mr. Maupin, their lessor, to enter into the contract; but under the clear terms of the written instrument they should have obtained that permission and should have given an unqualified and unconditional written acceptance within five days from June 27, 1927. There is no claim that they did so.

In making its ruling the trial court intimated that in its opinion the documents were so indefinite and uncertain as not to be enforceable. A great deal can be said in that connection, but in view of what has been said above we do not take up a discussion of that subject.

[2] The trial court made findings of fact and conclusions of law. The plaintiff claims that it committed error by so doing. The point may not be sustained. Code Civ. Proc. §§ 590 and 632.

[3] He also contends that some of the findings are too broad and therefore they are not sustained by the evidence. However, he does not claim that finding No. 4 was not sustained by the evidence. That finding is: "That plaintiff did not perform the things necessary on his part to be performed under said contract." As appears above, we think it was sustained by the evidence and was determinative of the case. Conceding that some of the other findings were too broad, the error, if any, was not prejudicial.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

116 Cal.App. 584

MORTGAGE GUARANTEE CO. v. PATCH.
Civ. 7587.

District Court of Appeal, First District, Division 1, California.
Sept. 15, 1931.

Rehearing Denied Oct. 15, 1931. Hearing
Denied by Supreme Court Nov. 12, 1931.

1. Pleading $\Rightarrow$ 218(3).

Judgment entered upon plaintiff's demurrer to second and succeeding answers and cross-complaints *held* erroneous as ignoring defendant's right to trial upon issues raised in complaint and first answer.

2. Interest $\Rightarrow$ 33.

Lender is bound by contractual rate of interest.

3. Usury $\Rightarrow$ 59.

Lender upon security of real estate may demand additional insurance thereon or designate insurer as matter of protection, and may charge for such insurance as expense in connection with loan.

4. Usury $\Rightarrow$ 53.

Lender may not, as means of extracting profits exceeding interest agreed upon, charge for expenses not incidental to loan.

5. Usury $\Rightarrow$ 53.

Borrower, paying unnecessary loan expenses, added to interest for purpose of extracting additional profit, so that interest exceeds 12 per cent. per year, may recover under Usury Act (Usury Law [St. 1919, p. lxxxiii]).

6. Usury $\Rightarrow$ 113.

Borrower has burden of proving charges for unnecessary loan expenses made loan usurious (Usury Law [St. 1919, p. lxxxiii]).

7. Usury $\Rightarrow$ 111(1).

Where pleadings alleging usury, disregarding conclusive allegations, evidence payment of amount not exceeding 12 per cent. interest, they are demurrable (Usury Law [St. 1919, p. lxxxiii]).

8. Usury $\Rightarrow$ 111(1).

Pleading alleging usury *held* demurrable as showing that interest charged was less than 12 per cent. (Usury Law [St. 1919, p. lxxxiii]).

9. Usury $\Rightarrow$ 111(1).

One pleading usury must clearly set out that interest exceeded 12 per cent. (Usury Law [St. 1919, p. lxxxiii]).

10. Usury $\Rightarrow$ 113.

Absent allegation that sums lender collected as insurance premiums, for insurance on property securing loan, were not used for insurance purposes, it must be assumed that sums were so used, rather than as disguise for extracting usurious interest (Usury Law [St. 1919, p. lxxxiii]).

11. Usury $\Rightarrow$ 59.

That lender owned interest in company insuring property securing lender's loan would not make lender's necessary insurance charges usurious (Usury Law [St. 1919, p. lxxxiii]).

12. Monopolies $\Rightarrow$ 21.

Lender's violation of Cartwright and Clayton Acts would not constitute defense to lender's action against borrower upon obligation arising out of loan, nor entitle borrower to recovery under Usury Act (Deering's Gen. Laws 1923, Act 8702; Clayton Act; Usury Law [St. 1919, p. lxxxiii]).

Borrower alleged that the lender was a member of a combination whose purpose it was to eliminate competition, to control price, increase cost to the public, and to increase profits to itself, in violation of Deering's Gen. Laws 1923, Act 8702, and Clayton Act (38 Stat. 730).

13. Frauds, statute of $\Rightarrow$ 74(2).

Alleged agreement to permit repurchase of foreclosed property should have been in writing.

14. Pleading $\Rightarrow$ 225(1).

Refusal of leave to amend cross-complaints and answers after sustaining demurrer thereto, following three attempts of defendant to state cause of action, *held* proper.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Mortgage Guarantee Company against Donald L. Patch, in which defendant filed cross-complaints. From an adverse judgment, defendant appeals.

Affirmed in part, and reversed in part with directions.

Donald L. Patch, in pro. per.

John L. Reith, of Oakland, for respondent.

WARD, Justice pro tem.

On November 10, 1927, defendant borrowed the sum of \$50,000 from plaintiff. The loan was evidenced by a promissory note and a deed of trust. Subsequently defendant failed to meet the installment payments of the note, and plaintiff declared the note and deed of trust to be in default and commenced proceedings on April 23, 1929, for the sale of the property under the deed of trust. In due time a sale took place and plaintiff bid the property in for the sum of \$40,000, leaving a deficiency of \$13,889.61. This action was instituted upon the deficiency. This is defendant's fourth attempt to answer and cross-complain, and consists of nine separate answers and eight separate cross-complaints. The first cross-complaint is set forth by reference to the second answer and so on until the eighth cross-complaint refers to allegations set forth in the ninth answer. Herein reference to an answer by number will also refer to the corresponding cross-complaint. A companion cross-complaint does not appear with the answer designated as first answer. A general and special demurrer was interposed to the second and succeeding answers and the cross-complaints.

[1] In the clerk's transcript on appeal the judgment docketed in this case appears as follows: "In the above entitled action the demurrer of Mortgage Guarantee Company, a corporation, to the third amended answer and cross-complaint, having been heretofore sustained without leave to amend; wherefore, by reason of the law and premises aforesaid, it is ordered that the above-named defendant take nothing on his third amended cross-complaint, and that the above-named plaintiff Mortgage Guarantee Company, a corporation, have judgment against the said defendant, Donald L. Patch, for the sum of thirteen thousand eight hundred eighty-nine and $\frac{61}{100}$ ths (\$13,889.61) together with costs amounting to the sum of \$8.80." That the judge presiding upon the hearing of the demurrer did not intend that judgment should be entered, as appears from the record in this case, is made plain by the minute order sustaining the demurrer without leave to amend, also appearing in the clerk's transcript. The demurrer was not directed against the first answer. The defendant is entitled to a trial upon the issues raised in the complaint and the first answer. This

cause will, therefore, to that extent, be remanded with directions that the superior court clear its records and proceed to trial, if the defendant desires a trial. In that connection attention is called to pages 42, 54, 55, and 57 of the clerk's transcript on appeal.

Defendant, a layman, appearing "in propria persona," incorporated into the second answer allegations that the defendant had and offered satisfactory insurance which was refused by the plaintiff for the sole reason of extracting extra profit on the premium and that the required premium was therefore an extra burden in the full amount upon the defendant and was interest and that the total charge was in excess of twelve per cent. per annum. The third answer alleges the same as the second answer excepting that only the premium on excessive insurance required is charged as interest. The fourth answer alleges the same as in the second answer but contends that 9 per cent., which is the highest rate expressed in writing in the contract, is the legal limit for the contract. The fifth answer alleges the same as in the second answer but that the profit in the insurance premium was in excess of \$1 and that the total charge was in excess of the highest rate expressed in writing, nine per cent., and contends that nine per cent. is the legal limit for the contract. The sixth answer alleges the plaintiff to be a member of a combination whose purpose is to eliminate competition, control prices, increase costs to the public, and to increase profits to itself, all of which are acts in restraint of trade and in violation of Act 8702, Deering's Gen. Laws 1923, commonly known as the Cartwright Act, of the state of California. The seventh answer alleges a violation of the United States federal statutes, commonly known as the Clayton Act (38 Stat. 730). The eighth answer sets forth the acts theretofore alleged as contrary to public policy. The ninth answer is an attempt to allege constructive fraud. In the cross-complaint defendant prays that the note and deed of trust be declared null and void; and asks judgment against the plaintiff in the sum of \$420,000.

[2-7] Appellant informs us that he is without funds to employ legal talent satisfactory to himself. In his briefs he does not argue the legal sufficiency of the answers or cross-complaints, but presents to this court certain questions which he desires answered. Considering the questions in appellant's brief which are not answered by the question itself, we comment as follows: A lender is bound by the rate of interest expressed in the contract. He may demand additional insurance or designate the insurance company as a matter of protection to the business venture and may charge for such insurance as an expense in connection with the loan. He may not, as a means of extracting profits, in addition to the

Interest agreed upon, charge for expenses that are not incidental to the loan. If the lender should charge for expenses not necessary to the loan, the borrower has his proper remedy. If unnecessary expenses for the purpose of extracting additional profits added to the interest exceeds 12 per cent. for a year and the borrower pays the additional sum, there is a violation of the provisions of the Usury Act (St. 1919, p. lxxxiii). In such a case the burden of proof is upon the borrower. If the pleadings, notwithstanding conclusive allegations, evidence the payment of an amount not in excess of 12 per cent., a demurrer addressed to this deficiency in pleading should be sustained. The briefs are not presented in conformity with the rules of this court, but appellant is a layman, and, accordingly, we shall consider the sufficiency of the cross-complaints and the second and succeeding answers.

[8-13] In paragraph XXXII of the second answer, appellant alleges as follows: "That the complete total charged for the use of said loan for the first year, as above set forth, was \$7,064.00 and that said amount has been paid in full and within one year of the commencement of this action, as before alleged, and that said amount is in excess of the maximum amount allowed by the Usury Law, to-wit: said \$7,064.00 is \$1,064.00 in excess of 12 per cent per annum on \$50,000.00." This total charge is made up of items appearing in other paragraphs. Two hundred dollars, cash in advance, was deducted from the original loan for additional insurance; \$876, according to paragraph XII, represented one of four quarterly installments, which was not even due within one year of the commencement of the action; \$2,014 is listed as a balance for fire insurance and \$350 for earthquake insurance. Deducting the first two items brings the total to less than 12 per cent. on \$50,000. In pleading usury it is necessary to clearly set out that the sum is in excess of 12 per cent. "The burden, and a heavy one, rests upon him to establish the evasion." *Terry Trading Corporation v. Barsky* (Cal. Sup.) 292 P. 474, 476. If the pleading is uncertain or upon its face shows that the interest was less than 12 per cent., the demurrer should be sustained. In paragraph II of the third answer, appellant alleges as follows: "That the total amount charged for the use of said loan for the first year, as above set forth, was \$6,677.49 and that said amount has been paid in full and within one year of the commencement of this action, above set forth, and that said amount is in excess of the maximum allowed by the Usury Law, to-wit: said amount is \$877.49 in excess of 12 per cent per annum on \$50,000.00." Herein is computed the sum of \$1,000, which appellant in the same paragraph alleges was deducted in advance. The date

of the loan was November 11, 1927. This action was filed October 15, 1929. The fourth and fifth answers allege that 9 per cent. was the maximum amount of interest to be charged during the first year; that a greater amount than 9 per cent. was charged and paid within one year of the beginning of the action. Appellant alleges in substance that the insurance premiums were used as a disguise for extracting additional profits in excess of the 9 per cent. for the first year and 7 per cent. for the following years and in excess of the amount allowed under the Usury Law. There is no allegation that the insurance premiums collected by respondent from appellant were not used for insurance purposes. From the pleadings we must assume that whatever sum or sums were collected as insurance premiums were so used. The deed of trust provided that the insurance was to be obtained through the Bond Investment Company. Appellant alleges upon information and belief in substance that the Bond Investment Company was in fact the plaintiff herein, or that it was controlled by the plaintiff. If insurance was in fact necessary, it would make no difference whether the premiums were eventually received by a company in which respondent owned some interest or by some other company. Appellant alleges that he was forced to cancel existing insurance and that the property was over insured. The application provided the insurance must be satisfactory to respondent. It was not necessary that appellant should obtain this loan from the plaintiff. If defendant desired some other insurance company than the Bond Investment Company or did not approve of the amount fixed for insurance by the plaintiff, defendant could have sought some other lender. A bad business bargain does not make the transaction usurious. There is no proper allegation of usurious interest in the answers or cross-complaints. The only question we are interested in is whether the interest charged was usurious. The sixth, seventh, and eighth answers allege violation of the Cartwright Act, the Clayton Act, and that the alleged allowance of profit on insurance to the insured is against public policy. If plaintiff violated any state or federal statute there was a tribunal and remedy at hand, but the allegations as set forth are not proper as a defense in this action, and the violation, if such it was, would not entitle defendant to recover under the Usury Act. The ninth answer alleges in substance that plaintiff represented that defendant would be given an opportunity to recover the property within thirty days after the sale, but there is no allegation that defendant offered to buy back or was ready, able, or willing to repurchase the property within thirty days; this being an alleged agreement to permit defendant to repurchase the property, it should have been in writing.

[14] The answers to which the demurrer is directed do not set forth proper defenses, and the cross-complaints do not allege any cause of action in their present form. The allegations are uncertain, unintelligible, and ambiguous. Many allegations are contradicted by other allegations in the same or in another answer or cross-complaint. This is defendant's fourth attempt to state a cause of action, and the order sustaining without leave to amend the demurrer to the second, third, fourth, fifth, sixth, seventh, eighth, and ninth answers, and the first, second, third, fourth, fifth, seventh, and eighth cross-complaints was a proper order. "When leave has been granted and the amendment is sham and ineffectual, the trial court could not be required to grant further indulgence." *Ellerhorst v. Blankman*, 102 Cal. App. 133, 134, 282 P. 507. "A plaintiff may not, without limit, replead after demurrer sustained." *Whittemore v. Davis* (Cal. App.) 297 P. 640, 643. See, also, *Stewart v. Douglass*, 148 Cal. 511, 83 P. 699. "So far as the general demurrer is concerned, the failure of appellant to defend the pleading may be treated as an abandonment, as the burden is always on the appellant to show error." *Ellerhorst v. Blankman*, supra.

In view of what has been said herein, the judgment only in so far as it pertains to the order sustaining the demurrer to the second and succeeding answers and to all of the cross-complaints is affirmed and reversed as to the first answer with directions to clear the record in the trial court and permit the defendant a trial upon such issues. It is not necessary to indicate the evidence that may be considered upon the trial, as the decision herein applies only to the pleadings.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 602

SALTER v. LOMBARDI et al.
Civ. 6630.

District Court of Appeal, Second District, Division 1, California.

Sept. 15, 1931.

Rehearing Denied Oct. 5, 1931. Hearing Denied by Supreme Court Nov. 12, 1931.

1. Judgment ⇨239.

Findings showing defendants by themselves and agents acted so negligently that plaintiff had judgment showed judgment against joint tort-feasors.

2. Contribution ⇨5.

Payment by codefendants of judgment against joint tort-feasors releases defendant,

and codefendants cannot enforce contribution from defendant directly or by assignment in name of third party (Civ. Code, § 1474).

3. Judgment ⇨835.

Judgment founded on tort is assignable.

4. Judgment ⇨880.

Payment of full amount of judgment for assignment is purchase, not satisfaction of judgment.

5. Appeal and error ⇨1024(5).

Conclusion of court in proceeding to enter satisfaction of judgment against joint tort-feasors supported by affidavits held controlling on appeal.

6. Judgment ⇨875.

Advancement by counsel for codefendants of one-half of judgment and assignment of judgment to third party who paid plaintiff full amount thereof did not constitute payment on behalf of clients, and hence remaining defendant was not entitled to full satisfaction of judgment.

Counsel for codefendants seeking to file appeal and stay execution against themselves only failed to file appeal in time, and advanced one-half of amount of judgment which was assigned to third person. Full amount of judgment was paid with money secured by codefendants and by counsel for codefendants under agreement that levy of execution against remaining defendant was to be held in trust, first, for repayment to counsel for his advances, and, second, to repay codefendants who put up balance of money. Defendant claimed that payment by counsel constituted payment for clients, and that judgment had thus been paid in full, and that he was entitled to full satisfaction rather than partial satisfaction of judgment.

7. Contribution ⇨7.

Where counsel for codefendants advanced portion of judgment, keeping alive of such portion to reimburse counsel was not enforcement of contribution from defendant to codefendants who were joint tort-feasors.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Amanda M. Salter against M. Lombardi and others. From an order directing entry of partial satisfaction of judgment, defendant Raymond Lewis appeals.

Affirmed.

Joseph Musgrove, Fred O. McGirr, and Thomas H. Cannan, all of Los Angeles, for appellant.

R. Allen Bright, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

This is an appeal by defendant Lewis from an order requiring the clerk of the superior court (Los Angeles) to enter only partial satisfaction of a judgment outstanding against appellant and other defendants, based on their joint tort. Appellant sought to have full satisfaction entered, contending that the judgment had been completely satisfied by the act of his codefendants' counsel in buying up the judgment at its face value. Under the circumstances of this case, we are of the opinion that the trial court's order denying full satisfaction should be affirmed.

[1] With appellant's basic premise we are agreed, that the judgment is one against joint tort-feasors. His motion for full satisfaction was made in part upon the record and files of the action. This lays before us the findings of fact upon which the judgment was founded, where it is finally adjudicated, so far as this case is concerned, that "defendants by themselves, their agents, employees and servants" acted so negligently that plaintiff had judgment. In the face of this finding, plaintiff's successor in interest may not be heard to say that the tort was solely that of defendant Lewis, and that Lewis' codefendants were liable only on the theory of respondent superior. We must consider the judgment as one against tort-feasors.

[2-4] So considered, certain principles become applicable. If appellant's codefendants have, as he claims, paid the judgment, then it is paid for all purposes and he is released from liability as to it. Civ. Code, § 1474. If appellant's codefendants have paid the judgment, they have no right to enforce contribution from appellant either directly (*Dow v. Sunset Tel. & Tel. Co.* [1912] 162 Cal. 136, 121 P. 379), or indirectly through the medium of an assignment taken in the name of a third party (*Adams v. White Bus Line* [1921] 184 Cal. 710, 195 P. 389). A judgment founded on tort is assignable, however (*La Fleur v. M. A. Burns Lumber Co.* [1922] 188 Cal. 321, 205 P. 102), and the payment of the full amount of the judgment for an assignment will, without further explanation, be interpreted as a purchase and not as a satisfaction of the judgment (*Williams v. Riehl* [1899] 127 Cal. 365, 59 P. 762, 78 Am. St. Rep. 60; *National Bank of California v. L. A. Iron & Steel Co.* [1906] 2 Cal. App. 659, 84 P. 466, 468; *La Fleur v. M. A. Burns Lumber Co.*, supra; *International Ry. Co. v. Pickarski* [1921] 114 Misc. Rep. 349, 186 N. Y. S. 319).

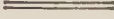
[5-7] That in the instant case, as to at least one-half of the judgment, there was no payment by appellant's codefendants, and that an assignment was taken which may be recog-

nized without indirectly enforcing contribution between joint tort-feasors, was the evident conclusion of the trial court. This conclusion finds sufficient support amidst the conflicts of the affidavits, so that it is controlling here. Taking the facts favorable to the court's ruling, we find that appellant's codefendants filed a notice of appeal and an undertaking to stay execution against themselves only. Thereafter it was discovered that their appeal had not been taken in time. His clients threatened with immediate demand that they pay the full judgment, counsel for the codefendants advised them of the situation, took upon himself the blame for failing to appeal in time, and made them this proposition: That, if they would secure from some source one-half of the amount of the judgment, he himself would advance one-half, and an assignment of the judgment would be taken in the name of a third party; whatever was secured from the levy of execution against appellant was to be held in trust by the assignee, first, for the repayment to counsel of his advances, second, to repay those who put up the balance of the money. This plan was carried into execution; a corporation in which the codefendants were the stockholders advancing their half, counsel making a personal loan to secure the fund he needed to make up the balance. The full judgment sum was paid plaintiff by a person who now appears plainly as a dummy for the parties; an assignment of the judgment being taken in his name. An attorney selected by the codefendants' counsel was substituted for the attorney who had been representing plaintiff. From these facts it appears that the most that the appellant's codefendants can be said to have paid on the judgment was one-half of the total amount, unless it must be held that counsel's payment was that of his client. But this is not established as the fact by the moving party. The money paid was not that of the client. It was not paid, so far as appears, under any obligation of law, nor in discharge of any obligation of contract. For this reason the case of *Adams v. White Bus Line*, supra, is not controlling; that being a case where the judgment was paid by an insurer of one of the judgment debtors. So far as is made to appear, counsel who made the payment did not, by doing so, secure a release from his client of any obligation he may have incurred for failure to appeal in time, although he may have put himself in a position to reduce the damage to his client incident to the failure. So far as appears, therefore, counsel's payment was not, in any legalistic sense, a payment by or on behalf of his clients. It was not, then, their payment, but his. To allow him to keep alive a portion of the judgment that he may reimburse himself is not to enforce contribution from appellant to the codefendants. The policy of the law seems to be not to pro-

tect one joint tort-feasor from the burden of the judgment, but rather not to aid one who has assumed the burden to reshift it to a wrongdoer. So far as appears in this action, there is no attempt to take a position which can result in shifting a burden from the shoulders of appellant's codefendants, for the burden is not there.

The order appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



116 Cal.App. 569

PENINSULA BURNER & OIL CO. v. McCaw et ux.
Civ. 7826.

District Court of Appeal, First District, Division 1, California.
Sept. 14, 1931.

1. Estoppel ⇨75.

Conditional seller selling oil burner to contractor *held* estopped from enforcing reservation of title as against building owner having no notice of reservation until expiration of more than two years.

Facts disclosed that the plans and specifications showed that an oil burner system was included in the contract and was a material part of the original construction agreed to be installed, and that the seller agreed to sell the heating plant to the contractor to be installed in the building.

2. Fixtures ⇨22.

Oil burner conditionally sold to contractor for installation in building became part of realty.

3. Fixtures ⇨22.

Conditional seller could not claim ownership of oil burner becoming part of realty as against building owner having no notice of reservation of title.

4. Sales ⇨472(3).

Generally, in absence of estoppel, conditional seller's rights are superior to those of subsequent buyer from original purchaser.

5. Fixtures ⇨22.

General rule that conditional seller's rights are superior to those of subsequent purchaser from original buyer is inapplicable where personality becomes attached to realty.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Peninsula Burner & Oil Company against T. J. McCaw and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

J. E. McCurdy, of San Mateo, for appellant.

David Cosgrave, of Redwood City, for respondents.

TYLER, P. J.

Action in claim and delivery. The property described in the complaint is an oil storage tank and a nonautomatic oil burner, together with pipes, valves, and fittings necessary for the complete installation in a home. The complaint alleges that plaintiff agreed to sell the above-described equipment to one Lawton to be installed in the home of defendants which Lawton was erecting. Defendants deny that they wrongfully withheld the property and affirmatively allege that they purchased the same from Lawton for a valuable consideration. Further, that the property was installed by Lawton in the home of respondents as improvements therein, and said equipment became a material part of the real property of defendants. The answer further alleges that after the property was installed, notice of completion of said home was filed in the office of the county recorder where the property was situate and that plaintiff filed no claim for the same in accordance with the materialmen's lien law. As a separate and further defense, the answer alleges plaintiff was estopped by reason of its laches to recover the property, and further that plaintiff did not notify defendants until more than two years after the installation of the property of its alleged ownership. Trial was had and judgment was entered that plaintiff take nothing against defendants. Plaintiff appeals and claims that the personality described did not become affixed to the realty so as to become a part thereof and that it is not estopped to assert its legal title.

[1-3] From the evidence it appears that respondents entered into a contract with Lawton, the vendee of plaintiff, for the construction of a dwelling house upon property owned by respondents. The plans and specifications show that an oil-burner system was included in the contract and was a material part of the original construction agreed to be installed. Appellant agreed to sell the heating plant to Lawton for installation in the building. The agreement of sale provided that title to the equipment was to remain in plaintiff until fully paid for. Respondents knew nothing of this arrangement. They held the required amount of the contract price until after the expiration of the time allowed by law for the

filing of liens, but no lien was ever filed by appellant. Under these circumstances it seems clear to us that the property sued for, being part of the original construction of the building, lost its original character as personalty and became a part of the real estate, and further that appellant is estopped from claiming ownership in the same and reservation of title cannot be enforced by it as against respondents. *Peck-Hammond Co. v. Walnut Ridge School Dist.*, 93 Ark. 77, 123 S. W. 771.

[4, 5] While it is generally true, in the absence of an estoppel, that the rights of a conditional vendor are superior to those of a subsequent purchaser of personal property from the vendee, the rule has no application where such personal property has become attached to the realty. Under such circumstances, its character as personalty is lost. The reason for the rule has been stated to be based on two grounds. The first is that the seller, voluntarily placing personal property in the possession and control of his vendee with knowledge that it would be affixed to the land if put to the use for which it is designed, is presumed to have agreed that it should be or might be converted into realty. The second reason is that where one of two innocent persons must suffer, he should bear the loss who caused the deceitful appearances. *Oakland Bank of Savings v. California Pressed Brick Company*, 183 Cal. 295, 191 P. 524; 12 Cal. Jur. 568. Here the vendor knew of the installation of the equipment and that it was intended to be permanently used in respondents' home. Under such circumstances the equipment became a fixture, and restoration of title by appellant as against respondents could not be enforced, especially as they had no notice of the agreement between plaintiff and its vendee. Moreover, the case presents a clear case of estoppel.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

116 Cal.App. 572

MARKET ST. RY. CO. v. GEORGE et al.

HARRIS v. SAME.

Civ. 7610.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1931.

Rehearing Denied Oct. 14, 1931. Hearing Denied by Supreme Court Nov. 12, 1931.

1. Appeal and error ⇨1015(1).

Order granting plaintiffs new trial for insufficiency of evidence cannot be reversed unless evidence will not support judgment for plaintiffs.

2. Automobiles ⇨220(3).

Street car employee alighting from street car could assume no vehicle would be operated on wrong side of street.

3. Automobiles ⇨245(76).

Whether street car employee struck by truck after alighting on left-hand side of street car was negligent in not looking for traffic *held* for jury.

4. Automobiles ⇨242(6).

Where employer's truck was driven by employee employed to drive it, court could infer employee was acting within scope of employment at time of accident.

5. Evidence ⇨588.

Courts and juries are not bound by mere swearing, no matter how positive, unless it be credible.

6. Appeal and error ⇨933(1).

Appellate court must assume, in support of order granting new trial to parties suing employer, that trial court disbelieved employee's testimony that he was on errand of his own when truck he was driving struck injured party.

7. New trial ⇨69.

As regards granting new trial, conclusion that employee's testimony that he was not acting in scope of employment when driving truck striking plaintiff was willfully false *held* justified.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Separate actions by the Market Street Railway Company and by William Harris against B. P. George and others. The actions were consolidated for trial and tried together before the same jury. Verdict for defendants. From an order granting new trial, defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

William M. Abbott, Kingsley W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent Market St. Ry. Co.

Mullins & Wynkoop and Carl W. Wynkoop, all of San Francisco, for respondent William Harris.

DOOLING, Justice.

Appeal from an order granting plaintiffs a new trial after verdict and judgment for defendants. Respondent Harris sued to recover for personal injuries alleged to have been neg-

lightly inflicted by defendants. Respondent Market Street Railway Company, having paid compensation to Harris for his injuries under the Workmen's Compensation Act, brought a separate action under the statutory subrogation. The two actions were consolidated for trial and tried together before the same jury.

[1] The motion for new trial was granted on the ground of insufficiency of the evidence, and we cannot reverse the trial court's order unless we find that there is not sufficient evidence in the record to support a judgment for plaintiffs. We shall therefore confine our statement of the evidence to that which is most favorable to plaintiffs.

Respondent Harris was struck by a truck driven by appellant Vlandis just after alighting from a street car on Stanyan street at its intersection with Haight street in San Francisco. On Stanyan street at this point and for some distance in either direction there are two parallel street railway tracks. The space between the inner rails of the two tracks is six feet four inches. The car from which Harris alighted had been traveling in a southerly direction on the westerly track and came to a stop with its front end opposite the northerly property line of Haight street. This is the terminus of the car in question and it is the custom of the railway company at this point to discharge its passengers from the southerly end of the street car on its easterly or inner side. In accordance with this custom Harris stepped off the street car on the evening in question into the space between the two tracks and without taking his hand from the stanchion of the car turned to his left and stood with his knee touching the step of the car waiting to assist a crippled passenger to alight. While in this position he was struck by the truck which was proceeding northerly on Stanyan street.

[2, 3] At no time before he was struck did Harris look southerly on Stanyan street for vehicles approaching from the south, and appellants claim that, because of this failure to look Harris was guilty of contributory negligence as a matter of law. The distance between the inner rails of the two tracks was, as we have said, six feet four inches. This would give a space of three feet two inches between the inner rail of the westerly track and the center line between the two tracks. The overhang of the street car was two feet beyond the rail. This allowed a space of more than one foot between the step of the car and the center line. As Harris stood facing the car with his knee touching the step it is not shown that any portion of his body extended beyond this center line. Under such circumstances, can it be said that Harris was guilty of contributory negligence as a matter of law? We are satisfied that it cannot. Harris would be entitled to assume that no ve-

hicle northbound on Stanyan street would be operated upon any portion of the street westerly of the center line. "There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and that the question of negligence * * * must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers." *Koehl v. Carpenter*, 47 Cal. App. 642, 645, 191 P. 43, 44; *Mann v. Scott*, 180 Cal. 550, 182 P. 281; *Bolles v. Boone*, 66 Cal. App. 238, 225 P. 775; *Gonnermann v. Roberts*, 78 Cal. App. 378, 248 P. 749; *Medlin v. Spazier*, 23 Cal. App. 242, 137 P. 1078. All of these cases had to do with passengers boarding or alighting from street cars and while the circumstances of each and the statutory regulations involved differed from those in the case at hand the principle involved is controlling.

We do not wish to be understood as holding that, even if Harris' body was a slight distance over the center line of the street when he was struck, he would be guilty of negligence as a matter of law. At a regular stopping place of the car where it was the custom for passengers to alight on the left-hand side of the car, we think that it should be a question of fact for the jury in any event whether a passenger in alighting and before taking a step away from the car was guilty of any negligence in not looking for traffic. It would seem to present a question for the jury as to whether a man of ordinary prudence would reasonably anticipate that an automobile would be driven so close to the standing car as to endanger persons alighting therefrom.

Appellants further urge that as to appellants other than Vlandis the evidence is such as to compel a judgment in their favor. It appears in this regard that the other appellants were the owners of the truck and the employers of Vlandis, that it was Vlandis' duty to drive the truck, that Vlandis was employed to haul produce from San Francisco to Petaluma and had come from Petaluma that day with the truck to haul a load back to Petaluma the following morning, and that it was Vlandis' duty to take the truck to a garage and leave it there for the night. These facts being established, Vlandis testified that while on the way to the garage and a few blocks from the scene of the accident he had decided to go to the Park Athletic Club to attend an athletic event and had already turned from the direct route to the garage to go to this club when the accident occurred. Appellants other than Vlandis claim that from this evidence the court and jury would be compelled to find that Vlandis was not acting within the scope of his employment at the moment of Harris' injury.

[4] It being established that the truck was owned by these appellants and that Vlandis was their employee employed to drive it, the court was entitled to draw the inference that Vlandis was acting within the scope of his employment. *Grantham v. Ordway*, 40 Cal. App. 758, 182 P. 73; *Wagnitz v. Scharetg*, 89 Cal. App. 511, 265 P. 318; *Perry v. Paladini, Inc.*, 89 Cal. App. 275, 264 P. 580; *Ransford v. Ainsworth*, 196 Cal. 280, 237 P. 747. Appellants, however, insist that his inference cannot stand against the positive testimony of Vlandis to the contrary, and cite *Kish v. California State Automobile Ass'n*, 190 Cal. 246, 212 P. 27, and *Gousse v. Lowe*, 41 Cal. App. 715, 183 P. 295. To these cited cases might well be added *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198. These cases may fairly be said to hold that, in the face of clear, positive, and convincing testimony to the contrary, the inference that an employee driving an automobile owned by his employer is acting within the scope of his employment cannot stand. For the purposes of this case we may accept this as the existing law, although it might well be argued that the foundation of these decisions is at least shaken by the later holdings in *Wagnitz v. Scharetg*, supra; *Perry v. Paladini, Inc.*, supra; and *Poncino v. Reid-Murdoch & Co.* (Cal. Sup.) 298 P. 818. Nor need we speculate here as to the relation between inferences and presumptions or whether the rule so recently reaffirmed in *Smellie v. Southern Pacific Co.* (Cal. Sup.) 299 P. 529, has application to an inference or applies only to a presumption. Those questions, in our view of it, are not necessarily here involved.

[5] We are content to rest our decision in this case on another ground. It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted.

[6, 7] In this case we must assume in support of the order granting a new trial that the court chose to disbelieve Vlandis' testimony that he was on an errand of his own. This, under settled principles, the court was entitled to do if it could reasonably find that Vlandis had wilfully sworn falsely to a material fact. In *Re Estate of Friedman*, 178 Cal. 27, 32, 172 P. 140, 143, the Supreme Court said: "If it can fairly be said that these wit-

nesses willfully swore falsely as to any material fact, the court was justified in rejecting their whole testimony. Code Civ. Proc. § 2061, subd. 3." Applying this rule to our case it is sufficient to point out that, while other witnesses testified that Harris stood facing the street car after alighting from it, Vlandis said that he took several steps away from it and walked directly in front of the truck; other witnesses testified that the truck was straddling the inner rail of the easterly track, Vlandis said his left wheels were between the two rails of that track; Vlandis testified that his headlights were lighted, other witnesses said that they were not; Vlandis placed his speed at eight to twelve miles per hour, other witnesses at twenty miles per hour; Vlandis said that the street car was twenty feet back of the property line of Haight street, other witnesses testified that its southerly end was even with the property line. In fact, the story of the accident as told by Vlandis differed in almost every material particular from that told by the other witnesses. The court may reasonably have concluded that Vlandis' testimony was willfully false in these particulars and as a consequence have decided to disbelieve his testimony that he was at the time on an errand of his own. If so, there remained no credible testimony opposed to the inference that Vlandis was acting in the scope of his employment.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, P. J.

116 Cal.App. 581
SARCADY v. BIEDENWEG.
Civ. 7601.

District Court of Appeal, First District,
Division 2, California.

Sept. 14, 1931.

Rehearing Denied Oct. 14, 1931.

1. Appeal and error ⇐930(1).

On appeal on grounds of excessive verdict in personal injury action, every conflict in evidence must be resolved in favor of plaintiff.

2. Appeal and error ⇐933(1).

On appeal from order denying new trial in personal injury action on grounds of excessive verdict, every intendment is in favor of action of trial court.

3. Appeal and error ⇐1004(1).

Verdict in personal injury action will not be set aside as excessive on appeal, unless so grossly disproportionate to damages sustained as to show passion, prejudice, or corruption.

4. Appeal and error $\S$ 930(4).

On appeal from judgment for plaintiff, court must assume jury found injuries testified to were result of the accident involved.

5. Damages $\S$ 132(2).

\$10,000 for injuries to limbs, shoulders, and back, injury to knee being probably incurable, *held* not excessive.

Plaintiff, a man 50 years of age, injured by being knocked down by an automobile, had a life expectancy of 20.91 years at time of accident, and was earning from \$200 to \$250 per month. After the accident, his earnings dropped to \$75 per month. His hospital and doctor bills amounted to \$528.20, and medical testimony was to effect that an injury to his right knee was very probably incurable.

6. Damages $\S$ 62(2).

Injured party *held* not required to risk operation, the outcome of which was uncertain, in order to minimize offending parties' damages.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by S. F. Sarcady against Eva Biedenweg. From a judgment for plaintiff, defendant appeals.

Affirmed.

James M. Koford, of Oakland (John Jewett Earle, of Oakland, of counsel), for appellant.

L. R. Weinmann and W. E. Licking, both of Oakland, for respondent.

DOOLING, Justice pro tem.

[1-3] This is an appeal from a judgment for \$10,000 for personal injuries entered pursuant to the verdict of a jury. The sole ground of appeal is that the verdict is excessive. In passing upon such a claim we start with the settled rules that every conflict in the evidence must be resolved in favor of respondent (8 Cal. Jur. 837; *Reneau v. Hirsch*, 88 Cal. App. 1, 7, 262 P. 1100), that every intendment is in favor of the action of the trial court in denying the motion for new trial on the same ground, and that "unless we are able to say that the award of damages * * * was grossly disproportionate to any compensation reasonably warranted by the facts * * * as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption, rather than an honest and sober judgment, this court may not exercise the power of revision" (*Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76, 81).

[4, 5] Respondent, a man 50 years of age, was struck and knocked down by an automo-

ble. He received a blow on the head, an injury to both shoulders, both elbows, his back in the sacroiliac region, his left hip, and his right knee, and when taken to the emergency hospital he was dazed, shocked, and suffering pain. At the time of the trial his left ear showed a depression of the drum and a 6/10 loss of hearing and he had an injury to the sacroiliac joint and a distortion of the lumbar spine. Medical witnesses testified that these were all probably traumatic in origin, and the respondent himself testified that prior to the accident he had had no trouble with his ear or back. We must therefore assume in support of the verdict that the jury found that these injuries were the result of the accident. The distortion of the spine can only be aided by putting the respondent's back into a cast or other appliance and requiring him to lie immobilized involving a great deal of pain and then the outcome would be uncertain.

The most serious injury was to respondent's right knee. At the time of trial the knee showed a depression of the outer tuberosity of the tibia and a rupture of the internal semilunar cartilage. This impaired the function of the knee and rendered its use extremely painful and in the absence of possible relief by operative treatment this condition was stationary and permanent. For many years respondent had been engaged in the manufacture of funeral urns with his brother, the mechanical work on the urns requiring respondent to remain standing and exert a pressure on the urn with his right leg; and the condition of the right knee rendered it impossible for him to continue with such work. The brothers were partners and respondent had been receiving between \$200 and \$250 per month as his share of the profits. They had been accustomed to work long hours, and since respondent's injury his brother had attempted to replace him by employing other men, but had been compelled to discharge them because of inefficiency.

The medical testimony showed that by operation the injured semilunar cartilage could be removed and that, were it not for the other injury to the knee, this operation would probably effect a cure; but all of respondent's medical witnesses agreed that in view of the other injury to the knee the outcome of such an operation would be doubtful.

Respondent's medical and hospital expenses amounted to \$528.20. He was entitled to a substantial allowance for the injury to his back and ear. At the age of 50 years the American experience tables of mortality show an expectancy of 20.91 years. If respondent is permanently disabled from performing his former work and his earnings are thereby reduced to only \$75 per month, a simple calculation will show that the allowance was far from excessive. In a business depending upon the personal efforts of the two brothers,

with the previous earnings shown, the finding of such a loss would be well within the limits of reason.

[6] Appellant's chief claim seems to be that the evidence shows without conflict that operative measures would entirely cure the knee. We cannot so construe the evidence. One medical man said: "If he wants to take the chance of having that cartilage removed in the hopes that it might improve him, he might not be improved, he might be worse." And another stated: "Where you have this depression on the outside, what that would do, we don't know, and there is no human that would know until after we got through."

Under such circumstances we cannot hold that respondent is required as a matter of law to risk an operation the outcome of which is so uncertain, or that the jury was not justified in finding the injury to the knee permanent in character. *Boa v. San Francisco-Oakland Terminal Railways*, 182 Cal. 93, 101, 102, 187 P. 2.

The appeal presents the not uncommon case of a conflict of testimony with which this court cannot interfere.

Judgment affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

116 Cal.App. 650

PEOPLE v. VELVIN.
Cr. 2049.

District Court of Appeal, Second District,
Division 1, California.

Sept. 17, 1931.

Rehearing Denied Oct. 1, 1931.

1. Criminal law ⇨1202(7).

Record in robbery prosecution established that defendant had in due form admitted fact of former conviction.

2. Criminal law ⇨1202(6).

Judgment sentencing defendant admitting former conviction to imprisonment for "term prescribed by law" held proper, though defendant was not shown to have served time under former conviction (Pen. Code, § 667, and § 1168, as amended by St. 1929, p. 1930, § 1).

Judgment was proper, since, defendant having been properly sentenced to imprisonment for "term prescribed by law," the actual term presumably would be determined in accordance with the established rules in due course of prison administra-

tion, and the sentence entitled defendant to have his term of imprisonment established according to facts of record, including fact that he was not shown to have served any term of imprisonment under former conviction.

3. Criminal law ⇨1218.

Selection of place of imprisonment being discretionary, fact that one prison and not another was selected did not add to punishment (Pen. Code, § 1202a).

Appeal from Superior Court, Los Angeles County; **K. S. Mahon**, Judge.

Paul Velvin was convicted of robbery, and he appeals.

Affirmed.

Franklin P. Bull, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J.

On this appeal it must be assumed that the defendant was properly convicted of the crime of robbery, committed on the 8th day of August, 1930. No contention is made to the contrary. The questions raised by appellant relate to an alleged former conviction of burglary.

In the information it was alleged that before the commission of the offense charged the defendant, in the said superior court of Los Angeles county, was convicted of the crime of burglary. Pursuant to consent duly given, the present case was tried without a jury. The minutes of the court show that at the beginning of the trial "defendant admits prior conviction." The reporter's transcript further shows that, before any evidence was introduced, the district attorney called attention to the fact that the prior felony conviction was denied. Thereupon the attorney for defendant said that there was no question but that the defendant was convicted, and that "for the purpose of the record at this time we will admit the prior." Thereupon the court inquired: "You withdraw the plea heretofore made and enter a plea that you have suffered such prior conviction?" To this attorney for defendant replied, "Yes." Thereupon a witness named Finmark was sworn and stated his name. Thereupon the district attorney called attention to the fact that counsel could not admit prior conviction for the defendant, but such admission must also be made by the defendant personally. Thereupon, addressing the defendant, the district attorney directed attention to the charge of robbery and of prior felony conviction, as stated in the information, and asked him whether he admitted

that prior felony conviction. The defendant's reply was "Yes, sir."

At the close of the trial the court found the defendant guilty of the crime of robbery as charged in the information. The judgment, after reciting such conviction, orders that the defendant be punished by imprisonment in the state prison at Folsom for the term prescribed by law.

[1-3] Upon the record thus made, there is no ground for contending that the defendant did not in due form admit the fact of the former conviction. But he further contends that the judgment as rendered is erroneous because the defendant never admitted more than "a prior conviction of a felony. He never admitted the serving a term therefor in a penal institution." It is true that, according to section 667 of the Penal Code, special provision is made for the term of punishment of a person "who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction." It is also true that according to subdivision (4) of section 1168 of the Penal Code, as amended in the year 1929 (St. 1929, p. 1930, § 1), certain minimum terms of sentence and imprisonment are provided in cases where the defendant has been previously convicted of a felony; and that those provisions of section 1168 omit all reference to the matter of actual service of any term of imprisonment under such prior conviction. It may be that, as intimated by the Supreme Court in *People v. Dawson*, 292 P. 267, said provisions of said section 1168 contain an implied repeal of said section 667 in so far as the section in its application depends upon pleading or proof of service of a term of imprisonment under the prior conviction. But in this case we are not required to decide that question. The judgment as rendered by the court, based upon the record to which we have referred, is simply and only a judgment that the defendant be imprisoned in said state prison "for the term prescribed by law." The fact that the place of imprisonment was the state prison at Folsom, and not the state prison at San Quentin, does not in itself add to the severity of the punishment. The selection of the place of imprisonment, as between those two prisons, is discretionary with the court. Pen. Code, § 1202a. The defendant having been properly sentenced to imprisonment "for the term prescribed by law," the actual years and days of the term presumably will be determined in accordance with the established rules in the due course of prison administration. In other words, the judgment will entitle the defendant to have his term of imprisonment established according to the facts of record, including the fact that he is not shown to have served any term of imprisonment under

the former conviction. What effect, if any, this particular fact will have by way of limitation of the term in this case, need not be determined now; for, however that may be, there is no error in the judgment.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

116 Cal.App. 662

MARYLAND CASUALTY CO. v. O'MEARA
et ux.
Civ. 7767.

District Court of Appeal, First District,
Division 1, California.
Sept. 18, 1931.

1. Judgment Ⓒ593.

Release and indemnity contract executed to tort-feasor *held* inseparable, and judgment invalidating release *held* res judicata, precluding subsequent recovery under indemnity contract.

It appeared that tort-feasor was insured against loss or damages arising from injury or death of any person resulting from operation of tort-feasor's automobiles, one of which injured minor son of defendant and his wife; that the parents executed release in question, containing agreement that defendant would indemnify tort-feasor for any loss which he might be compelled to pay as result of accident; that minor later died, whereupon defendant sued to invalidate release and obtained final judgment against tort-feasor which insurer paid to extent of its liability under policy and then brought present action against defendant on theory that it was subrogated to rights of tort-feasor arising out of release and indemnity agreement.

2. Judgment Ⓒ585(4).

Purely defensive claim available was conclusively adjudicated, though not squarely presented, and was not basis for second action.

Even though claim was not squarely presented in earlier action, it was merged in and conclusively adjudicated by judgment on merits, and could not be made basis of subsequent action, since all possible defenses existing at time of first action should have been interposed therein, for failure to do so would not prevent them from being concluded by judgment.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Maryland Casualty Company against Harry O'Meara and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, and Philip M. Carey, of Oakland, for respondents.

TYLER, P. J.

Action upon an indemnity agreement. Plaintiff issued a policy of insurance to one G. P. Haiden, insuring him against loss or damages for personal injuries or death sustained by any person by reason of his ownership of certain automobiles used in his business. While the policy was in full force and effect, Herbert O'Meara, a minor, was injured by an automobile owned by Haiden and operated in the scope of his business. Subsequent to the accident, plaintiff casualty company, for and on behalf of Haiden, paid to defendants herein, the parents of the minor, the sum of \$250 in full satisfaction of any and all damages sustained by them by reason of the injury to their minor son. At the time payment was made, defendants executed and delivered to Haiden a certain release and contract of indemnity. This release provided that, by reason of the payment, defendants released and forever discharged Haiden from any and all actions, claims, or demands by reason of any damages caused by the accident. The agreement contained the further provision that, in consideration of the payment, defendant H. O'Meara would indemnify and hold harmless the said Haiden for any loss to him which he might be compelled to pay in consequence of the accident. After the entering into of this agreement, Herbert O'Meara, the injured minor, died, and his father, Harry O'Meara, who had signed the release and indemnity agreement, sued Haiden for such death and obtained a judgment, which has since become final, for the sum of \$10,250. Plaintiff's full liability thereon under its contract of insurance with Haiden, was the sum of \$7,146.82, which it paid. Thereupon the present action was brought by plaintiff against O'Meara on the agreement of indemnity executed by O'Meara to Haiden; it being claimed that plaintiff having paid under its policy was subrogated to all rights of Haiden arising out of the release and indemnity agreement. Judgment was prayed for in the sum of \$7,146.82, the amount paid by plaintiff under its casualty policy. Defendants demurred to the complaint on various grounds, one of which was that another action was pending between the same parties. The demurrer was sustained without leave to amend and judgment

was entered in favor of defendants. The appeal is from such judgment.

[1, 2] The question here presented for our consideration is whether or not the judgment obtained by O'Meara for the death of his minor son (O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381), is a bar to the present action. We are of the opinion that the facts as set forth in plaintiff's complaint clearly show a prior adjudication of the subject of the controversy. In O'Meara v. Haiden, supra, the entire agreement involving the settlement and release, was before the court, and it was declared invalid and ineffective. The contention of appellant that the agreement was divisible into two parts, namely, a release and an indemnity agreement, and that only the portion relating to the release was held to be invalid is without merit. The agreement as a whole was before the court, and it was held that the parties entered into the same without knowledge of the serious injuries the child had suffered, for which reason the release was invalid. The same reason for holding the release to be invalid applies with equal force to the indemnity clause. To hold otherwise would be to render the judgment entirely ineffective, and deprive the person who executed the same of the fruits thereof. The entire agreement was supported by a single consideration and the only reasonable construction that can be given it is that it is insusceptible of severance. Then again plaintiff's claim is a purely defensive one which was available to it even though it be assumed that it was not squarely presented in O'Meara v. Haiden, and it is therefore merged in and conclusively adjudicated by the judgment on the merits in the former litigation between the parties, and it cannot be made the basis of a claim in this subsequent action. The validity of the agreement was in issue in the former action, and all possible defenses then existing should have been interposed to prevent them from being concluded by the judgment. If plaintiff's claim be sound, it would have afforded a complete defense in the former action, for a judgment against it would have had no legal effect. An adjudication that a party is not entitled to the benefit of a contract is conclusive in subsequent controversies. A contrary holding would be a violation of the principles of res judicata.

We conclude, therefore, that the promises contained in the agreement were entire and inseparable and insusceptible of severance, and that the contract in toto was before the court in the former action referred to. This being so, that judgment is res judicata of the rights of the parties, and the court below properly so held.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

116 Cal.App. 606

SCHWARTZ v. MEAD et al.

Civ. 4294.

District Court of Appeal, Third District,
California.

Sept. 15, 1931.

1. Quieting title ☞27.

Vendor and purchaser ☞269.

Statute limiting foreclosure of mortgage to one form of action *held* inapplicable to action in original complaint seeking to foreclose vendor's lien or amended complaint seeking to quiet title (Code Civ. Proc. § 726).

2. Judgment ☞787.

Where trustee's legal title is of record, judgment on default entered simply against trustor did not affect right or title held by trustee or beneficiary.

3. Vendor and purchaser ☞276.

Purchaser from trustee under trust deed could defend action to foreclose vendor's lien (Code Civ. Proc. § 385).

4. Parties ☞59(2).

Purchaser of property *pendente lite* need not be substituted as party to action to foreclose vendor's lien (Code Civ. Proc. § 385).

5. Quieting title ☞10(1).

In action to quiet title, one can succeed only by strength of his own title.

6. Execution ☞264.

Sheriff's deed based on judgment foreclosing only trustor's interests *held* insufficient to support judgment adverse to trustee under trust deed, beneficiary, or purchaser at trustee's sale, against whom no judgment was entered and no sale had in foreclosure suit.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Pearl Schwartz against Martin H. Mead, the Security Finance Corporation, and others. From an adverse judgment, the Security Finance Corporation and others appeal.

Reversed, with directions.

Fred W. Mears, Chas. H. Brock, Earl E. Johnson, Ralph H. Spotts, Farrand & Slosson, and A. H. Vernon, all of Los Angeles, for appellants.

Frazier McIntosh, of Los Angeles, for respondent.

PLUMMER, J.

This action was instituted by the plaintiff to foreclose a vendor's lien upon lot 7, block 1,

of tract No. 5647 in the city of Beverly Hills, county of Los Angeles.

The record shows that the defendants Martin H. Mead, Theresa Mead, and B. D. O'Neil defaulted, and that a separate judgment was entered against them. Execution thereafter issued and the interest of said defendants in the property above mentioned was sold by the sheriff of Los Angeles county, and a deed thereto executed by the sheriff and delivered to the plaintiff. The judgment upon which execution was issued appears upon its face to have been entered only against the defaulting defendants above named, and contained, among other provisions, the following limitations as to its effect, to wit: "And it is further adjudged and decreed that this judgment does not affect the rights of any of the defendants not herein specially mentioned, if any such rights any of them have, and as to all defendants other than Martin H. Mead, Theresa Mead and B. D. O'Neil it is hereby ordered, adjudged and decreed that this action may proceed."

Upon the trial of this action the only evidence in support of the plaintiff's title was the sheriff's deed based upon sale, pursuant to a judgment entered only against the defaulting defendants. The complaint in the action was amended so as to transform the same into the nature of an action to quiet title. The California Mortgage Company, corporation, one of the defendants and appellants, claims to be the owner of the premises involved, pursuant to sale made by the trustee of a trust deed executed by Martin H. Mead and Theresa Mead, his wife, to secure the repayment of \$10,000, and that the interest of the appellant in and to the property has never been foreclosed; that the court never established the existence of a vendor's lien in the plaintiff as against the Mortgage Company; that plaintiff waived her vendor's lien as against the Mortgage Company, and that, if plaintiff has any interest in the property, it is simply to the extent of enforcing a vendor's lien as superior to the rights of the appellant holding under the deed of trust, and that the deed made pursuant to the judgment to which we have referred established plaintiff's rights only as against the defaulting defendants.

The record shows the following facts: That the plaintiff was, on the 25th day of January, 1926, the owner of the property hereinbefore mentioned; that on said date an escrow agreement was entered into by virtue of which the plaintiff agreed to sell the described premises to the defendant Mead, for the sum of \$3,600. This agreement was delivered to and held by the Beverly National Bank. The escrow agreement provided for the delivery of a deed by the plaintiff to the defendants upon certain payments being made. On January 26, 1926, the defendant Martin H. Mead and his wife entered into a contract with the Security

Finance Company for a building loan in the sum of \$10,000, for the construction of a building upon the lot described, and executed a deed of trust conveying the property to the California Title Insurance Company, one of the defendants and an appellant herein. The agreement provided for the recording of the deed of trust after certain facts had been ascertained not material to be mentioned herein. The deed of trust contained the usual covenants providing for the sale by the trustee in the event that repayment of the loan was not made according to the provisions of the deed. On February 19, 1926, following the escrow agreement to which we have referred, a deed was recorded by the terms of which the plaintiff conveyed to the defendant Martin H. Mead the premises involved in this action. On February 15, 1926, the appellant Security Finance Corporation sold and indorsed the note, secured by the trust deed to which we have made reference, to the appellant California Mortgage Company. The trust deed appears to have been recorded on the 1st day of February, 1926. The assignment of the note by the Security Company and of its interest in the trust deed to the California Mortgage Company did not appear of record at the time of the beginning of this action. Thereafter the Mortgage Company advanced to the Meads the sum of \$9,300. Some time after the beginning of this action, the amount due under the trust deed not having been repaid, the property was sold by the trustee named in the trust deed, at which sale the California Mortgage Company became the purchaser.

On December 1, 1926, the plaintiff began this action to foreclose a vendor's lien, as hereinbefore stated, the record showing that only \$2,500 had been paid on account of the purchase price of the lot involved, and that there remained due the sum of \$1,000. At the time of the beginning of the action the record shows that the lot had been conveyed to B. D. O'Niel, who held the title subject to the deed of trust mentioned herein. On January 14, 1927, the default of the defendants Martin H. Mead, Theresa Mead, and B. D. O'Niel was entered. On January 27, 1927, judgment was entered against the defaulting defendants, as herein stated. On February 1, 1927, the plaintiff filed an amended complaint herein. On February 19, 1927, answers were filed to said amended complaint by the California Title Insurance Company and Security Finance Company. On March 7, 1927, sale of the premises was had under the separate default judgment entered against the defendants Meads and O'Niel. On June 3, 1927, the California Mortgage Company, appellant herein, served under the fictitious name of John Doe Company, filed its answer; on March 8, 1928, the case came on for trial; on March 8, 1928, the sheriff executed and delivered a deed purporting to convey the premises to the plaintiff, based upon the default judgment to which

we have heretofore referred; on the same date this cause came on for trial the plaintiff filed a supplemental complaint which was deemed denied; on March 26, 1928, the appellant California Title Insurance Company, issued its trustee's deed to the California Mortgage Company, purporting to convey the premises according to a sale made pursuant to the trust deed to which we have heretofore referred; on June 22, 1928, the court filed its findings of fact and conclusions of law; this was followed by motions on the part of the appellants to vacate the judgment to amend the conclusions of law, and also motions for new trial.

We do not need to follow the respective assignments of the appellant as to the insufficiency of the evidence to support the findings, or as to the insufficiency of the findings to support the judgment, as the whole case rests upon one question, to wit: Under the admitted facts which we have set forth, was the effect of the sale made by the sheriff, based upon a default judgment entered against the defendants Mead and O'Niel, expressly limited as to them, such as to bar and exclude the interests of any of the appellants in and to the premises involved? The respondents, in support of the judgment, call our attention to the provisions of section 726 of the Code of Civil Procedure, which reads: "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action." The first sentence of the section referred to reads as follows: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter." Upon these provisions of section 726 of the Code of Civil Procedure it is insisted that the appellant California Mortgage Company is barred from claiming any interest in or to the property involved, and that a deed based upon a judgment such as was entered in this action conveys the property free and clear of all liens and incumbrances, irrespective of the fact that judgment in the action was entered only as against the Meads and O'Niel. This contention is based upon the theory that an action to foreclose a vendor's lien is an action to foreclose a mortgage, and therefore governed by the first sentence of section 726 of the Code of Civil Procedure. In support of this contention respondent cites the case of *Brown v. Kahn*, 176 Cal. 159, 167 P. 869, in which there appears a sentence to the effect

that the Code provides the procedure of the foreclosure of a vendor's lien, and assumes that section 726, supra, is the only one referred to. A reference to that case, however, shows that no such construction can reasonably be given to the language there used. The opinion in that case shows that a previous action had been prosecuted upon a note given for the purchase-money, and, following the judgment in that action, a subsequent one was begun to foreclose a vendor's lien, based upon the unpaid purchase price of the property represented by the promissory note. Thus, it clearly appears that, if the court had had in view only the first sentence of section 726 of the Code of Civil Procedure, and not other sections of the Code relating to sales under execution, there could have been no foreclosure of the lien therein involved. Likewise, we think the respondent misconstrues the holding of the court in the case of *Breedlove v. Norwich, etc., Insurance Co.*, 124 Cal. 164, 56 P. 770, 771. The portion of the opinion quoted by the respondent we think directly refutes her contention. The quoted part of the opinion reads: "One who fails to record his conveyance from the mortgagor puts himself in position to be deprived of his title by the foreclosure proceedings. If he stands idly by, and permits the action to be prosecuted without intervention upon his part, he is consenting to be represented by his grantor, and the legal effect of the foreclosure sale is to dispose of his title as completely as though he himself were present and litigating. By failing or refusing to record his title, he holds it subject to divestiture under the foreclosure proceeding. It is not that he retains his title, but is estopped from asserting it against the purchaser at the foreclosure sale, or those in privity with him; it is that he has been stripped of title, and left with but a brief right of possession, and an equally brief equity of redemption." The record shows in this action that the trustee, the grantor of the California Mortgage Company, was a party to the action all the while, and it also shows that subsequently the California Mortgage Company was served and became a party to the action. The grantor of the Mortgage Company was a party to the action prior to the entry of any default judgment, and, as we shall subsequently see, the Mortgage Company's rights were amply protected under the provisions of section 385 of the Code of Civil Procedure.

The case of *Anderson v. Alexander*, 184 Cal. 265, 193 P. 241, is not pertinent to the action herein, as the opinion in that case shows that, where the real party in interest is made a party, a mere trustee has no cause of complaint.

[1] As we read the record in this case we do not think the action, either as set forth in the original complaint or in the supplemental pleadings, seeking to change the form of

the action to one quieting title, is governed by the provisions of section 726, Code of Civil Procedure, limiting foreclosure of mortgage to one form of action. The limitation contained in that section relates only to instances where there is privity of contract. Bearing somewhat upon this question is the case of *Murphy v. Hellman Commercial Bank*, 43 Cal. App. 579, 185 P. 485. We quote the following from the syllabus: "The provision of section 726 of the Code of Civil Procedure that 'there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property,' was enacted for the benefit of the principal debtor and to relieve him from liability from a multiplicity of actions, and does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract between the two existing obligations—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations." In the case at bar no privity of contract is shown between the parties litigant here. Nor was there any privity of contract between the plaintiff and the defaulting defendants.

In 17 California Jurisprudence, 718, § 23, the law is thus stated: "A vendor's implied lien after conveyance is created by law and not by contract of the parties, as are mortgages. It is not a specific and absolute charge on the land, but a mere equitable right to resort to it upon failure of payment by the vendee, that is, it is, in its nature, a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced." It is further held in the same section that, where the title is retained, the relationship of mortgagor and mortgagee does not exist, as the section reads: "Such contract does not establish the relation of mortgagor and mortgagee; the vendor's security is something stronger than a mortgage, because the legal title is retained as security—something that a mortgagee never has. * * * The lien of a purchase-money mortgage and a vendor's lien have some features in common, but are not identical." And as further said in 25 Cal. Jur. 740: "The lien is a creature of equity established solely for the security of the vendor after he has executed a conveyance to the purchaser. It does not depend upon an agreement of the parties or any intention on the part of the vendor to create or retain it, but is presumed to exist unless a contrary intention of the vendor is clearly manifested. The lien arises at the time of the sale and transfer of the legal title, without payment of the consideration, and though not evidenced by any writing or public record, it continues to exist after an absolute conveyance of the property, unless the vendor has taken securi-

ty." And further: "The lien is not a specific absolute charge upon the property, giving no right of entry or title, but is simply a right to resort to the property upon a failure of payment by the purchaser. In other words, it, strictly speaking, is not a lien but is a mere equity, capable of acquiring the force and effect of a lien under certain circumstances."

[2] That the provisions of section 726, Code of Civil Procedure, limiting the action to one form, applies only to actions to foreclose mortgages, is supported by the following cases: *Craig v. Burns*, 65 Mont. 550, 212 P. 856; *Synder v. United Properties*, 53 Cal. App. 428, 200 P. 366; *Kraft v. Bryan*, 140 Cal. 73, 73 P. 745; *Moore v. Schneider*, 196 Cal. 380, 238 P. 81; *Murphy v. Hellman Commercial, etc., Co.*, 43 Cal. App. 579, 185 P. 485. Nor do we find anything in the case of *Sax v. Clark*, 180 Cal. 287, 180 P. 821, or in the case of *Wyser v. Truitt*, 95 Cal. App. 727, 273 P. 147, supporting the respondent's contention. In the *Clark Case* the question decided was that one who claimed under a trustee was bound by a judgment against the trustee. In the *Wyser Case* the holding simply was that a judgment against the trustee was not binding upon the trustor. In the case at bar no judgment of foreclosure of a vendor's lien was entered against either trustee or beneficiary. Where the trustee holds the legal title, and that title is of record, it appears to us elementary that a judgment on default entered simply against the trustor would in no wise affect the right or title held by the trustee or the beneficiary for whom the title is so held.

[3] The contention is made that the Mortgage Company acquired no interest under and by virtue of the trustee's sale and conveyance of the premises. We do not need to determine the merits of this contention, as it in no wise affects the judgment that should be entered herein, for the simple reason that, if the Mortgage Company has not succeeded to the title held by the California Title Insurance Company, then the Title Insurance Company is still interested as the holder of the title to the premises, and, unless judgment of foreclosure of the vendor's lien claimed by the plaintiff was entered as against the Title Company, its interest still exists. But there is a provision of the Code covering this question. Section 385 of the Code of Civil Pro-

cedure reads in part as follows: "In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." So that the contention of the respondent that the transfer of interest, which took place during the pendency of the action, precludes either defendant from further defending, is untenable.

[4-6] In the case at bar the record shows that the Mortgage Company did come into the action, and it came into the action as successor to the interest of the Title Insurance Company. That a purchaser pendente lite need not be substituted appears from the section to which we have referred, and also is supported by the following cases: *Sears v. Ackerman*, 138 Cal. 583, 72 P. 171; *Stufflebeem v. Adelsbach*, 135 Cal. 221, 67 P. 140; *Moss v. Shear*, 30 Cal. 467; *Camarillo v. Fenlon*, 49 Cal. 202. The section of the code, however, is sufficient to cover the issue without citation of cases. If it be held that the supplemental proceedings filed herein transformed the action into one to quiet title, it is only necessary to state that it is elementary that one can succeed only by the strength of his own title. Thus, the sheriff's deed, based upon a judgment such as we find in the record here, foreclosing only the interests of certain parties in the action, is not sufficient to support a judgment adverse to defendants, in the same action against whom no judgment was entered and no sale had. Viewed as an action to foreclose a vendor's lien, the judgment should simply have gone against the appellants, other than the Security and Finance Corporation, which appears to have no interest in the action, for the foreclosure of the lien held by the plaintiff as vendor. As against the appellants we do not think that the lien held by the plaintiff as vendor has been waived.

The judgment is reversed, with directions to the trial court to permit the parties to amend their pleadings so as to fully tender for determination all the equities involved in this action.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

116 Cal.App. 679

J. D. HALSTEAD LUMBER CO. v. SECURITY TITLE INS. & GUARANTEE CO.
et al.

Civ. 4297.

District Court of Appeal, Third District,
California.

Sept. 18, 1931.

1. Appeal and error ⇨181.

Generally, appellate court will consider only objections raised at trial.

2. Subrogation ⇨28.

Guarantor, upon being compelled to pay part of note guaranteed, to be subrogated to holder's rights under trust deed, would be required to bid at foreclosure sale amount due holder.

3. Attorney and client ⇨72.

Evidence held to disclose that attorney for guarantor of note at foreclosure sale under trust deed was without authority to enter joint bid for guarantor and holder.

4. Subrogation ⇨41(6).

Evidence held to establish guarantor's failure at trust deed foreclosure sale to comply with terms of sale requiring payment of cash.

Guarantor of part of note secured by trust deed, after payment, brought action against trustee under trust deed and holder to recover amount paid with interest or to require execution of deed to guarantor as tenant in common of mortgaged property which holder purchased at foreclosure sale.

Appeal from Superior Court, Los Angeles County; Charles F. Cook, Judge.

Action by the J. D. Halstead Lumber Company against the Security Title Insurance & Guarantee Company and another. Judgment for the defendants, and the plaintiff appeals.

Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondents.

PLUMMER, J.

The plaintiff began this action to restrain the defendant Security Title Insurance & Guarantee Company, a corporation, from executing and delivering a trust deed to the defendant Harry H. Andrews, conveying certain property hereinafter mentioned, or in lieu thereof judgment against each of said defendants in the sum of \$8,000, together with in-

terest at the rate of 8 per cent. per annum thereon from the 4th day of May, 1928. The defendants had judgment and the plaintiff appeals.

The record shows that on or about the 1st day of July, 1926, W. P. Stillman and Florence R. Stillman, his wife, and A. M. McLellan and Hazel McLellan, his wife, were the owners of record of lot 10 in block E, Knob Hill tract, city and county of Los Angeles. That on or about said date said owners made, executed, and delivered to the Union Engineering Company, Incorporated, their promissory note in writing for the sum of \$25,000, payable in semiannual installments of \$500 each, with interest thereon at the rate of 8 per cent. per annum, and upon the same date executed and delivered to the Security Title Insurance Company a deed of trust to said property to secure the payment of the sum of \$25,000, evidenced by said promissory note. This deed of trust was made subject to a certain other deed of trust executed and delivered to one H. C. Ward, to secure the payment of \$75,000. That at a subsequent date the Union Engineering Company, Incorporated, transferred to the plaintiff the said \$25,000 note, together with its interest in the trust deed made and executed to secure the payment thereof. Following this transaction the plaintiff for the consideration of the sum of \$20,000, assigned said promissory note, together with its rights under said deed of trust, to the defendant Harry H. Andrews. At the same time the plaintiff entered into an agreement by which it guaranteed the payment of at least \$8,000 of the sum represented by said promissory note.

On or about the 18th day of February, 1927, the makers of said promissory note for \$25,000 having become bankrupt, the defendant Harry H. Andrews demanded of the defendant Security Title Insurance & Guarantee Company that it proceed to sell the premises covered by the deed of trust given to secure the payment of said \$25,000 note. The \$8,000 guaranteed to be paid by the plaintiff to the defendant Andrews not having been paid, the defendant Andrews began a suit against the plaintiff to recover the sum of \$8,000. Subsequent to the beginning of this suit, payment of the \$8,000 guaranteed to be made by the plaintiff to the defendant Andrews was arranged for, and the defendant Andrews and the plaintiff entered into an agreement by virtue of which, if the premises covered by the deed of trust hereinbefore referred to, given to secure the payment of the \$25,000 note, should be sold for sufficient to reimburse the defendant Andrews, the plaintiff should receive payment out of the selling price thereof to the extent of \$8,000 and interest thereon, and thereupon there was endorsed upon the \$25,000 promissory note the

following: "J. D. Halstead Lumber Company has an interest to the extent of \$8,000 and interest thereon at 8 per cent per annum from May 4, 1928, by way of subrogation to certain rights of Harry H. Andrews, which said interest and the terms and conditions thereof are more fully set forth and described in that certain settlement agreement between said J. D. Halstead Lumber Company and said Harry H. Andrews, dated May 4, 1928, reference to which is hereby made. Dated: May 4, 1928. (Signed) Harry H. Andrews. (Signed) W. C. Shelton, Witness." The agreement of May 4, 1928, referred to in the indorsement of the promissory note, provided for the payment by the plaintiff to the defendant Andrews of the \$8,000 hereinbefore referred to, and also provided that in the event of the sale of the premises covered by the second deed of trust being made for more than sufficient to repay the defendant Andrews for all moneys expended by him, then there should be paid to the plaintiff the sum of \$8,000, with interest thereon as mentioned in said indorsement, and that the plaintiff should be considered as subrogated to the rights of the party of the first part therein, and to have the said sum of \$8,000 with interest thereon, secured by the deed of trust, given to secure the payment of the \$25,000 note. The agreement of settlement contained the further provision, to wit: "Should the said property on the foreclosure sale be purchased for less than sufficient to reimburse the party of the first part (being the defendant Andrews), for his remaining interest in the said note, together with all accrued interest, costs and expenses and attorney's fees, as hereinabove provided, then the party of the second part shall have no interest whatsoever in said property, and it is expressly understood and agreed that should the party of the first part become a purchaser of said property on the said trustee's sale, that said party of the second part shall have no right or interest in said property after the said purchase. That such right of subrogation is limited solely to such rights of subrogation as the second party is entitled to under the said guaranty dated December 24, 1926" (the second party to this agreement being the plaintiff in this action). The trust deed referred to contained the usual covenants found in such instruments, provided for sale thereof in the event of default of payment, etc. Pursuant to the demand of the defendant Andrews, based upon the default of the makers of said \$25,000 note to make payment thereof, the Security Title Insurance & Guarantee Company, a corporation, began proceedings to sell the property covered by the trust deed. The record shows that the sale of the premises was delayed by certain legal proceedings not material to be mentioned herein, and that later the trustee, on or about the 21st day of March, 1928, gave

notice of the sale of the property covered by the trust deed, stating the date when, and the place where, sale would be made. The notice of sale contained, among other provisions, the following: "Auction under Stillman deed of trust, recorded in book 6285, page 131, official records, County of Los Angeles. Terms of sale are cash, gold coin of the United States, in accordance with the terms of the note. Those having an interest under the note may tender in lieu of gold coin, their bids as follows: As to bids on behalf of Harry H. Andrews—As to bids on behalf of Harry H. Andrews up to and including the sum of \$22,520.95, of this amount or any portion thereof, Mr. Andrews may tender his receipt to the trustee in lieu of cash, with the exception of \$521.40 which must be in cash. As to bids on behalf of J. D. Halstead Lumber Company—Trustee will require cash on all bids up to the sum of \$22,520.95, and as to bids in excess of that amount but less than \$30,551.17, will accept the receipt of said J. D. Halstead Lumber Company for that portion of such bid over \$22,520.95. As to that portion of any bid exceeding \$30,551.17, such excess must be cash."

At the sale of the premises by the trustee, pursuant to said notice, the defendant Andrews became the purchaser thereof for the sum of \$16,000. It is alleged in the complaint that at the time of the sale the property was worth \$125,000, being in excess, as alleged in the complaint, of the amount due on the promissory notes secured by the first and second deeds of trust. It is further alleged in the complaint that a conspiracy was entered into between the defendant Security Title Insurance & Guarantee Company and the defendant Harry H. Andrews, relative to the sale of said premises. This is based upon an agreement set forth in the record to the effect that in any action prosecuted against the Security Title Insurance & Guarantee Company on account of the sale of said premises, the defendant Andrews would hold said Security Title Insurance & Guarantee Company harmless. This agreement appears to have been entered into for the reason that after demand had been made by the defendant Andrews upon the Security Title Insurance & Guarantee Company as trustee, to make sale of said premises, notice had been served by the plaintiff threatening action against said company if a sale of said premises were proceeded with. The court found against the contention of the plaintiff as to any conspiracy by reason of this agreement, or otherwise. The agreement is too lengthy to be set forth herein, but our attention has been called to nothing therein indicating that the conclusion of the trial court was and is not fully supported. The real contention of the plaintiff upon this appeal is: First, that the proceedings leading up to the foreclosure sale

were and are void; and, second, that at the sale the plaintiff became the purchaser of the premises, together with the defendant Andrews.

[1] As to the first point urged for reversal, to wit, that the proceedings should have been amended, readvertised, and reposted so as to show an interest of the plaintiff in and to the foreclosure proceedings, it is sufficient to say that no such issue is tendered by the pleadings, nor was any such issue tendered to the trial court for determination. All that the plaintiff asks for is either that a deed be made to it as a tenant in common with the defendant Andrews, or for the recovery of the sum of \$8,000 and interest. What we have said is fully supported by the text found in 2 California Jurisprudence, 234, and the cases there cited, to wit: "It is a well established general rule that with certain exceptions to be noted hereafter, an Appellate Court will consider only such objections as were raised in the trial court. This rule precludes a party from asserting on appeal claims to relief not asserted or asked for in the court below. And it also prevents an appellant from raising matters of defense not pleaded in the trial court," etc. The authorities there cited are too numerous to be listed here. However, we may set forth the following excerpts from the opinion in *Los Angeles Investment Company, a Corporation, v. Home Savings Bank*, 180 Cal. 601-615, 182 P. 293, 299, 5 A. L. R. 1193, to wit: "It is clear that the point was not made at the trial, that the cause was tried on other issues entirely and as if this point were not present, and that the necessity of proving either tender or an excuse for it was not brought to the plaintiff's attention. Such a point, which the plaintiff might, and in this case in all probability could, have met by sufficient evidence if objection to its recovery had been made on this ground at the trial, cannot be raised for the first time on appeal." Citing, *Bank of Stockton v. Howland*, 42 Cal. 129; *Richey v. Haley*, 138 Cal. 441, 71 P. 499. The proceedings had at the sale, as shown by the testimony in the instant case, may be summarized as follows: There were present conducting the sale William H. B. Haymond, assistant secretary of the Security Title Insurance & Guarantee Company, the defendant Harry H. Andrews, W. C. Shelton, George W. Burch, Jr., A. E. Halstead, and D. C. Rich, attorney for the plaintiff. The trustee distributed copies of the memorandum setting forth the terms of sale, being the notice heretofore set forth in this opinion. The trustee then announced the sale by reading a copy of the notice. In reading the notice of sale the trustee stated the amount of principal and interest, including attorney's fees, costs, and expenses of sale, and announced the amount due. Bids were then called for, whereupon Harry H. Andrews

bid, individually, the sum of \$10,000. Mr. D. C. Rich, then, speaking on behalf of the J. D. Halstead Lumber Company, offered a bid on behalf of Harry H. Andrews and the J. D. Halstead Lumber Company, as joint beneficiaries in the deed of trust, in the sum of \$30,551.17. To this bid Harry H. Andrews objected on the ground that D. C. Rich had no authority to bid for said property in his behalf. The trustee then asked if the J. D. Halstead Lumber Company was prepared to pay in cash the sum of \$22,525.95, as required by the notice of sale distributed by the trustee, and read by the trustee before making the sale. This question was not answered by Mr. Rich, who had offered the bid, nor by any one else in behalf of said J. D. Halstead Lumber Company. That immediately after making this bid, and after this question had been asked and unanswered, the said D. C. Rich and A. E. Halstead departed from the place where said sale was being made. The sum of \$22,525.95 not having been paid, nor any part thereof having been paid, the trustee declined to accept the bid made by the said D. C. Rich, and again offered said property for sale, at which time the defendant Andrews bid for said property the sum of \$16,000, and there being no further or higher bids, the property was sold to the defendant Andrews for the said sum of \$16,000. The record further shows that the J. D. Halstead Lumber Company did not furnish any of its officers with the necessary cash required by the notice of sale to be paid by said company in the event it became the purchaser thereof, nor did any officer of said company go to said sale furnished with said sum of \$22,551.17, or any part thereof, to make payment on the purchase price of the sale of said premises in the event that the J. D. Halstead Lumber Company became the purchaser thereof.

While the record does contain some testimony to the effect that the property involved in this action is reasonably worth the sum of \$127,000, there is also testimony to the effect that it would not sell for anything like that sum, the sale in this instance being made subject to the first deed of trust executed and delivered by the owners of the property to secure the payment of a note for the sum of \$75,000, upon which default had already been made.

[2] A considerable portion of the appellant's brief is devoted to the subject of subrogation and the rights of tenants in common. Under the facts which we have summarized, and as found by the trial court, in view of the agreement entered into between the parties as to their rights upon sale of the premises, we do not think that the question of subrogation is really an issue in this case. If it were, the rule set forth in *Finnell v. Goodman, etc.*, 156 Cal. 18, 103 P. 483, is a complete answer to the appellant's contention.

In order to be subrogated to the rights of Andrews it would be necessary for the plaintiff to have bid the amount due to said Andrews.

[3, 4] The facts which we have recited justified the trial court in refusing to accept the bid made by D. C. Rich, the attorney for the Halstead Lumber Company, as a joint bid in behalf of said Company and the defendant Andrews. The record shows that D. C. Rich was not authorized to make any such bid on behalf of Andrews, and further shows, as we have stated, that the Halstead Lumber Company took no measures to comply with the terms of the notice of the sale of the property involved in this action.

The agreements and written instruments entered into between the parties to this action, as we have stated, were very lengthy, but the essence of all of them was and is to the effect that the defendant Harry H. Andrews was first to receive his money out of any proceeds arising from the sale of the premises covered by the trust deed, and that if a sale should be made, the rights of the parties would be as evidenced by the quotation from one of the agreements set forth herein.

Not having tendered any question or issue as to the regularity of the sale, or of anything further than its alleged rights based upon the character of the bid made by D. C. Rich, there appears nothing in the record justifying a reversal of the judgment herein.

It therefore follows that the judgment of the trial court must be, and the same is hereby, affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

HARRIS v. KESSLER. *
Civ. 7501.

District Court of Appeal, First District, Division 1, California.
Sept. 17, 1931.

Rehearing Granted Oct. 17, 1931.

1. Sales ⇨477(6).

Where forfeiture is involved, conditional seller waives time element by accepting payment from defaulting buyer without objection and without notification that future payments would have to be made promptly.

2. Sales ⇨477(6).

Under acceleration clause of conditional sale, seller could sue for entire unpaid balance on buyer's default, although seller had previously accepted overdue payments.

3. Sales ⇨464.

Provision for accelerated maturity on conditional buyer's default is not in nature of penalty or forfeiture.

4. Sales ⇨479(4).

Where entire principal and interest becomes due on conditional buyer's default, it is not essential that demand for payment be made before suit, in absence of agreement.

5. Sales ⇨464.

Agreement for accelerated maturity on buyer's default is not oppressive or inequitable.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by H. Harris against Fred G. Kessler. Judgment for plaintiff, and defendant appeals.

Affirmed.

Russell W. Cantrell, of San Francisco, for appellant.

Joseph T. O'Connor and M. L. Choynski, both of San Francisco, for respondent.

TYLER, P. J.

Action for breach of a conditional sales contract. From the record it appears that plaintiff was the owner of the furnishings contained in a certain hotel, together with the leasehold interest covering said premises. As such owner he agreed to sell and defendant agreed to purchase the business for the sum of \$24,000. Certain other property was included in the transaction, for which defendant was credited in the sum of \$10,000. The agreement of sale provided that an additional sum of \$4,000 was to be paid in cash when the contract was executed; the balance of \$10,000 to be paid in monthly installments of \$300 or more, together with interest on deferred payments until the whole sum was paid. A default clause provided, in substance, that, if the purchaser failed for a period of three days to pay any installment of principal or interest, as provided for, then the whole amount, together with interest, should immediately become due and payable. The agreement further provided that time was of its essence.

At the date of the commencement of the action defendant was in default according to the terms of the agreement in the sum of \$1,500 on account of principal and \$38 on account of interest. Under the acceleration clause, plaintiff elected to consider the full amount due, and sued for the same, and caused a writ of attachment to be issued in the action, and levy was made thereunder upon the property.

[1, 2] The main point involved in the case is whether or not the vendee was in default with respect to the meeting of the specified monthly payments, justifying the vendor in legally exercising his option to declare due and payable the entire unpaid balance of the purchase price; it being conceded that payments were never made by defendant in accordance with the strict terms of the contract, but were made and accepted by plaintiff after the same had become due, without objection and without any notification to defendant that future payments would have to be made strictly in accord with the agreement. Under these circumstances it is appellant's claim that plaintiff waived the time element of the contract and consequently prematurely instituted his action to recover the entire unpaid balance, and illegally took possession of the property through the attachment; that, having done so, the legal effect was to create a breach of the agreement on his part, entitling defendant vendee to recover from plaintiff the full amount paid under the contract, which amounted to the sum of \$16,636.92. In support of this claim, we are cited to numerous authorities to the effect that a seller under a conditional sales contract will not be permitted to declare a forfeiture of the rights of the purchaser under such a contract for nonperformance where such breach has been with the express or implied consent of the seller.

There can be no question that the law is well settled that a waiver of the time element occurs under such circumstances where a forfeiture is involved. This principle, however, has no application to the instant case. No question of estoppel, waiver, or forfeiture is here presented. Plaintiff elected to treat the sale as absolute, and sue for the amount due. He seeks no forfeiture. This he had a right to do.

[3] The question is not one of first impression in this state. A provision in an agreement for accelerated maturity is not in the nature of a penalty or forfeiture, but simply an agreement as to the time when a debt shall become due and enforceable according to its terms. Such an agreement is a lawful one which the parties may enter into, and when they do so the conditions will be enforced by courts of equity. No forfeiture is involved in such act and no penalty imposed. Plaintiff is not asking for anything that has been paid under the contract by way of forfeiture, but is simply refusing to extend the credit for the reason that defendant has failed to comply with his contract.

[4, 5] The situation is entirely different from an agreement of sale wherein, upon failure of payment of an installment, the vendor is attempting to retain payments made and

also the property itself, the subject of the sale. *Young v. Burchill*, 96 Cal. App. 341, 274 P. 379; *Righetti v. Monroe*, Lyon & Miller (Cal. App.) 293 P. 114. Nor does the fact that, after default, no notice was given the vendee that strict compliance with the time element of the contract would in future be enforced, alter or in any manner affect the situation. In the absence of an agreement upon the subject, it is not essential that a demand for payment be made before suit in this character of action, and especially so where the whole sum of principal and interest becomes immediately due on default. As above indicated, there is no element in the case which would justify a court, upon the theory of waiver or estoppel, in denying plaintiff the right to enforce the express terms of the contract, as such an agreement cannot be condemned as being oppressive or opposed to equitable principle; no forfeiture being involved.

Appellant next complains that the trial court erred in sustaining demurrers interposed to the answer and two counts contained in the cross-complaint. We need not be at pains to discuss the orders on demurrers. The defense of waiver and estoppel invoked by defendant could, as we have seen, avail him nothing. The matter was fully presented to the court, and it was rightfully determined that the facts pleaded constituted neither a defense nor were they the proper subject of a cross-complaint.

The orders and judgment are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

116 Cal.App. 665

ABBOTT et al. v. GOODYEAR TIRE & RUBBER CO. et al.

Civ. 8006.

District Court of Appeal, First District,
Division 2, California.

Sept. 18, 1931.

1. Trial $\Rightarrow$ 296(7).

Instruction authorizing recovery if jury found misrepresentations were made deceiving plaintiffs "as alleged," although omitting essential element of defendant's knowledge of falsity, *held* not objectionable as formula instruction; preceding instructions correctly stating law without conflict.

2. Trial $\Rightarrow$ 295(1).

All instructions must be read together.

3. Trial $\hookrightarrow$ 295(1).

In considering allegedly erroneous instructions, appellate court is not limited by paragraphing or numbering in record.

4. Trial $\hookrightarrow$ 296(2).

In action for false representations, instruction omitting essential element *held* not erroneous in view of another instruction.

Instruction omitting essential element of defendant's knowledge of falsity of misrepresentations was not erroneous, in view of instruction which directed verdict for defendant unless he did not believe representations to be true or made them as positive assertions in manner not warranted by information in his possession.

5. Fraud $\hookrightarrow$ 58(2).

In action for falsely representing that street assessments had been paid, evidence warranted inference that defendant knew of assessment proceeding.

6. Release $\hookrightarrow$ 37.

Dismissing action against vendor, sued with agent for misrepresentations, on vendor's agreement to pay specified sum if purchaser failed to recover against agent, *held* merely agreement not to sue, which does not release either joint tort-feasor.

7. Dismissal and nonsuit $\hookrightarrow$ 26.

In action against vendor and agent for misrepresentations, dismissal as to vendor in consideration of compensation for injuries would release agent as joint tort-feasor.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by Earl V. Abbott and another, individually and as copartners doing business under the copartnership firm name and style of the Abbott-Meisel Company, and others, against the Goodyear Tire & Rubber Company of California and W. H. Daum. Judgment for plaintiffs against defendant last named, from which such defendant appeals.

Affirmed.

John M. Hall, of Los Angeles, for appellant.

Rohe & Freston, Ralph E. Lewis, Kenyon F. Lee, and Bradner W. Lee, Jr., all of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiffs sued for damages for false representations. Before trial the action was dismissed as to the tire company. The cause was tried as to defendant Daum before a jury, which returned a verdict for plaintiffs in the sum of \$7,218.88. Defendant Daum appeals upon a bill of exceptions.

Plaintiffs purchased certain real property from the tire company through its agent Daum. Prior to the negotiations for the purchase, proceedings had been instituted for the widening and paving of one of the streets fronting the property. As a part of the inducements it is alleged that defendant Daum represented to plaintiffs that the assessments for such improvements had been fully paid and that said defendant knew that such representations were untrue. The suit is to recover as damages for such representations the amount of said assessments which was subsequently paid by plaintiffs.

[1, 2] Appellant first complains of instruction No. 12, which informs the jury as to the amount of recovery to which respondents are entitled if the jury finds certain facts to be true. The criticism of the instruction is that it is a "formula" instruction which fails to include the essential element of knowledge of the falsity of the representations on the part of the appellant. There are several answers to the criticism. It will suffice to say that in instructions 1 to 11 the jury had been advised of the allegations of the complaint charging fraud; that instruction No. 3 particularly dealt with the allegations respecting Daum's knowledge of the falsity of the representations complained of; and that instruction No. 12 directed a verdict for respondents if the jury found that all these representations were made and that respondents had been deceived "as alleged." The complaint fully alleged every essential element for recovery in a case of this kind and the instruction complained of took all these allegations into consideration. This is not a case of a directed verdict on a single issue or upon a limited number of the issues involved. All the instructions must be read together and, in so reading them, we find no conflict between No. 12 and those preceding, but a general summary telling the jury of every element which must be found for a verdict. The case is somewhat similar to *Robinet v. Hawks*, 200 Cal. 265, 273, 252 P. 1045, where the trial court used the expression "under the instructions as I have given them to you." See also, *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 394, 264 P. 237, where the Supreme Court holds in effect that where, as here, the instruction complained of does not purport to be a complete statement of the law upon which plaintiffs might recover and the other instructions are amplifications of and *not in conflict with* that instruction the objection of "formula" instruction is not sound. Putting it in other words, when the tone of the instructions as a whole denotes that no single instruction was intended to be a complete statement in itself but that all the instructions are to be taken together and, when these instructions fully and correctly state the law *without conflict*, then no one instruc-

tion may be singled out for criticism because it does not completely state all the elements necessary for recovery.

[3, 4] The criticism of instruction No. 17 is not without merit. It was given at the request of respondents. It is poorly drawn, wholly unnecessary, and should not have been given. It too directs a verdict for respondents if the jury should find that the alleged representations were made under certain conditions. It omits the element of knowledge of the falsity of the representations on the part of appellant. Standing alone, the instruction is indefensible, and is more or less unintelligible, but for that reason may have been harmless. However, in the consideration of these instructions, we are not limited by the paragraphing or numbering given in the record, but must read the instructions as a whole to determine whether the *charge* correctly states the law to the jury. In so reading these instructions we find that in "number 17" the jury was instructed that if it found that the representations as to the payment of the assessments were made to induce respondents to purchase the property, and were material, and were false, and that respondents believed them to be true and acted upon them, then the jury should find for the respondents. Nevertheless, in instruction "number 35," which is the concluding instruction given, the jury was told that "*in addition* to finding that the representations alleged to have been made were in fact made and that the same were untrue," the verdict "must be" for the appellant, unless "you also find" that appellant did not believe the representations to be true, or that they were made as positive assertions in a manner not warranted by the information possessed by the appellant. This is not, therefore, a case of "a clear conflict in the instructions" within the rule of *Beyerle v. Clift*, 59 Cal. App. 7, 9, 209 P. 1015, and the cases cited in *Douglas v. Southern Pac. Co.*, 203 Cal. 390, 394, 264 P. 237. It is rather a qualification of the criticized instruction within the rule of *Robinet v. Hawks*, 200 Cal. 265, 272, 252 P. 1045.

[5] It is argued that the evidence is insufficient to show that appellant knew that assessments had been levied against the property sold on account of street improvements. Respondents put in evidence the contract between Daum and the tire company wherein the company undertook to furnish an unlimited guaranty of title free of all incumbrances *except* as to proceedings for the improvement of Florence avenue. This provision was inserted in the contract by Daum and was discussed at the time in a conversation between Daum and a representative of the tire company. This occurred about a year before the representations were made. The only possible inference to be drawn from these

facts is that appellant had knowledge of the assessment proceeding. No credible evidence was offered to the contrary.

[6, 7] Finally it is argued that, because of the dismissal of the tire company, the cause of action fell for the reason that appellant and the tire company were joint tort-feasors. The dismissal was based upon a stipulation with the respondents wherein the tire company orally agreed to pay respondents \$3,000 if respondents failed to recover a judgment against this appellant. No consideration was paid for the dismissal. This promise of the tire company was not accepted by respondents in full or any satisfaction of the injury (*Wallner v. Barry*, 207 Cal. 465, 473, 279 P. 148), and the dismissal of the company was nothing more than an agreement not to sue, which is not alone a release of either joint tort-feasor. 23 R. C. L. p. 408; 50 A. L. R. 1091; 66 A. L. R. 212; *Hawber v. Raley*, 92 Cal. App. 701, 703, 704, 268 P. 943; *Johnson v. Pickwick Stages System* (Cal. App.) 291 P. 611, 613. If the dismissal had been entered in consideration of the payment to respondents of any sum as compensation for the injuries, it would have barred their right to proceed against appellant. *Johnson v. Pickwick Stages System*, *supra*. But there was no word in the evidence tending in the slightest degree to prove the special defense or bar raised by appellant, and there was nothing to go to the jury on that issue.

Judgment affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

116 Cal.App. 674

SEITZMAN v. SRERE CORPORATION
(HARTFORD ACCIDENT & IN-
DEMNITY CO., Intervener).

Civ. 6773.

District Court of Appeal, Second District, Division 2, California.

Sept. 18, 1931.

1. Landlord and tenant ⇨169(7).

Where tenant's employee was injured by falling down elevator shaft, due to elevator doors being open and unguarded, *prima facie* case of owner's negligence was presented.

2. Negligence ⇨136(6).

Jury determines whether defendant has successfully rebutted *prima facie* case under *res ipsa loquitur* doctrine.

3. Negligence ⇨138(3).

In action submitted under doctrine of *res ipsa loquitur*, instruction which required defendant to overcome *prima facie* case by preponderance of evidence *held* prejudicial error.

4. Trial ⇨296(8).

Instruction requiring defendant in negligence case to overcome *prima facie* case by preponderance of evidence *held* not cured by earlier correct instruction.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Julius Seitzman against the Sreere Corporation, in which the Hartford Accident & Indemnity Company intervened. Judgment for plaintiff, and defendant appeals.

Reversed.

Superseding opinion in 300 P. 115.

George H. Moore and M. B. Silberberg, both of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for intervenor.

ARCHBALD, Justice pro tem.

Plaintiff was an employee of a firm which occupied a portion of the sixth floor of a building owned by defendant. On March 21, 1927, coming into the building on his way to work, he found, as he said, the elevator doors open, and the light being dim he stepped through the doors and fell into the basement, injuring himself. His employer was insured under the Workman's Compensation, Insurance and Safety Act by the Hartford Accident & Indemnity Company, and an award having been made by the industrial accident commission of the state in favor of the employee and against said insurance carrier for the injuries thus sustained, the latter intervened in the instant action, praying that it might have a first lien on any recovery by plaintiff for the sums expended by it under said award. The case was tried before a jury, which returned a verdict in favor of plaintiff in the sum of \$15,000. From the judgment entered on said verdict defendant has appealed. No brief on appeal was filed by plaintiff, but the intervenor has responded to appellant's brief.

The amended complaint, and also in effect the complaint of intervenor, alleges that on the day in question "the defendant so negligently and unlawfully maintained and conducted said elevator shaft and the doors thereof that said doors were permitted to be left open and said elevator way or shaft to be darkened and unguarded while the elevator car was at some point above said ground floor, and negligently failed to have said passageway or hallway and elevator shaft properly

and sufficiently lighted, in consequence whereof plaintiff, while lawfully upon said premises and properly on said ground floor in said building * * * believing that the elevator car was there in said shaft on said ground floor in waiting and in readiness to receive passengers for carriage, and induced to so believe by the fact that said doors were standing open, as aforesaid, and believing that by entering said doors he would be stepping into the aforesaid elevator car, and it appearing to him in the uncertain and dim light of the hallway or passageway that the elevator was on said floor, he entered and passed part way through said doorway and doors, and the said elevator car not being in that portion of the shaft, but at some point above said ground floor at that time, without any fault on his part, the said plaintiff fell * * * from the ground floor of said building to the lower floor or basement thereof," receiving the injuries of which he complained. As to who actually opened the elevator doors and failed to close them prior to the accident the evidence is silent. Plaintiff testified in substance that the elevator shaft was about 20 to 30 feet from the open entrance to the building, in a passageway about 4 feet wide, on the left side of which was a soft-drink stand, and that about 5 feet from that "was the elevator on the left side"; that there was a chandelier about 5 feet from the entrance which was never lighted, "only at night"; that "over on the right side of the elevator they had a little bulb, and there was a staircase that would turn around to the left going up to the building. There would also be a light there"; that he arrived about 7:30 a. m. on his way to work; that it was "rather a gloomy day. * * * There was no lights whatsoever in the hallway; just a light coming from the street into that long hall"; that the elevator doors were open as he had seen them before, "and with that confidence * * * I just walked straight in, because it was a common occurrence at times."

Appellant complains of the following instruction and in particular of the language we have italicized: "You are instructed that when a thing which causes an injury is shown to be under the management of the defendant and the situation is such that in the ordinary course of things does not happen if those who have its management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In applying the above doctrine to this case you are instructed that if you find that the doors of the elevator on the first floor were open when the elevator cage was not there, and that that was such a thing as does not ordinarily happen if those who have the management thereof use proper care in the management thereof it affords *prima facie* evidence of negligence, and would

justify a verdict for the plaintiff if you believe from all the evidence that such negligence, if any, was the proximate cause of the accident, *unless the evidence in the case negates that prima facie presumption and establishes by a preponderance of the evidence that it was not the result of the negligence of the defendant*, or unless you find that the plaintiff was guilty of some negligence which proximately contributed to the accident and his injuries."

[1, 2] It will be seen that the allegations of negligence in the complaint are in general terms and in effect charge that the doors were open due to the negligence of defendant, and that due to the dim light plaintiff did not discover the absence of the elevator until it was too late. The proximate cause of the injury was the open doors, and the dim lighting is only material in connection with such alleged negligence as a circumstance immediately connected with the happening of the accident and on the question of contributory negligence. In the instant case the allegations of the complaint charge negligence in permitting the elevator doors to remain open without the elevator being there present, and in having the passageway dimly lighted at such time. The evidence itself leaves the question as to just how the doors were left open somewhat in doubt. It does show, however, that defendant corporation was in charge of the elevator at the time through its employee, who had taken the elevator up a few moments before the happening of the accident. It is true the latter testified on defense that he closed the doors before he ascended and that the elevator could only be operated with the shaft's doors open by using an emergency button on the elevator, which he says he did not use, yet the jury evidently did not accept his testimony; and the elevator being at the time in charge of defendant, and the accident one that in the ordinary course of things does not happen if the management uses proper care, and plaintiff having testified that the doors were open when he approached in the dimly lit passageway, and as they could not very well open of themselves, it would seem to be a proper case for an instruction as to the application of the rule *res ipsa loquitur*; and of course the presumption raised by the application of the instruction to the facts of the case makes a prima facie case of negligence (*Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 240, 59 A. L. R. 480) on the issues raised by the complaint and answer. Defendant attempted to meet such case by introducing evidence from which the jury could have inferred that plaintiff himself, or some third person, opened the doors.

Appellant urges that the evidence of the defendant shows that no employee or agent of

defendant could have left the doors open, and that they must have been opened by either the plaintiff or some interloper. We must admit that the cold record before us is quite persuasive, but "it is for the jury * * * to determine from all the evidence in the case whether the defendant has successfully met and rebutted the prima facie case made out by the plaintiff in an action wherein the mere proof of the happening of the accident and the circumstances surrounding it give rise to an inference of negligence." *Michener v. Hutton*, supra. Where there is no direct evidence before the jury as to who opened the elevator doors, the fact that the elevator was under the management and control of defendant—the occurrence being one that does not ordinarily happen—made it an ideal situation for the application of the doctrine *res ipsa loquitur* and presented a prima facie case of negligence, where without it it is to be doubted if the cause would have reached the jury.

[3, 4] However, the inclusion in the questioned instruction of the portion thereof italicized by us placed on defendant the burden of overcoming such prima facie case by a preponderance of the evidence—a burden which properly remains with plaintiff throughout the trial. It is sufficient to prevent a recovery by plaintiff if the evidence of the defendant is of equal weight in the scales of justice with that of the plaintiff, even though it does not preponderate. The language referred to, therefore, might well have been the very thing that determined the verdict returned. The fact that the court, earlier in the instructions, told the jury in effect that unless plaintiff proved by a preponderance of the evidence that defendant was guilty of negligence he could not recover, could not in our opinion cure the error, as the jurors might well think that such earlier instruction applied to evidence produced before them and that it had no application to a case where the facts themselves spoke and in connection with which they were in effect told that the defendant must overcome such prima facie case by a *preponderance* of the evidence. An instruction to the effect that the jurors might infer negligence from the situation surrounding the accident would attract their attention rather more than the ordinary instruction, anyway, and placing the burden on the defendant to overcome such inference by a preponderance of the evidence must have had a very impressive effect. At least in our opinion it constituted prejudicial error.

We see no merit in appellant's other contentions.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

116 Cal.App. 670

DAIRY FOOD STORE, Inc., v. ALPERT et al.
Civ. 6661.

District Court of Appeal, Second District, Division 1, California.

Sept. 18, 1931.

1. Evidence ⇨413.

Proof of change in street program resulting in narrowing lot *held* not objectionable as varying written agreement to lease portion of contemplated building.

2. Contracts ⇨309(2).

Performance of contract is excused to extent that thing assumed as basis of agreement ceases to exist.

3. Contracts ⇨323(1).

Question when alteration becomes consequential, so that subject-matter of original building plan ceases to exist, is one of fact.

4. Landlord and tenant ⇨22(4).

Finding that change in street program, whereby contemplated building was reduced from 46 to 38 foot frontage, released lessor from agreement to lease portion thereof, *held* justified.

The agreement for lease called for "12 feet inside measure * * * of the building we are to build," and the parties to the agreement knew at the time of the transaction that the city was about to open a street which would cut off a part of the lot on which the projected building was to be placed. At the time of the agreement it was understood, however, that the width of the street would permit a building with a frontage of 46 feet, but the change in the city administration was followed by a change in the street program resulting in making street 8 feet wider, reducing the store frontage to 38 feet.

HOUSER, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by the Dairy Food Store, Incorporated, against Myer L. Alpert and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Thomas A. Sanson, of Los Angeles, for appellant.

Frank C. Dunham, of Pasadena, for respondents.

BISHOP, Justice pro tem.

We approve the conclusion reached by the trial court, that the defendants were released

from their agreement to lease to plaintiff a portion of a building to be erected, because not the building contemplated but a different one was constructed, the change being due to causes over which the parties had no control. The agreement in question was written by C. H. Gibson, plaintiff's president, and by him presented to the defendants for their signatures. In so far as it need be before us, it reads:

"June 22, 1927.

"Mr. C. H. Gibson,
"Pasadena, California.

"Dear Sir:

"We hereby offer to you 12 feet, inside measure to run 75 ft. southerly along the West wall of the building we are to build on the C. H. Baker Property on the corner of Colorado Street and Garfield Avenue, Pasadena. * * * \$350.00 to be paid upon the signing of the contract for building and \$450.00 to be paid upon the signing of the lease. Completion to be as soon as possible.

"[Signed] M. L. Alpert

"Esther B. Alpert.

"Accepted C. H. Gibson."

Whatever Gibson understood, at the time he drew and "accepted" this offer, about the identity of the intending builder, whether it was the defendants, as the offer would indicate, or Baker, as was the fact, he did know that the plan was to erect the building on the land of Baker, and that the source of defendants' rights in the building would be a lease from Baker. He also knew, as did every party to the transaction, that the city of Pasadena was about to open a street which would cut off a part of the lot upon which the projected building was to be placed. At the time the offer was made and accepted, it was quite definitely understood that the width of the new street would permit a building with a frontage of forty-six feet, and it was this building which was then contemplated. A change in the city administration was followed by a change in the street program, resulting in a wider street by eight feet, making impossible the erection of a forty-six foot building. The lease between Baker and the defendants was canceled, and the defendants notified plaintiff that their agreement with it was at an end. A building was built to conform to the narrowed lot, however, and the defendants and Baker entered into a new lease relative to it. Plaintiff and defendants entered into negotiations, but not into a new contract. Standing on the June 22d agreement, plaintiff seeks in this action to recover damages suffered by the refusal of the defendants to lease to it premises in the building which was erected, contending that as the land taken was from the east side of the building, its twelve feet along the west side remained unaffected.

[1, 2] Many objections were interposed to the proof of the facts just narrated on the ground that it was an attempt to vary the terms of a written agreement. This was not its object or effect. Rather it was proof that the subject-matter of the lease, which the parties agreed to enter into, never came into existence, and hence the parties were excused from carrying out their agreement to enter into a lease. The principle which controls is, in truth, the subject-matter of the executory agreement was nonexistent without the fault of defendants when performance was due, is, we find, not in doubt. "It is * * * well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent." *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 292, 156 P. 458, 459, L. R. A. 1916F, 1. See, also, the note following the report of the *Howard Case* in L. R. A. 1916F, p. 52 et seq., and the note, 12 A. L. R. 1274. This quotation from the opinion in *Leventritt v. Cowell* (1913) 21 Cal. App. 597, 602, 132 P. 627, 629, is of significance: "Zellerbach & Sons had contracted, tentatively at least, to lease a building to be commenced within six months from June 13, 1904. This building had been almost completed when it was destroyed. Its destruction terminated the contract for its leasing. Civ. Code, § 1933." Performance of an agreement to let space in a building occupied by the lessor-to-be is excused by the burning of the building, and the expectant lessee cannot complain because it was not granted space in another building subsequently occupied. *Martin, etc., Co. v. Siegel, Cooper & Co.* (1908) 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114.

[3, 4] Our problem narrows down, then, to this question: Did there come into existence "12 feet, inside measure * * * of the building we are to build on the C. H. Baker property"? Admittedly, if the plans had been altered in an immaterial or insubstantial particular, neither party could withdraw from the agreement to lease by saying, this is not the building our contract referred to. Equally true, it seems to us, either party to a contract could properly insist that a building with a fifteen-foot frontage was not the building referred to in an agreement which related to one with a hundred-foot frontage. The point at which the alteration in a plan passes from the inconsequential to the vital, so that the product of the final plan ceases to be the project of the original plan, is one of fact, peculiar to each case. We cannot say that the trial court was not justified in determining that the change in street plans made it impossible to erect the building contemplated, for a store with thirty-eight feet

frontage may be said to be substantially different from one with a forty-six-foot frontage. If that building was not erected, then defendants were properly held not to be required to respond in damages for a failure to lease to plaintiff space in it.

The judgment is affirmed.

I concur: YORK, J.

I dissent: HOUSER, Acting P. J.

116 Cal.App. 635

WILSON v. COFFEY.

Civ. 7998.

District Court of Appeal, First District,
Division 2, California.

Sept. 16, 1931.

1. Deposits in court ⇨10.

Where deposit in court was made subject to court's order, judgment entitling defendant to money constituted order on which money could be withdrawn without notice to plaintiff.

2. Deposits in court ⇨10.

That defendant was insolvent when he withdrew deposit from court held immaterial as regards plaintiff's right to obtain restoration, notwithstanding judgment permitting defendant's withdrawal was erroneous.

3. Judgment ⇨538.

Judgment took effect as of date of entry, where no stay of execution was entered.

4. Deposits in court ⇨10.

That defendant's attorney after judgment for defendant presented affidavit to judge, who issued order on auditor for warrant to permit defendant to obtain deposit in court, held not to show irregularity (Code Civ. Proc. § 188).

No irregularity was shown, since the affidavit was mere surplusage and, in absence of anything to the contrary appearing, it would be assumed that certified copy of judgment which justified withdrawal was served on proper officers.

5. Deposits in court ⇨10.

In absence of contrary showing, court assumed that certified copy of judgment for defendant was duly served on officers in obtaining withdrawal of deposit (Code Civ. Proc. §§ 572-574, 684).

6. Deposits in court ⇐10.

No personal liability rested on defendant's attorneys to return deposits withdrawn from court on erroneous judgment, absent showing that they received part of funds.

7. Deposits in court ⇐10.

Issuance of writ for restitution of deposit withdrawn from court is discretionary.

8. Deposits in court ⇐10.

Discretion in refusing to order restitution of deposit withdrawn from court on erroneous judgment *held* not abused.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Alden C. Wilson against Charles H. Coffey. From an order denying motions for an order directing the restoration of a deposit and for an order to show cause for contempt for failure to do so, plaintiff appeals.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant.

Rohe, Dottenheim & Weikert and Freston, Mulroney, Nilsson & Files, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondent.

STURTEVANT, J.

On October 5, 1923, the plaintiff entered into a contract with the defendant, Coffey, to sell him certain land located in Los Angeles county at an agreed price of \$35,000. By the terms of the contract \$15,000 was to be paid in cash upon delivery of a grant deed together with a certificate showing good title and the balance of the purchase price was to be secured by defendant by executing a second mortgage upon the land. It was agreed that plaintiff and defendant would enter into an escrow for the execution of said agreement and that they would make the Title Insurance & Trust Company their escrow holder for the purpose of carrying out the terms of their contract. It was further agreed that plaintiff would deposit with said title company a deed conveying said lands to the defendant and that said defendant would deposit with said company at once the sum of \$5,000.

Accordingly the defendant on the 5th day of October, 1923, paid to and deposited with said title company the sum of \$5,000 as payment to plaintiff upon the purchase price of said property. At about the same time the plaintiff deposited with said title company for said defendant a deed duly executed in full compliance with the terms of said contract and said escrow instructions and was ready, able, and willing to furnish the necessary certificate of title.

Thereafter a controversy arose between the parties, and the plaintiff commenced an action in the superior court of Los Angeles county to require the defendant to perform his contract and to cause said title company to pay to him the said \$5,000 deposited with it by said defendant. The title company was joined in said action as a defendant and filed an answer. The defendant Coffey also filed an answer. When the action came on for trial, the parties entered into a stipulation as follows: "It is hereby stipulated in open court by all parties to this action through their respective counsel that the defendant and cross-complainant, Title Insurance and Trust Company, deposit in court the funds, to-wit, the sum of \$5,000 and a deed running from Alden C. Wilson and wife to Charles H. Coffey and wife in connection with escrow transaction No. 705303 of the Title Insurance and Trust Company, said transaction being between the plaintiff Alden C. Wilson and the defendant Charles H. Coffey and that upon certain deposits being made this court may make an order dismissing this defendant and cross-complainant, the Title Insurance and Trust Company, from this action and discharging this defendant and cross-complainant, the Title Insurance and Trust Company, from liability to each of the conflicting claimants, Alden C. Wilson and Charles H. Coffey, said deposit to be subject to the order of the court."

In accordance with said stipulation the said title company did deposit the said money in court and the court made its order dismissing said action as to the title company.

The action was then tried as between the plaintiff and the defendant, and after the trial judgment was ordered for the defendant and the defendant's attorneys were directed to prepare findings and judgment. They did so and served those papers on the attorneys for the plaintiff. The attorneys for the plaintiff proposed amendments to the findings and a hearing was had thereon, and after such hearing the court took the matter of the amendments to said findings under advisement.

On April 8, 1925, the findings were signed and the judgment was entered. Among other things said judgment decreed: "That the defendant Charles H. Coffey is entitled to receive and that he does receive of and from the clerk of this court who is hereby directed to pay said sum over to him upon the entry of this judgment the sum of \$5,000 which said sum was deposited with the said clerk of this court on January 28, 1925, by the defendant Title Insurance and Trust Company. * * *" On the morning of April 9, 1925, the attorneys for the defendant obtained a withdrawal of the deposit. A little later on the same day the attorneys for the plaintiff called on the trial judge and applied for a

stay. The judge stated that he was willing to grant the stay, but that he believed it was too late and advised the plaintiff's attorneys to examine the record and see if the \$5,000 on deposit had not already been withdrawn. On making that examination the plaintiff's attorneys learned that the deposit had been withdrawn. On April 30, 1925, the plaintiff filed his motion to vacate and set aside the judgment and to have a judgment entered in favor of himself. On September 28, 1925, the motion was granted and a judgment was entered in favor of the plaintiff. Among other things said judgment decreed: "1. That the plaintiff have judgment against the defendant Charles H. Coffey for the sum of \$5,000; 2. That the plaintiff Alden C. Wilson is entitled to receive of and from the clerk of this court the sum of \$5,000 which said sum was deposited with the clerk of this court on January 28, 1925, by the defendant Title Insurance and Trust Company. * * *"

From that judgment the defendant took an appeal, which was affirmed. *Wilson v. Coffey*, 92 Cal. App. 343, 268 P. 408. On the 9th day of October, 1928, the plaintiff served and filed a notice of motion for an order directing the defendant and his attorneys to restore the deposit of \$5,000 together "with interest at seven per cent from the 9th day of April, 1925, * * * and to show cause why they should not be punished for contempt for failure to do so." The motion was made on the following grounds: "I. The deposit of \$5,000 was deposited in court by a stakeholder to abide the final decision of the court as to ownership of the same and could not be withdrawn until the question of ownership was finally adjudicated. II. Judgment did not become final until the disposition of the appeal and hence the defendant and his attorneys wrongfully withdrew the fund. * * *" Thereafter the motion came on for hearing and both plaintiff and defendant introduced evidence consisting of court records and affidavits. Thereafter the court made its order denying the motion. From that order the plaintiff has appealed.

The plaintiff contends that the result of the final adjudication in the case was to establish the fact that the \$5,000 deposit belonged to the plaintiff from the date of the deposit of his deed in escrow. The defendant does not seriously controvert that contention, and we pass on.

In his second point the plaintiff claims that when a court erroneously determines that a deposit belongs to one party and then corrects that error and vacates its erroneous judgment it has the power to order a return to it of the fund obtained through its erroneous order. In reply to that contention the defendant admits the soundness of the claim as a general proposition, but claims there are exceptions to the rule which we will presently note.

[1-5] The third point made by the plaintiff is that the attorneys for the defendant should have been ordered by the lower court to see that the deposit was returned. In support of that point he contends that the deposit having been made in court upon the stipulation and notice to both parties, the deposit should have been withdrawn only in the same manner. That contention is not sound. It was deposited subject to the order of the court. The judgment in the pending action was the "order" of the court. It was not irregular in form. In this same connection the plaintiff asserts that the defendant was insolvent at the time the \$5,000 was drawn out by him. That fact would seem to be immaterial in this case. If the first judgment rendered by the court had been altogether correct, we know of no reason why the court should have hesitated about making an order for the payment of the fund even though the defendant was insolvent. In this same connection the plaintiff claims fraud was practiced. The first judgment was entered April 8, 1925. No stay of execution was entered. It took effect as of that date. 34 C. J. 70 and 508. On the following day Mr. Murphy, one of the attorneys for the defendant, executed an affidavit " * * * that the sum of \$5,000 is justly due to Charles H. Coffey from the treasurer of the County of Los Angeles and demand therefor is hereby made." He presented that affidavit to the presiding judge and the presiding judge issued an order on the auditor to draw his warrant. The auditor did so, and the warrant was paid. These facts did not constitute a fraudulent transaction. The plaintiff's trouble arose by reason of his omission to have a stay of execution ordered by the trial judge. In making his affidavit we assume that Mr. Murphy was attempting to comply with Code of Civil Procedure, § 188. However, the \$5,000 was deposited under the provisions of sections 572-574 of the Code of Civil Procedure. After it had been paid to the clerk it became the duty of that officer to " * * * deposit it with the county treasurer, to be held by him subject to the order of the court." Code Civ. Proc. § 573. Thereafter when the court rendered its judgment said judgment should have been executed as provided in section 684 of the Code of Civil Procedure. That section provides: " * * * When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court." Nothing to the contrary appearing, we may assume that a certified copy of the judgment was duly served and the most that can be said is that an affidavit by Mr. Murphy was mere surplusage. In short, the record discloses no

irregularity regarding the payment of the fund.

[6-8] As to the attorneys, the record does not show that any one of them received any part of the fund. Therefore no liability rested on them personally to return any part of it. *Warren v. Order of Railway Conductors of America*, 199 Mo. App. 200, 201 S. W. 368, 375. As to the defendant, it is important to bear in mind that the issuance of a writ of restitution rests in the sound discretion of the court. *Yndart v. Den*, 125 Cal. 85, 89, 57 P. 761; *II Freeman on Judgments*, § 1171. As early as September 28, 1925, the trial court had given the plaintiff a judgment for those moneys. No stay was asked or granted. At any time after that date the plaintiff could have caused a writ of execution to issue. He did not do so apparently, but alleged in his affidavit that the defendant is insolvent. Under these circumstances we cannot say that the trial court committed an error in refusing to order a writ of restitution to issue.

We find no error in the record.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

116 Cal.App. 647

WOODFIELD v. WELLS FARGO BANK & UNION TRUST CO.

Civ. 7314.

District Court of Appeal, First District, Division 2, California.

Sept. 17, 1931.

Rehearing Denied Oct. 17, 1931. Hearing Denied by Supreme Court Nov. 16, 1931.

1. Corporations ⇨123(14).

Under agreement, pledgeholder, had authority to sell pledged stock without notice to pledgor on happening of specified contingency (Civ. Code, § 3001).

Agreement stated the market value of the stock pledged at date agreement was signed, and specified that, should the market value, together with the value of any additional stock that might be pledged, decline so that total aggregate value of stock deposited was less than specified amount, then the indebtedness should become immediately due and payable, and the pledgeholder was authorized to sell the stock at public or private sale, with or without notice.

2. Evidence ⇨5(2).

It is common knowledge that sale on stock exchange is private sale.

3. Corporations ⇨123(14).

Pledgeholder authorized to sell pledged stock on happening of specified contingency, at public or private sale, with or without previous notice, could sell on stock exchange without giving notice of sale to public.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by William H. Woodfield, Jr., against the Wells Fargo Bank & Union Trust Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe and James L. Atteridge, all of San Francisco, for respondent.

SPENCE, J.

Plaintiff sought to recover damages from defendant for the alleged conversion of certain shares of stock. At the close of plaintiff's case, defendant's motion for nonsuit was granted. From the judgment thereupon entered in favor of defendant, plaintiff appeals.

This controversy arose out of the alleged wrongful action of defendant as pledgeholder in selling certain stock of plaintiff during the memorable stock market flurry of June 11, 1928. In March of that year plaintiff arranged to borrow the sum of \$141,750 from L. T. Edwards, giving as security certain stock of the market value of \$236,000. A promissory note due one year after date and a collateral agreement were executed by plaintiff in favor of Edwards. After the parties had their documents prepared, the defendant bank, which had been named by the parties as pledgeholder in their agreement, was requested to act as such. It accepted the "escrow" and was compensated for its services. The stock was deposited with defendant, and the money was paid over by Edwards to plaintiff through the defendant bank. The collateral agreement contained the following provision: "The San Francisco market value of said stock at the date hereof is \$236,000. Should said market value, together with the value of any additional stock that may be deposited by Wm. H. Woodfield, Jr., together with any additional stock that may be issued by said corporation aforesaid as a stock dividend on account of said shares of stock aforesaid, decline so that the total aggregate value of all of said stock deposited hereunder is less than \$190,000, then said note shall become immediately due and payable thereupon, notwithstanding the due date of said note, in which event, I hereby irrevocably authorize and empower said Wells Fargo Bank & Union Trust

Company to sell said stock aforesaid * * * at public or private sale, with or without previous notice to us of such sale. * * * On June 11, 1928, the market value of said stock suddenly declined below the figure named, and defendant caused the stock to be sold upon the San Francisco Stock Exchange at the prevailing market prices. It is conceded in plaintiff's amended complaint that the contingency referred to in the collateral agreement had occurred. It is there alleged that "on the 11th day of June, 1928, the San Francisco market value of said 612 shares of the capital stock of said Bancitaly Corporation and said 435 shares of the capital stock of said Bank of America suddenly declined so that the total aggregate market value of all of said shares was at said time less than \$190,000."

[1] It is appellant's contention that the trial court erred in granting the motion for nonsuit, but in our opinion this contention cannot be sustained. It is not suggested that there was any negligence or fraud on the part of respondent in selling the stock, but, as shown by the amended complaint, appellant's allegation that respondent "converted all of said shares * * * to its own use by selling and disposing of the same" is based solely upon its allegation that the sale was made "without any notice to or demand" upon appellant. Under the agreement under which respondent agreed to act as pledgeholder, we are of the opinion that, upon the happening of the contingency which had admittedly occurred, respondent was authorized to sell the stock, and that no notice to or demand upon appellant was necessary.

Despite the diligence of counsel, our attention has not been called to any authority on all fours with the facts in the present case. Appellant cites section 3001 of the Civil Code, providing that "the pledgee must demand performance thereof from the debtor, if the debtor can be found," and relies upon *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307, holding that, where no time is expressly fixed for the payment of an obligation, the pledgee cannot sell the pledged stock without a previous demand of payment even where the pledgor has expressly waived notice of sale. That case is not in point and it is only necessary to call attention to the fact that there, as in practically all of the authorities cited, the question arose between the pledgor and the pledgee and no special agreement with a pledgeholder was involved. Here, by agreement, the parties selected respondent as a disinterested pledgeholder to act as the agent of both the pledgor and pledgee. The authority of respondent to sell the stock was thereby conferred upon it. That agreement, without requiring a demand before exercising the authority conferred, provided that, in the event of the depreciation of the stock to a value of

less than \$190,000, "we hereby irrevocably authorize and empower said Wells Fargo Bank & Union Trust Co. to sell said stock aforesaid. * * * Respondent cannot be charged with conversion for selling the stock under the authority expressly delegated to it by appellant.

[2,3] Appellant raises the further point that the sale was an "attempted public sale" and void because no notice was given to the public. This point does not appear to have been raised in the trial court. In any event, it is without merit, for there is nothing in the record to show that a public sale was attempted. On the contrary, the sale was strictly a private sale made upon the stock exchange. Respondent was authorized by the agreement to sell the stock at "private sale with or without notice. * * * It is a matter of common knowledge that a sale upon the stock exchange is a private sale being made at a place to which the general public does not have access. This is conceded by appellant where he states "the sales in this instance were made upon the stock exchange to which of course only members have access." Respondent was not required to give notice of such sale to the public.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

116 Cal.App. 643

WILLIAMS v. E. P. BOSBYSELL CO.
et al.
Civ. 8004.

District Court of Appeal, First District, Division 2, California.
Sept. 16, 1931.

1. Appeal and error ⇐907(3).

Where appeal was on judgment roll, appellate court assumed that evidence supported judgment, and that finding was statement of ultimate facts.

2. Assignments for benefit of creditors ⇐171.

Assignment held properly interpreted as releasing assignors, transferring assets, from all claims and liabilities due, not only to assignees, but all other creditors.

Assignment provided that the assignor should cause to be transferred and conveyed to the assignees, and to such other creditors as were therein mentioned as might desire to participate therein, all of the assets, excepting accounts receivable, of named corporations, and/or the capital

stock of such corporations in consideration of a full release of the personal liability of himself and all other stockholders of such corporations from the aforesaid obligations of the assignees and the participating creditors.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for declaratory relief by Paul E. Williams against E. P. Bosbyshell Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Raymond B. Wells, of Los Angeles, for appellants.

Carroll Allen, of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff commenced an action to obtain a judgment of declaratory relief. The defendants answered, and the issues were tried before the court sitting without a jury. The trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed and have brought up the judgment roll.

The controversy between the parties arose over the proper interpretation of a written instrument which was in effect an assignment for the benefit of creditors. That document purported to be between the plaintiff as party of the first part and certain creditors. It purported to be signed by the plaintiff, the defendants, and the California Hardware Company, a corporation. The name of the latter corporation is printed among the signatures "California Hardware Co., a corporation, By ———." Whether that name was written at the end of the written instrument by that corporation or was typed for the purpose of further authentication the record does not disclose. The contract on its face recites that the defendants were creditors to the extent of about \$38,000, the California Hardware Company was a creditor in the further sum of nearly \$6,800, and twenty-six other companies were creditors in the further sum of about \$8,500. Among other things, the instrument provided: "It is the purpose and intent of this agreement that first party shall cause to be transferred and conveyed to second parties and to such of the other creditors herein mentioned as may desire to participate herein, all of the assets, excepting accounts receivable, of the said corporations C. B. Williams & Sons Co. and Paul E. Williams y Cia and/or the capital stock of said corporations in consideration of a full release of the personal liability of himself and all other stockholders of said corporations from the aforesaid obligations of second parties and said participating credi-

tors." In his complaint the plaintiff alleged: "That a dispute has arisen between plaintiff and defendants regarding said contract, as follows: Plaintiff claims that said agreement shall be construed that the defendants should be and are obligated to hold him free and clear of any liability on account of any of the claims mentioned in said agreement." In their answer the defendants alleged: "* * * That the paragraph of said agreement therein referred to is ambiguous and that the true purpose and intent of the parties to said trust agreement was that plaintiff should be released and discharged only from his then existing liabilities to the creditors who participated in said agreement, including his liabilities to the defendants herein." In the introduction to the findings there is a recital that oral and documentary evidence was introduced. As a conclusion of law the trial court found: "* * * That the defendants herein and each of them be and they are required to release and discharge Paul E. Williams of all claims and liabilities on account of the indebtedness due to the following creditors of said C. B. Williams & Sons Co. and/or Paul E. Williams y Cia, said indebtedness being in the following amounts: (Here follows names of defendants and all other creditors hereinabove referred to) or that defendants pay any judgment that may be received by any of said creditors against plaintiff and/or Paul E. Williams y Cia and/or C. B. Williams & Sons Co."

[1] Finding No. 3 is as follows: "That it was the intent of all of said parties to said agreement, and said agreement so provides, that said C. B. Williams & Sons Co. and Paul E. Williams y Cia were to be released of all claims and liabilities due, not only to the defendants herein, but to all other creditors whose names are set forth in said agreement, and it was the intent of all of said parties, and is so provided in said agreement, that said Paul E. Williams and said Paul E. Williams y Cia and said C. B. Williams & Sons Co. should be released from the obligations due, not only from them to the defendants in this action, but also to all the other creditors referred to in said agreement. That it was the intent of all of said parties, and is so provided in said agreement, that the defendants should hold the plaintiff and said Paul E. Williams y Cia and said C. B. Williams & Sons Co., and each of them, free and clear of any liability due to any creditor mentioned in said agreement." The defendants assert it is a conclusion of law, and thereupon they make the further assertion that the conclusions of law and the judgment are not supported by the findings of fact. This argument fails of course by reason of the first assumption. This court is not able by an inspection of the judgment roll to state that in the trial court a large amount of oral and documentary evidence was not tendered

for the purpose of supporting said finding. *Fanning v. Green*, 156 Cal. 279, 104 P. 308. In support of the judgment we must assume that such evidence was introduced, and that said finding is a statement of the ultimate facts.

[2] The second point made by the defendants is that the trial court erred in interpreting the intent of the parties to said agreement differently from the clear and explicit language of the parties thereto defining the purpose and intent of said agreement as contained therein. This point, it will be observed, is directly contrary to the allegations contained in the answer of the defendants. In that answer they stated that the contract was ambiguous. Now they state it is clear. We will not pause to ascertain which statement, if either, is correct. Picking up the written instrument by its four corners and reading and comparing one covenant with another and considering them all together, it is obvious that the trial court did not err in its interpretation.

In support of their last point, the defendants assert that the trial court has substituted for the contract an obligation which in effect requires the other creditors to pay the full amount of the California Hardware Company's claim forthwith. Of course, there is not one word in the judgment to that effect. The payment of that claim was not specially before the court, and the court made no specific finding on that subject.

We find no error in the record. The judgment is affirmed.

We concur: **NOURSE, P. J.; SPENCE, J.**

116 Cal.App. 641

BROZEY v. ALESEN et al.

Civ. 8003.

District Court of Appeal, First District, Division 2, California.

Sept. 16, 1931.

1. Judgment $\S$ 460(6).

In action to set aside money judgment, complaint alleging meritorious defense in general terms held insufficient to present such issue.

Plaintiff brought action to set aside money judgment on ground that judgment was obtained against him by fraud and without service of summons. Complaint merely alleged in general terms that plaintiff had meritorious defense to action in which judgment was obtained.

2. Appeal and error $\S$ 931(7).

Where complaint was insufficient to present issue and trial court made no finding thereon, appellate court must presume issue was not tendered nor tried.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by A. A. Brozey against L. A. Alesen and another. Judgment for the plaintiff, and the defendants appeal.

Reversed, with directions.

Collamer A. Bridge, of Los Angeles, for appellants.

Constantine M. Mooslin, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued in equity to set aside a money judgment obtained by defendants herein against plaintiff and others in the municipal court. Plaintiff had judgment, and the defendants appeal upon the judgment roll.

For the purposes of this opinion it is sufficient to say that plaintiff bases his action on the allegations that the judgment was obtained against him by fraud and without service of summons upon him. The trial court found that summons was not served and that plaintiff had no notice of the proceeding until after the judgment had been entered. The complaint herein alleged in general terms that plaintiff had a meritorious defense to the action in the municipal court. On this issue the trial court made no finding.

[1] The allegation was wholly insufficient to present the issue. 15 Cal. Jur. p. 38. The need of tendering the issue and the substance of the pleading required are both clearly stated in *Lee v. Colquhoun*, 174 Cal. 16, 17, 164 P. 894, where the Supreme Court say: "In an action to set aside a judgment for these grounds, the plaintiff must show: 'That he has a defense to the original action upon the merits, and that he is able to present to the court the evidence constituting that defense. It is not sufficient to merely allege these matters as ultimate facts, or to aver them in the form of an affidavit of merits, but the facts themselves * * * must be incorporated into his complaint, so that the court may determine that if his allegations are admitted by the other party, the plaintiff would have been entitled to a judgment in his favor in the original action.' *Whitney v. Kelley*, 94 Cal. 146, 153, 28 Am. St. Rep. 106, 15 L. R. A. 813, 29 P. 624. This rule is so well established that we content ourselves with referring to *Bell v. Thompson*, 147 Cal. 689, 82 P. 327, and to the very recent case of *Matson v. John Batto & Sons*, 173 Cal. 800, 161 P. 1144, where many of the earlier decisions are cited."

[2] Respondent urges that, because the appeal is on the judgment roll, we must presume that adequate proof of the issue was made. We might do so if the trial court had made a finding. But, in the absence of a proper pleading, and, in the absence of a finding as well, we must presume that the issue was not tendered and was not tried.

The judgment is reversed, with directions to grant the respondent leave to amend his complaint if so desired.

We concur: STURTEVANT, J.; SPENCE, J.

116 Cal.App. 654

**PAEZ v. MUTUAL INDEMNITY ACCIDENT,
HEALTH & LIFE INS. CO. OF CALI-
FORNIA.**
Civ. 900.

District Court of Appeal, Fourth District, Cali-
fornia.

Sept. 17, 1931.

1. Insurance $\S$ 136(2).

Time of delivery of policy depends solely on intention of parties (Civ. Code, $\S\S$ 1059, 1627).

2. Insurance $\S$ 665(2).

Finding that life policy was constructively delivered on day following policy dating *held* justified, where application provided that liability should start on that day (Civ. Code, $\S\S$ 1059, 1627).

3. Insurance $\S$ 392(1).

Insurer could not keep part payment of premium and at same time deny liability on policy.

4. Insurance $\S$ 559(2).

Insurer's unequivocal denial of liability amounted to waiver of provision requiring proof of death (Civ. Code, $\S$ 1440).

5. Insurance $\S$ 558(1).

Any conduct by insurer which tends to create belief in insured's mind that notice of proof of loss will be unnecessary operates as waiver.

6. Insurance $\S$ 623(4).

Provision of life policy requiring delay of 60 days after filing proof of loss before bringing suit *held* inoperative, where insurance company made outright denial of liability (Civ. Code, $\S\S$ 1440, 3532).

7. Customs and usages $\S$ 12(1).

Evidence as to existence of custom is immaterial, where contract is not made with reference thereto (Code Civ. Proc. $\S$ 1870, subd. 12).

8. Customs and usages $\S$ 17.

Evidence of usage is never admissible except as instrument of interpretation, and is not available to change fixed legal rights (Code Civ. Proc. $\S$ 1870, subd. 12).

9. Insurance $\S$ 153.

In action on policy claimed to have been constructively delivered, evidence concerning custom of insurer as to delivery of policies transmitted to agents *held* properly excluded, where there was no showing that insured contracted with this custom in mind (Code Civ. Proc. $\S$ 1853, and $\S$ 1870, subd. 12).

10. Evidence $\S$ 123(7), 244(13).

Statements made by insured to agent after issuance of life policy *held* inadmissible because not part of *res gestae* and not binding on beneficiary (Code Civ. Proc. $\S$ 1870, subd. 4).

Appeal from Superior Court, San Diego County; Eugene Daney, Jr., Judge.

Action by Maria Paez against the Mutual Indemnity, Accident, Health & Life Insurance Company of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Byron J. Walters, of Los Angeles, and Walters & Cloud, of San Diego, for appellant.

Edward J. Kelly, of San Diego, for respondent.

ALLEN, Justice pro tem.

The defendant appeals from a judgment on one of its policies. On June 12, 1926, one Joseph R. Paez applied for a policy of health and accident insurance of the defendant company. At the time the application was made he paid to the agent of the company \$3, to be applied on the first premium, and on his death held a receipt issued by the agent therefor. On July 4, 1926, the said Joseph R. Paez was killed, the policy never having been actually delivered into the possession of the insured. The plaintiff was the beneficiary under said policy. The defendant denies liability in that no policy was ever written on the life of Joseph R. Paez; denies the payment of the sum of \$3 on account of any premium; denies that proof of the death of the insured was ever furnished; admits that on the 12th day of June, 1926, Joseph R. Paez made application to defendant for insurance against loss of life resulting from accidental bodily injury; that the premium on said policy should be \$23 for a period of 13 weeks, with renewal

privileges; that Paez, on account of said premium of \$23, paid to the agent of defendant company the sum of \$3; that the policy so issued upon the application aforesaid, was canceled prior to the death of the insured.

It assigned as error that the action was prematurely brought, in that no proof of loss had been furnished defendant as provided in the policy; that the court erred in holding that the defendant insured the life of Joseph R. Paez, for the reason that the policy was never delivered; that the premium was never paid; that the court erred in refusing to admit certain testimony; and that certain findings of fact are not supported by the evidence.

We first take up the question of the delivery of the policy and the payment of the premium, as the determination of this will enlighten us on the other objections. The home office of the appellant was in Los Angeles and its agent was soliciting business in San Diego. On June 12, 1926, the agent solicited the deceased, who made formal application for one of its policies and paid thereon the sum of \$3, procuring from the agent an official receipt, which receipt is in the following language:

20.00

"Amount Due ~~\$18.00~~ Official Receipt

"For 13 months weeks Ins. City San Diego State Calif.

"Date June 12, 1926.

"Received of J. A. Paez \$3.00 Dollars in Full payment for Initial premium, on part renewal

"Policy

"Form

"No. Paid up Policy issued by ——— the Mutual Indemnity Accident, Health & Life Insurance Company of California

"Home Office: 405 South Hill Street Los Angeles, California

"Liability of Company starts noon, 12 o'clock Pacific Standard Time, on day following Policy dating.

"If Policy not received in 30 days Insured must notify Home office.

"All Monies Returned if application is declined.

"F. H. Decker, Agent.

"All policies issued by the Company approved by the Department of Insurance of California."

The application, attached to the policy, named respondent, his mother, as beneficiary. This application was forwarded to the home office of appellant, which on June 15 issued its policy insuring the said Joseph R. Paez for the term beginning 12 o'clock noon, Pacific Standard time, June 15, 1926, to 12 o'clock noon, Pacific Standard time, September 15, 1926, and with a provision for its renewal at the end of such period, upon the payment of a renewal premium of \$13 for a second three-month

term. The policy was mailed to appellant's agent for delivery.

Respondent argues that the policy by its terms was in effect at the time of the death of the insured and that no actual delivery was necessary. The agent of appellant who solicited the application testified that his duties consisted of soliciting and taking applications for insurance and collecting premiums for the policies; that he had solicited and obtained the application of insured and forwarded the same to the Los Angeles office; that he received the policy issued by appellant on such application around June 17; that he had the policy in his possession at the time of the death of the insured; that, on the 5th day of July, after he had learned of the demise of the insured, and after communicating with appellant, on orders from the appellant's home office, he returned the policy for cancellation; that he had made three attempts prior thereto to deliver the policy to the insured, at which times he demanded payment of the balance of the premium and that such payments were not made. Under this statement, was there a delivery of the policy? Section 1059, Civil Code, provides though a grant be not actually delivered into the possession of the grantee, it is to be deemed constructively delivered in two cases:

"1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

"2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed."

[1, 2] Section 1627, Civil Code, under the head of contracts, provides that the provisions of the chapter on transfers in general, concerning the delivery of grants, absolute and conditional, apply to all written contracts. In the case of Carr v. Howell, 154 Cal. 372, 380, 97 P. 885, 889, it is held that "while this section relates by its terms to a grant, we think the principles therein laid down are equally applicable to any contract." See, also, Harrigan v. Home Life Ins. Co., 128 Cal. 531, 546, 58 P. 180, 61 P. 99. It is a matter, therefore, solely of the intention of the parties. If it was intended that the document should be in force before it was actually handed over, it will be deemed to have been constructively delivered. Of course, the agent could not complete the contract of insurance, but he could contract subject to the approval of the company, whose ratification would make the contract binding as made. The receipt executed by the agent for defendant states: "Liability of Company starts noon, 12 o'clock Pacific Standard Time, on the day following policy dating." This clearly determines that the appellant intended to become liable from the hour stated in the policy. Suppose the in-

sured had been killed on the afternoon of June 16, the day after the execution of the contract of insurance and before any attempt to make delivery thereof, could it be contended that the appellant was not liable? We think not. Then if such be the rule, much less it behooves appellant to wait until after the accident, and when its agent has knowledge of its loss under said policy to return the same to the company. From a reading of the policy it must be held it was the intention that it should be in force at the time stated in the receipt, and therefore it must be deemed to have been delivered as provided in the sections of the Civil Code heretofore referred to. The trial court found upon the evidence against the contention of appellant that said policy was constructively delivered, and there being sufficient evidence therefore, such finding will not be disturbed on appeal.

[3] The receipt admitted in evidence stated that the sum of \$20 is due, and acknowledges payment of \$3. This was a sufficient consideration for the issuance of the policy. At any rate, appellant so considered it and the policy was issued. No repayment or offer of repayment was ever made, so far as the record discloses. The appellant cannot be allowed to keep the consideration or any part thereof and deny liability. Under some circumstances by restoring the payment theretofore made, the appellant might have rescinded the contract. Nothing of this sort was done.

[4-6] It is next complained that this action was prematurely brought for the reason that the policy in question contained a clause: "No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after proof of loss has been filed in accordance with this policy, nor shall such action be brought at all unless brought within two years from the expiration of time within which proof of loss is required by this policy." On July 8, 1926, respondent's attorney wrote appellant, stating that J. A. Paez came to his death on July 4; that deceased had applied for insurance in appellant company and paid \$3 on account of premium, for which he held a receipt and asking the attitude of the appellant as to payment and for a copy of the application made by the deceased. In answer to this letter the appellant on July 9 wrote respondent's attorney stating that the premium was not paid by applicant and the policy was not delivered; that it was returned for cancellation under its rules and that the policy was not in force and "we have no liability." The unequivocal denial of liability on the contract relieved respondent from furnishing further proof and amounted to a waiver of the provisions requiring proof of loss to be furnished by the beneficiary under the terms of the policy. Should we hold otherwise, appellant would be put in the position of saying: "We have no contract with respondent but respondent cannot maintain suit until some clause of the contract which we maintain does

not obligate us, is complied with." This seems rather absurd. Any conduct on the part of the insurer, which tends to create a belief in the mind of the insured under the policy that notice of proof of loss will be unnecessary, operates as a waiver of the provision requiring such notice of proof. Section 1440, Civ. Code; *Wilkinson v. Standard Acc. Ins. Co.*, 180 Cal. 252, 180 P. 607; *Millard v. Legion of Honor*, 81 Cal. 340, 349, 22 P. 864. The insurance company waived the provision of the policy requiring proof of loss to be furnished by denying its liability. *Francis v. Iowa Nat. Fire Ins. Co.* (Cal. App.) 297 P. 122. In *Lee v. U. S. Fire Ins. Co.*, 55 Cal. App. 391, 396, 203 P. 774, 776, it is said: "The denial of such liability prior to the expiration of the time to make proof of loss is a waiver of the condition of the policy requiring such proof. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 263, 23 P. 869, 17 Am. St. Rep. 233; *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 S. Ct. 247, 48 L. Ed. 385." Likewise, where a denial of any liability under such policy is asserted by the insurer, it pertains equally to all parts thereof. Since the denial of liability operated as a waiver of the condition requiring proof of loss, the further requirement that no action should be brought to recover on the policy prior to the expiration of 60 days after proof of loss has been filed loses its efficacy. The obvious purpose of the provision inhibiting the institution of an action within the 60-day period is to permit the company to make an investigation of the circumstances surrounding the loss, but if the company makes an outright denial of liability there can be no excuse for delay in commencing an action for the purpose of determining whether the company's claim of nonliability is well taken. It would be an idle act to insist upon compliance with the requirement for delay in bringing an action which the law "neither does nor requires." Civ. Code, § 3532; *Farnum v. Phoenix Insurance Co.*, supra.

[7-9] The last point raised by the appellant is that the trial court erred in refusing to admit certain evidence and that certain findings of fact were not supported by the evidence. Appellant offered evidence as to the custom of the delivery of its policies transmitted to its agent for delivery, which, on objection of respondent, the court excluded. Proof of custom is not admissible to oppose or alter a rule of law or to change the legal rights or liabilities of parties as fixed by law. So also where a contract was not made with reference to custom, evidence as to the existence thereof is immaterial. Subdivision 12 of section 1870, Code of Civil Procedure, provides that evidence may be given of usage to explain the true character of an act, contract or instrument when such true character is not otherwise explained, but usage is never admissible except as an instrument of interpretation. *Withers v. Moore*, 140 Cal. 591, 597, 74 P. 159. Usage should not be regarded at all unless it

be of such a character as may be supposed to influence the parties to the contract. The evidence offered went to the custom between appellant and its agent. It was not shown, nor did appellant pretend, that the insured knew or dealt with appellant with this usage in mind. The primary purpose in the admission of such evidence is to ascertain the intention of the parties to the contract, and without some showing that the insured contracted with this custom in mind, such evidence was not admissible. There was nothing in this contract that required explanation. Section 1853, Code of Civil Procedure, does not apply in the instant case, as there was no testimony tending to show insured had any knowledge of the customs sought to be proven.

[10] Appellant offered, over objection of respondent, certain evidence proving that the deceased had made certain statements to the agent of the appellant. Respondent's objection to its admission was sustained and the offered evidence excluded. It is contended that the court erred in so doing. The testimony offered does not come within the exceptions provided for in subdivision 4 of section 1870, Code of Civil Procedure. In support of its contention in this regard appellant relies on *Yore v. Booth*, 110 Cal. 238, 42 P. 808, 52 Am. St. Rep. 81. This was an action on a policy of life insurance issued to one Peter Yore. Certain declarations of the decedent, relative to the date of his birth, were offered in evidence for the purpose of proving that he had misstated his age in his application for the policy. The trial court excluded the evidence and its ruling was sustained, the Supreme Court holding that the decedent's prior declarations were not a part of the *res gestæ* and not admissible. In the instant case any statement made by the deceased after the issuance of the policy was not a part of the *res gestæ* and not binding on the plaintiffs herein and therefore not admissible.

Finding no error in the record, the judgment of the trial court is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

116 Cal.App. 591

WALTER H. SULLIVAN, Inc., v. JOHNSON.
Civ. 7913.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1931.

Rehearing Denied Oct. 15, 1931. Hearing
Denied by Supreme Court Nov. 12, 1931.

1. Landlord and tenant ⇨184(2).

Substance of lease determines whether money given lessor by lessee is deposit securing performance.

2. Landlord and tenant ⇨184(2).

Lease *held* to show that money given lessor by lessee was deposit securing performance.

Lease provided for annual interest on the money to be paid by the lessor to the lessee, showing that the parties did not treat it as an absolute payment in consideration of the execution of the lease, and further provided for the crediting of the money upon the rent due for the last five months of the lease in the event that the lessee had performed under the lease, showing that the money was not treated as an absolute payment of rent.

3. Landlord and tenant ⇨184(2).

Lessee wrongfully evicted *held* entitled to return of deposit securing performance.

4. Landlord and tenant ⇨184(2).

Lessee wrongfully evicted could recover deposit securing performance from original lessor, absent novation, regardless of rights against lessor's successive grantees.

5. Landlord and tenant ⇨184(2).

Lessor's grantee, accepting lessee's deposit securing performance, of lease as credit on purchase price, and selling with same credit *held* not volunteer in defending lessee's action against original lessor for deposit, and could recover from his grantee for money expended in defense and in settling judgment (Civ. Code, §§ 1589, 3521).

Recovery could be had, since, when lessor's grantee accepted the benefits of the deposit as a credit on the purchase price, then, as between himself and his grantor, he must be held to have assumed the obligation of the grantor with respect thereto, and similarly as between himself and his grantee the latter assumed the obligation when he likewise accepted the benefit of the deposit as a credit upon the purchase price.

6. Landlord and tenant ⇨184(2).

Lessor's successors in interest, accepting lessee's deposit securing performance of lease, as credit on purchase price, were liable to respective grantors, if grantors were called upon to reimburse lessee after wrongful eviction (Civ. Code, §§ 1589, 3521).

7. Contracts ⇨4.

Purchaser accepting reduction from purchase price for amount of seller's obligation impliedly agrees to assume obligation.

8. Landlord and tenant ⇨184(2).

Although purchaser accepting lessee's deposit securing performance of lease as credit upon purchase price parted with title, he was

liable to grantor who defended and settled action for return of deposit; statute not applying (Civ. Code, § 1466).

9. Appeal and error ⇨1175(6).

When facts entitling appellant to judgment were admitted, retrial was unnecessary.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Walter H. Sullivan, Inc., against Axel A. Johnson. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (G. H. Elmore, of San Francisco, of counsel), for appellant.

Bianchi & Hyman and C. G. Morse, all of San Francisco, for respondent.

SPENCE, J.

Plaintiff sought reimbursement from defendant in the sum of \$2,155.70 for money paid out in settlement of a judgment and for necessary expenses incurred in the defense of an action brought by the lessee of certain premises after a wrongful eviction. From a judgment in favor of defendant, plaintiff appeals.

The facts are not disputed, and even as presented in the trial court the controversy involved solely an issue of law. The lessor, Wright, a predecessor in interest of both plaintiff and defendant, leased the premises to the lessee, Warren, in 1925 for a term of five years. At the time of the execution of the lease, Warren delivered to Wright the sum of \$2,500. With respect to this sum, the lease provided: "That the Lessor, in consideration of the sum of two thousand five hundred dollars (\$2,500), * * * paid to the Lessor by the Lessee, * * * and in further consideration of the rent to be paid and the covenants and agreement to be performed by the Lessee, * * * does by these presents lease unto the Lessee. * * *" The lease further provided that, "if, at all times during the said term; the Lessee shall perform * * * the Lessor will pay the Lessee interest at the rate of six (6) per cent per annum upon the said sum of two thousand five hundred (\$2,500) * * * which said interest shall be payable annually * * * and the Lessor will credit the Lessee with the said sum * * * upon the five (5) instalments of rent of the said premises last maturing, * * * at the rate of five hundred dollars (\$500) upon each of the said instalments of rent."

Thereafter Wright conveyed the premises to plaintiff, who then conveyed the premises to defendant. Subsequently the property chang-

ed hands upon several occasions during 1926 and 1927. At the time of each transfer of title the \$2,500 delivered by Warren to Wright was credited by the grantor upon the purchase price paid by the grantee. In August, 1927, the then owner of the premises wrongfully terminated the lease and evicted Warren from the premises. After his wrongful eviction Warren brought an action against his original lessor, Wright, to recover the \$2,500. Wright called upon plaintiff, as her grantee to whom she had paid said sum, to assume the defense of the action and hold her harmless. Plaintiff similarly called upon defendant to whom it had paid the money. Upon defendant's failure to defend the action against Wright, plaintiff assumed the defense. In that action the lessee Warren recovered judgment. Plaintiff negotiated a settlement, and in December, 1929, paid to Warren the sum of \$1,750 in satisfaction of the judgment. Thereafter on the 19th day of December, 1929, plaintiff made demand on defendant for said \$1,750 together with the sum of \$405.70 necessarily expended as counsel fees and costs in the defense of said action. Upon defendant's refusal to pay said sums, plaintiff commenced the present action.

[1, 2] Under the foregoing admitted facts it is appellant's contention that it was entitled to recover from respondent, and in our opinion this contention must be sustained. Preliminarily we may state that much is said in the briefs concerning whether the \$2,500 was paid by Warren to Wright as consideration for the execution of the lease or as advance payment of rent or as a deposit given to secure performance by the lessee. Examining the various provisions of the lease, we find that the parties did not treat it as an absolute payment in consideration for the execution of the lease as the lease provided for annual interest on said sum to be paid by the lessor to the lessee and further provided for the crediting of said sum upon the rent due for the last five months of the lease. It further appears that it was not treated as absolute payment of rent, but the lease merely provided that it would be credited upon the rent for the last five months in the event that the lessee had performed under the lease. It is not the form but the substance which is important in determining the nature of such payment or deposit, and in our opinion, under the provisions of the lease above quoted, the money delivered to the lessor was clearly a deposit given as security for performance by the lessee. *Redmon v. Graham* (Cal. Sup.) 295 P. 1031; *Stern v. Green*, 127 Wash. 429, 221 P. 601; *Moumal v. Parkhurst*, 89 Or. 248, 173 P. 669; *Cain v. Brown*, 105 Ohio St. 264, 136 N. E. 916; *In re Frey* (D. C.) 26 F.(2d) 472.

[3-9] Upon the wrongful termination of the lease and eviction of Warren, he was entitled

to the return of the deposit. *Blessing v. Fetters*, 40 Cal. App. 471, 181 P. 108. We are not called upon to determine whether Warren could recover from each and all of the successive grantees of the premises, but it is clear that he was entitled to recover from Wright, for in the absence of a novation the original lessor remained liable under the lease. 36 C. J. 298, § 1075. That was the course pursued by Warren in the instant case. Respondent contends that there was no obligation upon appellant's part to reimburse Wright and that appellant therefore acted as a volunteer in assuming the defense of the action of Warren v. Wright and in settling the judgment. This contention cannot be sustained. When appellant accepted the benefit of the \$2,500 as a credit on the purchase price paid to Wright, then, as between the parties, appellant must be held to have assumed the obligation of Wright with respect thereto. Civ. Code, §§ 1589 and 3521. Similarly as between appellant and respondent, the latter assumed that obligation when he likewise accepted the benefit of the \$2,500 as a credit upon the purchase price paid to appellant. It was not necessary that the agreement to assume the obligation be express, for, where a purchaser accepts as a reduction from the purchase price the amount of an obligation of the seller, an agreement on the part of the purchaser to assume the obligation is implied. *Kaufman v. Williams*, 92 N. J. Law, 182, 104 A. 202; *Schmidig v. O'Baggy*, 137 A. 560, 5 N. J. Misc. R. 554; *Friedman v. Zuckerman*, 104 N. J. Eq. 322, 145 A. 541; *Siekman v. Moler*, 47 Idaho, 446, 276 P. 309; *Hopkins v. Warner*, 109 Cal. 133, 41 P. 868; *Epperson v. Cappellino* (Cal. App.) 298 P. 533; 36 C. J. 298, § 1075. The situation here is analogous to that in which a grantee withholds from the purchase price paid to his grantor the amount of the mortgage indebtedness on the premises. In such cases, in the event that the grantor becomes liable for a deficiency judgment, he is entitled to reimbursement from his grantee. *Robson v. O'Toole*, 45 Cal. App. 63, 187 P. 110; *Graham v. Durnbaugh*, 44 Cal. App. 482, 186 P. 798. It is held that as between the parties, the relation of principal and surety is created by the transaction, and, if the grantor as such surety is required to satisfy the obligation, the grantee as principal is bound to reimburse him. Civ. Code, § 2847. In the present case we are of the opinion that the transactions between the parties involving a credit given by each grantor to his grantee rendered each grantee liable to his grantor in the event that his grantor was called upon to meet the obligation. Apparently the trial court adopted respondent's view that, as respondent had parted with title to the premises, he was no longer liable under the provisions of section 1466 of the Civil Code. In our opinion that section has no application

to the facts in the present case. 36 C. J. 298, § 1075; *Kaufman v. Williams*, supra.

As all of the facts necessary to entitle appellant to judgment are admitted, a retrial of the cause would serve no useful purpose. The judgment is therefore reversed, with direction to the trial court to enter judgment in favor of plaintiff for the sum of \$2,155.70, together with interest on said sum from December 19, 1929.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

116 Cal.App. 577
EASTON v. GELLER et al.
 Civ. 7997.

District Court of Appeal, First District, Division 2, California.
 Sept. 14, 1931.

1. Limitation of actions $\S$ 102(8).

Statute commences to run against action to enforce constructive trust with inception of trust, that is, unlawful transfer by trustee, or succession upon trustee's death (Code Civ. Proc. § 343).

2. Limitation of actions $\S$ 192(3).

An action to establish constructive trust, general allegation of ignorance at one time and knowledge at another did not serve to toll statute (Code Civ. Proc. § 343).

This was particularly so since the facts alleged raised the presumption that with reasonable diligence plaintiff might have ascertained the matters of which he complained.

3. Pleading $\S$ 236(1).

Granting leave to amend is largely within trial court's discretion.

4. Pleading $\S$ 236(1).

Where facts appearing upon motion for leave to amend showed that plaintiff could not amend to state good cause of action, refusing leave held not abuse of trial court's discretion.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by E. E. Easton against W. A. Geller and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Charles Mitschrlich, of Los Angeles, for appellant.

Joseph L. Lewinson, O'Melveny, Tuller & Myers, and Pierce Works, all of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiff sued to establish a trust and for an accounting. Demurrers to his amended complaint were sustained without leave to amend. Plaintiff then moved for leave to amend and tendered a proposed amendment. Leave was denied and judgment for defendants was entered. Plaintiff has appealed on a bill of exceptions.

The complaint alleged that on November 20, 1917, plaintiff, as legal owner, transferred to one O. F. Brant 997 shares of a total 1,000 shares of a Mexican corporation which held the legal title to 15,000 acres of land in Mexico worth \$75 an acre, and which was incumbered for \$370,000; that the mortgage was subject to foreclosure; that Brant agreed to manage the land, to rent it, and to sell the same for \$75 an acre, pay the indebtedness, interest, and advances made by him, and to pay over to plaintiff the balance; that in January, 1918, Brant sold 8,000 acres of the land and in October, 1921, sold the remaining 7,000 acres, paid off the mortgage and interest, and realized out of both sales and the rentals \$538,460, which defendants received at times unknown to plaintiff. That each of the defendants had full knowledge of the alleged trust and received the proceeds thereof without giving any consideration therefor. That O. F. Brant died March 14, 1922, and defendant Title Insurance & Trust Company is the executor of his estate. That the said sum of \$538,460 is in the possession of said title company, as executor of the estate of O. F. Brant, and also in the possession of said title company and of the defendants named as heirs of said estate.

This action was commenced on June 18, 1927.

[1] Respondents defend the order sustaining the demurrer to the original complaint solely on the ground that the action is barred by section 343, Code of Civil Procedure. In this position we cannot but agree. The complaint alleges an express voluntary trust between plaintiff and deceased and an implied constructive trust on the part of the respondents. It fails to allege when or how the respondents came into possession—whether by deed in the lifetime of decedent or by will or descent at his death. In either case title must have passed more than four years before suit was brought. In the case of a constructive trust, such as we have here, the statute commences to run with the inception of the trust—i. e., the unlawful transfer by the trustee, or the succession upon the death of the trustee as the case may be. Norton v. Bassett, 154 Cal. 411, 416, 97 P. 894, 129 Am. St. Rep. 162, citing Hecht v. Slaney, 72 Cal. 363, 366,

14 P. 88, Nougues v. Newlands, 118 Cal. 102, 106, 50 P. 386, Broder v. Conklin, 121 Cal. 282, 53 P. 699, and Barker v. Hurley, 132 Cal. 21, 63 P. 1071, 64 P. 480. To the same effect is Lezinsky v. Mason Malt. W. D. Co., 185 Cal. 240, 250, 196 P. 884, and 17 R. C. L. pp. 711, 794.

The demurrer was confessed as to the executor of the Brant estate. This left the complaint alleging a constructive trust as to the title company and the heirs. As to both groups of defendants the action is barred upon the authorities cited.

[2] In an attempt to toll the running of the statute appellant proposed an amendment in which he alleged that the first information or knowledge that he had that O. F. Brant conveyed said trust property in his lifetime, or that, after his death, the title company transferred to the other respondents was on December 31, 1924, and that up to that time he had believed that the property was regarded as a part of Brant's estate and as such devised to respondent Susan Brant. He does not allege that such information was withheld from him through fraud or concealment, and does not give any reason why he did not obtain such information at an earlier date. It is the settled rule that a general allegation of ignorance at one time and of knowledge at another is of no effect. Phelps v. Grady, 168 Cal. 73, 78, 141 P. 926; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807. This rule is particularly applicable to a case such as this, where from all the facts alleged the court must presume that with reasonable diligence the plaintiff might have ascertained the matters of which he now complains.

[3,4] However, the granting of leave to amend is addressed largely to the discretion of the trial court. Here, in opposition to the motion, respondents filed an affidavit showing that appellant knew of Brant's death on the day following the occurrence; that he presented a claim against the estate covering the same matters here in suit, which claim was rejected; that he thereafter sued the widow and others upon these same matters; that this suit was transferred to the federal court, where it was heard on the merits and the judgment against the appellant was entered; that, in the federal court proceeding, this appellant testified that he had full knowledge of these transactions soon after the death of Brant; and that the judgment was affirmed by the Circuit Court of Appeals on May 31, 1927, less than three weeks before this suit was begun. Easton v. Brant, 19 F.(2d) 857.

With these facts before the trial court, the good faith of appellant's proposal was put to the test on the motion for leave to amend. The demurrer was sustained to an amended complaint which was filed more than a year after the original complaint was filed. The defects in the amended complaint were

brought to the appellant's attention during the argument on the demurrer and he then asked leave to amend if the demurrer should be sustained. His proposed amendment fell far short of correcting these defects, while the showing on the motion demonstrated that he could not amend to state a good cause of action. The case is alike to *Norton v. Bassett*, 158 Cal. 425, 427, 111 P. 253, 254, where the Supreme Court say: "Speaking generally, it may be said that the test as to whether or not the court has abused its discretion will depend upon whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded."

We find no error in the record.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

213 Cal. 671

JAKOBSEN v. PERATIS.

L. A. 11267.

Supreme Court of California.

Sept. 23, 1931.

1. Municipal corporations ⇨581.

Notice to redeem from sale for delinquent assessments under street improvement act held invalid because understating amount due (Deering's Gen. Laws 1923, Act 8199, § 74).

2. Municipal corporations ⇨581.

Owner may redeem property from sale for delinquent assessments under street improvement act until notice to redeem strictly complying with statute is given (Deering's Gen. Laws 1923, Act 8199, § 74).

3. Appeal and error ⇨181.

Objections first raised on appeal, but appearing from uncontradicted facts, could be considered, since argument on law need not be first made in trial court.

In Bank.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Cora Jakobsen against Spiro Peratis. Judgment for plaintiff, and defendant appeals.

Reversed.

Nimmo, Leighton, Heath & Hall, William H. Hitchcock, Michael F. Shannon, Thomas A. Wood, and George Penney, all of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles, for respondent.

PER CURIAM.

This is an action to quiet title, brought by plaintiff, holder of a tax deed dated July 11, 1927, executed by N. T. Powell, city treasurer of Los Angeles, against defendant, the former owner of the property. The proceedings leading up to the execution of the deed were taken under the Street Improvement Act of 1911 (Deering's Gen. Laws 1923, and Supplements, Act 8199). The trial court gave judgment in favor of plaintiff.

[1, 2] Defendant contends that the deed was void for lack of compliance with certain provisions of the statute, and we see no escape from this conclusion. The principal defect is in the notice to redeem, required by section 74 of the act (Deering's Gen. Laws 1923, Act 8199). It is not disputed by plaintiff that the amount there specified to be due was incorrect, being \$.51 less than the amount actually due. Such an error is sufficient to invalidate the notice, and the owner may re-

deem at any time before notice is given in strict accordance with the statute. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Landregan v. Peppin, 86 Cal. 122, 24 P. 859; Reed v. Lyon, 96 Cal. 501, 31 P. 619; Colkins v. Doolittle, 45 Cal. App. 776, 188 P. 601. It also appears that the time specified for redemption was incorrect, and that the land was not properly described.

[3] Plaintiff makes no answer to these objections save to state that they were raised for the first time on appeal. But they appear from the uncontradicted facts, and there is no necessity that an argument on the law be first made in the trial court. Moreover, the points were all presented in defendant's motion for a new trial.

The judgment is reversed.

213 Cal. 675

LA FRANCHI et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14313.

Supreme Court of California.

Sept. 24, 1931.

As Modified on Denial of Rehearing Oct. 22, 1931.

1. Master and servant ⇨348.

Workmen's Compensation Act is to be given application liberal to workman (St. 1917, p. 831, as amended).

2. Master and servant ⇨405(2).

Evidence sustained Industrial Commission's award of compensation to workman engaged for agreed sum to gather brush in orchard on finding that workman was "employee" rather than "independent contractor" (St. 1917, p. 831, as amended).

Evidence disclosed that workman was employed by owner of a ranch to pick up brush in an orchard for \$30, owner stating that he would see that workman at least made wages out of job, that, if the work had not progressed satisfactorily, the owner could have discharged the workman, that all equipment for doing the work, including a horse and burner, was furnished by the owner, that the workman was more or less free to determine when he would do the work, so long as it was completed within a period of two months, and was apparently free to engage assistants, although owner exercised some control over work.

[Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Act by Ben Simons, alleged employee, opposed by Earl La Franchi, employer, and the Employers' Liability Assurance Corporation, Limited, insurer. To review an award of the Industrial Accident Commission in favor of alleged employee, the employer and insurer apply for a writ of certiorari.

Award affirmed.

Reversing judgment of District Court of Appeal in 298 P. 44.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

WASTE, C. J.

The Industrial Accident Commission petitioned for hearing in this court after annulment by the District Court of Appeal (298 P. 44) of an award of compensation. The only question involved is whether the injured person was an employee or an independent contractor at the time he incurred the injury (loss of an eye) for which the compensation was awarded.

The respondent Simons was employed by petitioner La Franchi, owner of a ranch, to pick up brush in an orchard. The agreed price was \$30; La Franchi stating, however, that he would see that Simons at least made wages out of the job. Both parties testified that, if the work had not progressed satisfactorily, La Franchi could have discharged Simons. All equipment for doing the work, including a horse and burner, was furnished by the owner. Simons, the employee, was more or less free to determine when he would do the work, so long as it was completed within a period of two months to permit of plowing, and he was apparently free to engage assistants, though the oral contract of employment was silent in this regard; but La Franchi exercised some control over the work.

[1, 2] In *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 580, 250 P. 570, this court held that whether or not the relation of employer and employee exists is a question of mixed law and fact, a finding to that effect being binding on this court; and that, only where there is an entire absence of evidence to support the commission's finding and award should it be set aside. It is apparent from the foregoing brief survey of the evidence that the record contains some testimony tending to support the employee theory. Wages may be measured by time, by the piece, or by any other standard. It is well settled that the Workmen's Compensation Act is to be given an application liberal to the workman.

The findings of the commission are approved, and the award is affirmed.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

213 Cal. 672

THOMAS v. PETERSON et al.

L. A. 11304.

Supreme Court of California.

Sept. 23, 1931.

1. Municipal corporations ⇨575.

Taxation ⇨614.

Sales of property for default in taxes or local assessments must strictly comply with statutory requirements.

2. Municipal corporations ⇨575.

Sale of realty for nonpayment of installment of street improvement bond, not complying with statutory requirements, held fatally defective (*Deering's Gen. Laws 1923, Act 8208, § 5, subs. f and j*).

Proceedings for sale of property in question failed to comply with *Vrooman Act, § 5, subs. f and j* (*Deering's Gen. Laws 1923, Act 8208*), requiring treasurer, before delivering certificate of sale, to enter date of bond in record book, and to enter on record of bond the words, "Canceled by sale of the property," and requiring also that purchaser's affidavit should show that notice to redeem was posted in conspicuous place on property.

3. Deeds ⇨193, 194(5).

Where deed is acknowledged and recorded, its genuineness and due execution and delivery are presumed (*Code Civ. Proc. § 1951*).

4. Corporations ⇨444.

Corporate seal gives prima facie validity to deed from corporation.

In Bank.

Appeal from Superior Court, Los Angeles County; Herbert S. Gans, Judge.

Action by James H. Thomas against C. W. Peterson and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

PER CURIAM.

This is an action to quiet title to certain real property in the city of Los Angeles. Defendant's claim is based upon a deed from the city treasurer of Los Angeles, executed and delivered after a sale of the property for nonpayment of an installment of a street improvement bond issued under the Vrooman Act (Deering's General Laws 1923, Act 8208). The trial court concluded that the proceedings upon which such title was founded were fatally defective, and rendered judgment quieting the title of plaintiff, the original owner.

[1,2] The rule that proceedings for the sale of property for default in taxes or local assessments must strictly comply with the statutory requirements is settled. Several defects were shown in the proceedings involved herein. The statute requires that the treasurer keep a record book open to public inspection, in which he must among other things enter the date of the bond, before delivery of the certificate of sale. Section 5, subd. f, of the act, Deering's General Laws 1923, Act 8208, p. 3435. This was not done. The absence of a date, where required by a taxing statute, has been held to be material. *Preston v. Hirsch*, 5 Cal. App. 485, 90 P. 965; *Shipman v. Forbes*, 97 Cal. 572, 32 P. 599; *Hinds v. Clark*, 173 Cal. 49, 159 P. 153. The same section of the above-mentioned statute requires the treasurer, before delivering any certificate, to enter on the record of the bond the words "cancelled by sale of the property," and this entry was omitted. It further appeared that the affidavit of posting of notice to redeem, filed by the purchaser, did not show that the notice was posted in a conspicuous place on the property, as required by section 5, subdivision j, of the act. The affidavit states only that the notice was posted "in a conspicuous place upon the property," and it has been held that such a statement is too general to meet the requirements of the statute. See *Hindle v. Warden*, 50 Cal. App. 356, 195 P. 428; *Hennessy v. Hall*, 14 Cal. App. 759, 113 P. 350.

[3,4] Defendant has shown no authority which would support the title he claims, and his only other contention is that plaintiff's title is also defective, and that the judgment quieting that title was consequently unwarranted. The objection is that in the chain of title there is a deed from a corporation, and that no showing was made of its corporate existence and payment of license taxes. The deed bore the corporate seal and was ac-

knowledgeed. When an instrument conveying real property is acknowledged, as was this deed, it may be read into evidence without further proof, and when recorded, its genuineness and due execution and delivery are presumed. Cal. Code Civ. Proc. § 1951; *Thomas v. Fursman*, 177 Cal. 550, 171 P. 301. The corporate seal also gives prima facie validity to the instrument. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Burnett v. Lyford*, 93 Cal. 117, 28 P. 855.

The judgment is affirmed.

213 Cal. 664

FLANAGAN v. CAPITAL NAT. BANK OF SACRAMENTO et al.

Sac. 4462.

Supreme Court of California.

Sept. 23, 1931.

I. Wills ⇨59.

Wife's agreement to accept certain devises and bequests in lieu of community property rights is supported by consideration and is binding.

Such agreement is binding on wife, irrespective of any element of estoppel arising from testator's change of position in reliance on representation contained in the agreement.

2. Marriage ⇨50(1).

Facts held to show claimant was not wife nor de facto wife of decedent; hence claimant was not entitled to community property rights.

Facts showed that claimant went to live with decedent and to outsiders they declared they were married; that no license was procured and no solemnization had; and that there was no reasonable basis for belief on part of claimant in existence of valid marriage, which was essential as basis for recovery as de facto wife.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Elizabeth Flanagan against the Capital National Bank of Sacramento, executor of the last will and testament of James Flanagan, deceased, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. H. Hatfield and Ray T. Coughlin, both of Sacramento, for appellant.

C. F. Metteer, of Sacramento, H. J. March, of Los Angeles, and White, Miller, Needham & Harber and Sumner Mering, all of Sacramento, for respondents.

LANGDON, J.

This action was brought by plaintiff to cancel a so-called "waiver" of community property rights in the estate of James Flanagan.

James Flanagan made his will on March 29, 1929. By its terms he left considerable real and personal property to plaintiff. The remainder of his estate he left to a brother, a sister, and a niece. At the time of its execution, plaintiff signed an instrument reciting that she was the wife of the testator, that she had read the will, and that "in consideration of the provisions made in and by said will" she elected to accept its provisions and conditions, including the disposition of the "community property," and that she waived all claim to said community property. Upon the death of the testator, the will was admitted to probate. Thereafter this action was commenced by plaintiff against the executor and the residuary beneficiaries. The trial court granted defendants' motion for a nonsuit.

[1] We think that the trial court's action is fully sustained by the record. The "waiver" was in fact a contract, by the terms of which plaintiff accepted certain devises and bequests under the will in lieu of any rights she might have in any community property. Such an agreement is clearly supported by consideration and is binding upon the plaintiff, irrespective of any element of estoppel arising from the testator's change of position in reliance upon the representation contained in the instrument. See *In re Estate of Whitney*, 171 Cal. 750, 154 P. 855; *In re Estate of Wyss* (Cal. App.) 297 P. 100.

[2] However, there is no need to rest this decision on the validity of that instrument, for the facts show that plaintiff was not the wife of the decedent and her claim of community property rights was clearly unfounded. It is admitted by plaintiff that she never was legally married to the decedent, but it is urged that she has the status of a putative or de facto wife, and is entitled as such to claim a share in the property on equitable grounds, under the rule laid down in several decisions in this state. See *Coats v. Coats*, 160 Cal. 671, 118 P. 441, 36 L. R. A. (N. S.) 844; *Schneider v. Schneider*, 183 Cal. 335,

191 P. 533, 11 A. L. R. 1386; *Macchi v. La Rocca*, 54 Cal. App. 98, 201 P. 143; *Figoni v. Figoni* (Cal. Sup.) 295 P. 339. In all of these cases, the essential basis of recovery is a bona fide belief on the part of the "wife" in the existence of a valid marriage. No such belief is shown by the evidence before us. In about the year 1911, plaintiff went to live with Flanagan, and to outsiders they declared that they were married. No license was procured and no solemnization was had. In the examination of plaintiff by her attorney we find the following:

"Q. What did he say about the license? A. He said it was not necessary; we did not have to have any license. He says, 'We will get along as good as any couple that is married and better.'"

Further on she testified:

"Q. You relied upon his representations that you and he were just as good as married? A. I did, nothing was ever discussed about it."

It would be difficult to believe that even an inexperienced foreigner, unacquainted with the laws and customs of this country, would consider that by this arrangement she had contracted a valid marriage. But plaintiff was not inexperienced. She had lived all her life in California, and had been previously legally married and divorced. Everything in the record suggests that she viewed the relationship not as a marriage, but as a satisfactory substitute for a marriage.

In practically all of the cases on this subject, the putative wife who was permitted to recover complied with some or all of the legal requisites of a marriage, and the invalidity arose from some fact of which she knew nothing, such as a prior undissolved marriage of the other spouse. Mere cohabitation has also been held sufficient in such states as recognized common-law marriages. See note, 11 A. L. R. 1394; *Evans*, Property Interests Arising from Quasi-Marital Relations, 9 *Corn. L. Q.* 246. None of these decisions offer any support to plaintiff's position.

Of course, this case does not involve a quasi-contractual claim for the value of services rendered, and, in view of the substantial provision made for plaintiff in the will, such a claim would doubtless fail.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

213 Cal. 661

McQUIGG v. CHILDS et al.
L. A. 11282.

Supreme Court of California.
Sept. 23, 1931.

1. Automobiles ⇨217(2).

Pedestrian within marked crosswalk under ordinance held entitled to assume that motorists would exercise reasonable care to avoid injury.

Ordinance in question made it unlawful for operator of vehicle to drive into any crosswalk, with certain exceptions, marked as required therein, until pedestrian upon half of roadway on which vehicle was traveling had passed beyond path of vehicle.

2. Automobiles ⇨245(76).

Contributory negligence of pedestrian hurrying across marked crosswalk to reach street car when injured by truck held for court in juryless trial.

It appeared that negligence of truck driver was undisputed, and that no horn was sounded or alarm given by driver; that pedestrian, before attempting to cross street, had seen truck about 125 feet away, and believed she could cross to street car in safety; and that, finding herself in sudden peril, pedestrian stood practically still.

3. Negligence ⇨136(9).

It is only when facts are clear and indisputable, and when no inference other than that of negligence or contributory negligence can be drawn, that issue becomes one of law, not fact.

4. Automobiles ⇨220(2).

Pedestrian hurrying across marked crosswalk to reach street car had right to assume that truck driver's observance of laws and reasonable regard for others' safety would not require pedestrian to look constantly at truck.

5. Automobiles ⇨160(3).

It was primary duty of truck driver to have seen pedestrian on marked crosswalk.

6. Trial ⇨142.

When men of average intelligence honestly differ regarding effect of evidence, fact question arises.

7. Appeal and error ⇨1008(1).

When question of fact arises, finding of triers of fact becomes conclusive on appellate tribunals.

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Agnes C. McQuigg against C. D. Childs and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellants.

John B. Haas and John D. Home, both of Los Angeles, for respondent.

SEAWELL, J.

Appeal from a judgment awarding to respondent the sum of \$2,500 clear of \$250 for incurred physicians' bills and costs of suit. The case was tried by the court, a jury having been waived. The sole question raised by the appeal is that respondent was guilty of contributory negligence and therefore judgment should have gone for appellants.

The injuries were inflicted in the city of Los Angeles at the intersection of Gower street and Hollywood boulevard. The former street extends northerly and southerly, while Hollywood boulevard extends easterly and westerly. A double-track street car system is operated on Hollywood boulevard. It is a thoroughfare of some 70 or 80 feet in width, and considerable traffic passes over it. The accident in question occurred at about 7:30 a. m., December 27, 1927.

Respondent, who was intending to board an easterly bound street car, traveled down the easterly side of Gower street to a point some 30 feet northerly of the northerly line of Hollywood boulevard, and from that point cut across Gower street to the northwesterly corner of the intersection of said streets, and from there, after making observations as to traffic, was hurrying across Hollywood boulevard to the southerly car track, where a street car had stopped to receive and discharge passengers, when said injuries were inflicted while respondent was attempting to reach the car, which had started, but stopped again upon respondent's signal. A crosswalk 12 or 14 feet in width, and corresponding in width with the sidewalks on Gower street if projected across Hollywood boulevard, is marked as provided by Ordinance No. 50,515, New Series, of the City of Los Angeles, section 9, article III, which reads as follows: "Pedestrians' right of way at intersections. (a) It shall be unlawful for the operator of any vehicle to drive into any crosswalk, outside of the central traffic district, which is marked as provided in section 11, of this ordinance, while there is in such crosswalk upon the half of the roadway upon which such vehicle is traveling any pedestrian engaged in crossing the roadway, until such pe-

destrian shall have passed beyond the path of said vehicle."

[1] The crosswalk, as marked in accordance with said ordinance, is, in the instant case, outside of a central traffic district. The evidence is easily sufficient to sustain a finding that respondent was within the zone in which she had a right to assume that reasonable care would be exercised by motorists to avoid injuring her. The negligence of the driver of the Cudahy Packing Company's truck is not disputed.

[2-7] Aside from whether respondent was warranted in relying upon the assumption that the zoned area offered at least some protection to pedestrians, we are of the opinion that the question of contributory negligence was one of fact for the trial court to determine from all the evidence in the case. It is only when the facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that the issue becomes one of law and not of fact. In the instant case the driver of the truck, notwithstanding the boulevard was unobstructed for a distance of 75 or more feet, did not see the respondent until he was practically upon her. There is evidence in the record that he was traveling as fast as 25 miles per hour or better when crossing the intersection, and that the pavement showed skid marks of from 15 to 20 feet before the respondent was struck. No horn was sounded or alarm given by the driver of the truck before the impact. The sudden peril respondent found herself in naturally filled her mind with consternation and she stood practically still when the impact occurred. Fortunately her body fell between the two front wheels of the truck and escaped being broken by its weight. She was beneath the engine when the truck was brought to a stop. Respondent testified that before she attempted to cross the street she looked to her left and saw the truck at a distance of approximately 125 feet away, and she calculated she could cross to the street car in safety. We think she had a right to assume that an observance of laws and a reasonable regard for the safety of others on the part of the driver of the truck would not require that she should keep a constant eye upon him under the circumstances of the case. He could have seen her hurrying for the car, as did others, and it was his primary duty to have done so. When an honest difference of opinion between men of average intelligence arises as to the effect of the evidence, a question of fact arises and the finding of the triers of fact becomes conclusive upon appellate tribunals. The law governing this subject is too well settled to require

citations of authorities in cases wherein a conflict of evidence exists. The instant case is within the rule.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

213 Cal. 668

MEIZLISCH v. SAN FRANCISCO WOOL SORTING & SCOURING CO. et al. (F. P. McLENNAN WOOL CO., Intervener).

S. F. 13469.

Supreme Court of California.

Sept. 23, 1931.

Attachment ⇐308(4).

In action for services, evidence *held* to support finding that intervener corporation was continuation of defendant, rendering attachment of former's funds proper.

Plaintiff brought an action against the S. corporation to recover a balance due for services rendered to it. No attachment was issued at the time of the commencement of the action. Subsequently a new corporation was organized, which, though having different offices, used same equipment and warehouse facilities, etc., and had same management. The plaintiff levied an attachment against certain funds of the new corporation which the new corporation sought to have discharged.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Meyer Meizlisch against the San Francisco Wool Sorting & Scouring Company and others, wherein the F. P. McLennan Wool Company intervened. From an order denying a motion to discharge an attachment, the intervener appeals.

Order affirmed.

Geo. Clark Sargent, of San Francisco (Aaron M. Sargent, of San Francisco, of counsel), for appellant.

Inman & West, of Sacramento, for respondent.

RICHARDS, J.

This appeal is from an order of the superior court in and for the city and county of San Francisco denying the motion of the interven-

er and appellant herein to discharge an attachment which had been issued and levied upon certain moneys on deposit in the Crocker First National Bank of San Francisco in the name of said intervener, but which was claimed by the plaintiff herein in reality belonged to the defendant in the action. Upon the hearing on said motion the trial court received evidence in the form of the affidavit of one F. P. McLennan, who had been successively the president and manager of both of these companies, and also in the form of the sworn testimony of said McLennan, in amplification of the matters treated in his said affidavit. These statements of McLennan by affidavit and as a witness constituted the only evidence presented to the trial court upon the hearing upon said motion, and basing its ruling thereon the court denied the intervener's motion, and from its order to that effect this appeal has been taken.

The only question presented upon this appeal is as to whether or not the evidence thus presented to the trial court was sufficient to justify its order denying said motion. This evidence showed substantially the following to be the facts: On September 20, 1927, the plaintiff commenced this action against the San Francisco Wool Sorting & Scouring Company to recover a balance alleged to be due him for services as a wool buyer rendered to said company. No attachment was issued at the time of the commencement of said action for the reason, apparently, that the defendant therein did not appear to have any tangible assets. At the time of the commencement of the action F. P. McLennan was, and for many years prior thereto had been, the president and manager of said defendant, which was a family corporation, all of the stock whereof had been owned by members of the McLennan family. On April 26, 1928, however, the F. P. McLennan Wool Company was incorporated, the incorporators thereof being F. P. McLennan, George C. Daley, and Marjorie F. Adams, the first two of these subscribing one share of stock each, and Marjorie F. Adams, who was the daughter of McLennan, subscribing to the remainder of the total capitalization of \$25,000. F. P. McLennan became president and manager of the new company, which opened offices in the same building, although not in the same room, as the old company, but which used the same equipment and warehouse facilities and had access to the files and list of customers of the former concern, the office personnel of the new concern being the same as that of the old. The new company when thus organized proceeded to do business with the same wool growers with whom the former concern had done business, and the eastern connections of the wool company were substantially the same as those with whom the sorting company had been doing business for a number of years. While

the two concerns did not occupy the same office space, they were in the same building and the sign of the new company contained in smaller letters the name of the former concern. Shortly after its incorporation the F. P. McLennan Wool Company had a transaction with a customer who apparently had been one of the customers of the former concern, as a result of which it received and deposited in the bank the moneys which were made the subject of the attachment process in this action, issued shortly after said transaction, and levied upon the moneys thus deposited in said bank. The foregoing facts appeared from the affidavit and testimony of the witness McLennan. It is true that McLennan also undertook to depose and testify that the new concern was not the alter ego of the old, but was a different and independent corporation, the chief owner of the stock of which was his daughter, whose money invested therein was her own, and who had not been a member or stockholder of the former concern. It is asserted, however, by the respondent herein, and was not seriously denied, that the moneys which the daughter invested in the new concern had been derived by her from her mother, the deceased wife of F. P. McLennan, who had in her lifetime been the owner of practically all of the stock of the old concern. The trial court, while accepting in the main the testimony of F. P. McLennan, was not bound to accept that portion of his evidence wherein he undertook to testify that these two companies were independent concerns and were not in fact the mere successive instrumentalities through which the McLennan family were continuing to do the same business under the name of the new concern which had been conducted under the old, between the same customers, with the same equipment and agencies, and under the same management by McLennan as the head of the McLennan family. We are satisfied that from the evidence thus adduced the trial court was justified in finding that the two concerns were practically the same, the latter being merely a continuation of the activities of the former, under the same control and management, but merely under a different name. This being so, it would seem to follow that the trial court was justified in its refusal to dismiss the attachment, upon the authority of 6 Cal. Juris, pp. 591, 599 and 600; *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 P. 986; *Stanford Hotel Co. v. Schwind Co.*, 180 Cal. 348, 181 P. 780; and *Strahm v. Fraser*, 32 Cal. App. 448, 163 P. 680, all of which are cited in 6 Cal. Juris.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

213 Cal. 654

LEBLANC v. COVERDALE.

L. A. 11289.

Supreme Court of California.

Sept. 22, 1931.

1. Automobiles ⇨171(4).

It was motorist's duty to yield right of way to motorist first entering intersection from former's right (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541, § 55).

2. Automobiles ⇨171(4).

Motorist entering intersection when motorist approaching from left was 75 feet therefrom had right to assume that latter would yield right of way (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541, § 55).

3. Automobiles ⇨245(80).

Contributory negligence of motorist, entering intersection at lawful speed when motorist, approaching from left at 50 miles per hour, was 75 feet therefrom, *held* for jury (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541, § 55).

4. Automobiles ⇨244(43).

Evidence *held* sufficient to support jury's finding that motorist, injured in collision with automobile at street intersection, was not contributorily negligent.

5. Courts ⇨107.

Language in Supreme Court opinion must be construed in connection with facts of case in which used or analogous cases to determine its real effect and purport.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by R. Leblanc against N. W. Coverdale. Judgment for plaintiff, and defendant appeals.

Affirmed.

Culver & Nourse and Forrest A. Betts, all of Los Angeles, for appellant.

Ben W. McLendon, of Long Beach, for respondent.

CURTIS, J.

Action to recover damages alleged to have been sustained by plaintiff in an automobile collision which occurred at the intersection of Atlantic avenue and San Antonio boulevard, in the city of Long Beach. Atlantic avenue runs practically north and south. It is intersected by San Antonio boulevard at an obtuse angle. Plaintiff was traveling westerly on San Antonio boulevard and the

defendant was traveling north on Atlantic avenue. When plaintiff was about 50 feet from the intersection, he looked to the south and saw defendant's car about 150 feet from the intersection. Plaintiff again looked to the south just as he was entering the intersection and saw the defendant's car 75 feet south of the intersection and traveling at the rate of about 50 miles per hour. Plaintiff then proceeded to cross the intersection, and, when he had passed the center line of Atlantic avenue, and while he was in the northwest quadrant of the intersection, he was struck by the defendant's car. Atlantic avenue is 80 feet in width and San Antonio boulevard is 60 feet wide. Plaintiff, at the time he entered the intersection, was traveling about 15 miles per hour, and he testified that he could stop his car while so traveling in 10 to 12 feet. As he entered the intersection, he glanced to the north and observed that Mr. Hawks, who was approaching the intersection from that direction, had stopped his car. Plaintiff then proceeded across the intersection, and did not see defendant's car after it had entered the intersection until it was within 10 to 12 feet from plaintiff's car. Defendant, both before and after he entered the intersection, was traveling at approximately 50 miles per hour. In approaching the intersection, the defendant had passed one or more cars traveling in the same direction, as was the defendant. In order for him to pass these cars, it was necessary for the defendant to travel on the westerly side of the center line of Atlantic avenue, and it appears from the evidence that, when he entered the intersection, and at the time his car collided with the plaintiff's machine, the defendant was traveling on the westerly or left side of Atlantic avenue. The action was tried before a jury, and evidence supporting the foregoing statement of facts was introduced in behalf of the plaintiff. This evidence is in some material respects contradicted by that of the defendant. The jury, however, rendered its verdict in favor of the plaintiff, and judgment upon this verdict was entered. From this judgment the defendant has appealed on the grounds that the evidence is insufficient to support the verdict, and that the court erred in denying his motion for a nonsuit. As defendant's motion for a nonsuit was based upon the contention that the evidence was insufficient to entitle plaintiff to recover, it is apparent that this appeal presents but one question for decision, and that is whether or not the evidence is sufficient to support the judgment.

[1, 2] Defendant makes no contention that the evidence is lacking in respect to his own negligence. As the defendant was traveling across the intersection at the rate of 50 miles per hour, and had been traveling at that speed for some time before reaching the intersec-

tion, during most of which time he was traveling on the westerly side of the street, and was so traveling at the time of the collision, it is obvious that it would be futile for him to claim that this evidence was insufficient to support the implied finding of the jury that he was guilty of negligence. Defendant does, however, contend that the evidence, without conflict or contradiction, shows that the plaintiff was guilty of contributory negligence as a matter of law in attempting to cross the intersection after he had observed the defendant approaching the intersection at such a rate of speed as would bring the two cars into collision if both continued across the intersection at the rate of speed at which each was then traveling.

The plaintiff testified that he could stop his machine at the rate of speed he was traveling at the time he entered the intersection within 10 to 12 feet. Atlantic avenue is 80 feet wide. Plaintiff, therefore, had ample time after entering the intersection to have stopped his car before reaching the center of Atlantic avenue. As the defendant was traveling on the westerly side of the avenue, if plaintiff had stopped his machine before reaching the center line of said avenue, the accident would have been avoided. Under these circumstances, the defendant insists that the plaintiff, in failing to stop and permit the defendant to pass over the intersection, was guilty of negligence as a matter of law. Plaintiff, having entered the intersection first, had the right of way over the defendant's car. Even had the two machines approached the intersection at approximately the same time, the plaintiff's machine, as it was to the right of the defendant's, had the right of way over the latter. Section 131, California Vehicle Act (St. 1929, p. 541, § 55). It was therefore the duty of the defendant to yield the right of way to the plaintiff. *Crabbe v. Rhoades*, 101 Cal. App. 503, 282 P. 10; *Wynne v. Wright*, 105 Cal. App. 17, 21, 286 P. 1057; *Couchman v. Snelling* (Cal. App.) 295 P. 845, 847. Furthermore, the plaintiff as a reasonably prudent person had the right to assume that the defendant would obey the law and yield the right of way at the intersection. In *Wynne v. Wright*, supra, at page 21 of 105 Cal. App., 286 P. 1057, 1059, the court in a case much similar to the present one said: "While the plaintiff was exercising ordinary care in the operation of his car, he had the right to assume that the defendant would also use ordinary care to avoid an accident and would obey the law and yield the right of way at the intersection. *Crabbe v. Rhoades*, 101 Cal. App. 503, 282 P. 10"; and again, on page 22 of 105 Cal. App., 286 P. 1057, 1059: "When the plaintiff entered the intersection the distance of the defendant's car from him (140 feet) was such that a reasonably prudent person might have believed that the defendant would

see what was in front of him and so control his car as to avoid a collision instead of driving straight into the plaintiff's automobile."

In the recent case of *Couchman v. Snelling*, supra, the facts thereof show that, when the plaintiff therein was about 20 feet distant from the intersection of the streets, he observed defendant's car approaching said intersection some 75 feet away, proceeding at a speed of 25 miles per hour. Believing he had time to pass the intersection without danger of a collision, he proceeded to cross the same without again looking directly at defendant's automobile. When approximately three-quarters of the way across the intersection, his car was struck by the defendant's automobile. In sustaining a judgment in favor of the plaintiff in said action, the court declared the law as follows: "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. *Keyes v. Hawley*, 100 Cal. App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679. Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine."

[3, 4] The two last cited cases are almost on all fours with the present case. We are satisfied that they contain a correct statement of the law applicable to cases of this type, and that they lay down the only safe rule to be followed by motorists when crossing over street intersections. To hold otherwise would not only nullify the provisions of the California Vehicle Act giving the right of way to the vehicle first entering the intersection, but would subject the traveling public using our highways to the mercy of reckless motorists who have little regard for the law and less for the safety of their fellow travelers. In this case the plaintiff entered the intersection at a lawful rate of speed, and had the right of way at the intersection. He was traveling in a careful and prudent manner. The defendant was 75 feet from the intersection and over 100 feet from the line of travel pursued by the plaintiff. He was then traveling at an unlawful rate of

speed, and was violating the law in not yielding the right of way to the plaintiff. To hold that under this statement of facts the plaintiff was guilty of negligence as a matter of law would be contrary both to reason and the law as established by the decisions of this state. The question of his negligence was rightly left to the jury, and its determination thereof was, in our opinion, in accordance with the great preponderance of the evidence. Were we disposed to do so we could not, in view of the state of the evidence, disturb the verdict of the jury.

[5] The defendant has cited a number of authorities in support of his contention that the plaintiff was guilty of negligence as a matter of law. All of these cases were decided prior to the three cases which we have cited. In fact, all three of these cases were decided since the appeal of the present action was taken. We will not attempt to differentiate or discuss at length all of the cases cited by the defendant, but only those from our own state. The first case is *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 186 P. 631. In that case the plaintiff was a pedestrian, and attempted to cross the street in front of an approaching automobile. It is quite evident that the facts of that case are so different from those in the present case as to render it of but little aid in the decision of the present case. In the next case, *Grillich v. Weinshenk*, 64 Cal. App. 474, at page 485, 222 P. 160, 164, the court considered an instruction which the appellant contended took from the jury the question of the respondent's contributory negligence. It was held that the instruction was "neither confusing nor misleading, nor does it withdraw any question from the jury." The third case, cited by defendant, is *New York Lubricating Oil Co. v. United Railroads*, 191 Cal. 96, 99, 215 P. 72. That case involved a collision between a truck belonging to the plaintiff and one of defendant's cars. The facts thereof were so radically different from those in the present case that the principles of law enunciated therein have little or no bearing upon any question presented on the present appeal. A further case relied upon by defendant is the case of *Donat v. Dillon*, 192 Cal. 426, 221 P. 193, 194. In that case the defendant was first to enter the intersection, and, after entering thereon, attempted to make a left turn and gave the proper signal of his intention to do so. He ran beyond the center of the intersection, and then turned his car to the left, but, before he cleared the

street, his car was struck by a second car proceeding from the opposite direction from which the defendant was traveling before he made the turn. Defendant claimed that he was not negligent. The question of his negligence was submitted to the trial court and decided adversely to him. This court, after a discussion of the facts of the case, stated its conclusion therefrom as follows: "It was therefore, a question for the trial court to determine upon all the evidence and the reasonable deductions therefrom whether the defendant, after having seen the approaching machine, continued to exercise the care and prudence which a reasonable man would have exercised under the circumstances. And, as we cannot say that the trial court reached an unreasonable conclusion, we are bound by its finding of the ultimate fact which determined the proximate cause of plaintiff's injury." When we recall that the sole point made by the defendant in this case is that the question of plaintiff's negligence is a matter of law and not one of fact, we can readily see that the holding of this court in the case of *Donat v. Dillon* affords no support to the contention of the defendant. There may be language used in the opinion in that case which, if applied to the facts in the present action, would tend to support defendant's position, but that language must be construed in connection with the facts of the particular case in which it was used, or in cases analogous thereto, in order to determine its real effect and purport. It cannot have any controlling effect in a case like the present one, where the facts are materially different from those in the case wherein the language was used.

The remaining cases, cited by the defendant, are from other jurisdictions. Some of them are readily distinguishable from the present action. Others may be said to enunciate a rule different from that followed by the courts of this state and predicated upon the terms of our own statutes. We do not find anything in any of them, or in any cases of which we have any knowledge, of sufficient persuasive force to cause us to depart from the most salutary rule announced by our own courts, and which we have already discussed and approved.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

PEOPLE v. GATES.*

Cr. 128.

District Court of Appeal, Fourth District, California.

Sept. 23, 1931.

Rehearing Denied Oct. 7, 1931. Hearing
Granted by Supreme Court Oct. 22, 1931.

1. Indictment and information ⇨161(8).

That amended information, filed after conviction, charging prior convictions and changing original charge, was dismissed before judgment, did not affect conviction on original information (Pen. Code, § 969a).

Such dismissal of the amended information, together with all charges of prior conviction, did not affect conviction under original information, despite the claim that the amended information, as filed, superseded the original information, and, when dismissed, left no record on which to base the judgment of conviction, since Pen. Code, § 969a, limits the purposes of the amended information to charging accused, by way of amendment, with prior convictions, and the Legislature never intended that the filing of an amended information would displace or in any manner affect the original information.

2. Criminal law ⇨964.

Court granting accused new trial could not subsequently deny new trial, in absence of showing that order granting new trial was made prematurely or inadvertently.

3. Criminal law ⇨964.

Court granting or denying new trial cannot afterward set its ruling aside.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

L. L. Gates was convicted of forgery, and he appeals.

Reversed, with directions.

Clyde E. Cate and Tom Okawara, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

ALLISON, Justice pro tem.

The information in this case, charging the defendant with the crime of forgery, was filed on the 31st day of March, 1931. Defendant was thereafter on the 15th day of April, 1931, found guilty. The time for pronouncing judgment was fixed for the 18th day of April, 1931. On the 15th day of April, 1931, the court granted the district attorney's motion for permission to file an amended information charging defendant with two prior convictions.

The amended information sets out the charge of forgery as contained in the original information, but adds to the wording of said charge the following: "And passed the same as true and genuine to Frank Smith." Before pronouncing judgment, the amended information, together with all charges of prior convictions, were dismissed.

[1] It is urged by the appellant that the amended information, as filed, superseded the original information, and, when dismissed, no record remained upon which to base the judgment of conviction. We find no merit in this contention. It will clearly appear from reading section 969a of the Penal Code that it was never intended by the Legislature that the filing of an amended information would displace or in any manner affect the original information. The statute limits the purposes of the amended information to charging the defendant, by way of amendment, with prior convictions and nothing else. The charge of forgery, as set out in the original information, is not, nor can it be, affected by anything contained in the amendment.

[2, 3] The record before us presents a much more serious question, which is decisive of this appeal, and necessitates granting a new trial. It appears from the record that on the 5th day of May, 1931, an order was made granting the defendant's motion for a new trial, and on the 12th day of May, 1931, without any showing having been made that the order granting a new trial was made prematurely or by inadvertence, the court made an order denying the defendant's motion for a new trial, and thereupon proceeded to pronounce judgment upon him. Having granted defendant's motion for a new trial, the power of the court to set it aside as an award of a new trial is at an end. Its power is exhausted and is functus officio. The order can be reviewed and set aside only in the manner prescribed by statute except, where it has been entered prematurely or by inadvertence, upon proper showing, it may be set aside. *Holtum v. Greif*, 144 Cal. 521, 78 P. 11. When a motion for a new trial is made and passed upon, either granted or denied, it is not competent for the court afterward to set its ruling aside and make another in the case. *Lang v. Superior Court*, 71 Cal. 491, 12 P. 306, 416, citing *People v. Center*, 61 Cal. 191. The statute authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the Superior Court is concerned. In the case of *Dorland v. Cunningham*, 66 Cal. 484, 6 P. 135, 136, the court, citing with approval from the case of *Coombs v. Hibberd*, 43 Cal. 453, uses the following language: "If the practice of moving to set aside an order granting or denying a new trial should be allowed, 'the proceedings after judgment would be interminable, for the last order

could be vacated upon motion of the losing party, and so ad infinitum. There must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress.'"

In *Bloomquist v. Haley*, 204 Cal. 258, 268 P. 364, 365, it is held that a trial court exhausts its jurisdiction in that behalf in granting a motion for a new trial, and, when the order is general, an order afterward made attempting to vacate the previous order is void, no attempt having been made to set it aside upon a proper showing that it had been entered prematurely or by inadvertence; the court stating that "upon the granting of the motion for a new trial the action stood in the exact condition in which it was before any trial thereof." The rule is the same in criminal and civil cases. *People v. Martin*, 199 Cal. 240, 248 P. 908.

The remaining points deal with matters which can, and we have no doubt will be, corrected on a retrial of the case.

Judgment and order reversed, and a new trial ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

NATIONAL CITY FINANCE CO. et al. v. LEWIS (FRYMIER et al., Interveners).*

Civ. 6702.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1931.

Rehearing Denied Oct. 20, 1931.

1. Joint-stock companies and business trusts
 ☞1.

Common-law trust may or may not be partnership, depending on degree of control that beneficiaries have over trustees, and no partnership exists where control of beneficiaries approximates zero.

2. Joint-stock companies and business trusts
 ☞3½.

Statute requiring "person transacting business under fictitious name" to file certificate giving true name as condition to maintaining suit *held* inapplicable to trustees of common-law trust (Civ. Code, § 2466).

3. Joint-stock companies and business trusts
 ☞3½.

Persons transacting business solely in representative capacity as trustees of common-law trust, without exercise of control by beneficiaries, *held* not required to file certifi-

cate, giving names and addresses, as condition to maintaining suit (Civ. Code, §§ 14, 2466, 2468).

4. Bills and notes ☞520.

Evidence *held* insufficient to sustain finding that notes were procured by plaintiffs' misrepresentations.

5. Bills and notes ☞394.

Demand for payment *held* not condition precedent to bringing action on notes which contained unconditional promise to pay within fixed time.

6. Corporations ☞123(24).

Creditor receiving assignment of stock from debtor as security held stock as pledgee, and could bring suit on note without first offering to return pledge.

7. Appeal and error ☞843(2).

On reversal of judgment, appeal from order denying motion to set aside judgment becomes moot.

8. Appeal and error ☞110.

No appeal lies from order denying motion for new trial.

9. Appeal and error ☞870(6).

Order granting new trial, after first trial of action, is not reviewable on appeal from judgment rendered on second trial.

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the National City Finance Company, a trust, and E. L. Junod and others, as trustees, against Willis O. Lewis, in which John E. Frymier and another intervened. Judgment for defendants, and plaintiffs and interveners appeal from the judgment and from an order denying a motion to set aside the judgment and from an order denying a motion for new trial.

Judgment reversed, and appeals from orders dismissed.

Samuel A. Miller and Paul J. Ziegler, both of Los Angeles, for appellants.

Euler & Subith, Louis J. Euler, and Fred E. Subith, all of Los Angeles, for respondent.

Roy Maggart and Walter J. Richards, both of Los Angeles, for intervenor Keefe.

BISHOP, Justice pro tem.

Three barriers have been erected between plaintiffs and the judgment for \$87,550 and interest which they desire. The first barrier is the conclusion that the plaintiffs have no legal capacity to sue, because they have failed to file and publish a certificate of doing busi-

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion 14 P.2d 298.

ness under a fictitious name. Secondly, it is found that fraud guided the defendant's hand as he signed the twelve notes upon which recovery is sought. Lastly, it appears that plaintiffs failed to demand payment when the notes matured and neglected to tender the stock which had been pledged as security for the notes. We are of the opinion that the first of these barriers is without substance, that the second is without a sound foundation in the evidence thus far produced, and that only a new trial can determine how real an obstacle the facts, out of which the third barrier is built, may prove to be.

The notes sued upon were made payable to the National City Finance Company. This payee, the trial court found, is a common-law trust, with E. L. Junod, John L. Junod, and Myron J. Sophy, as trustees, doing business in their collective capacity under a fictitious name. None of these trustees, the finding further recites, has either filed or published a certificate of doing business under a fictitious name. As its conclusion of law, based on these facts, the trial court held that plaintiffs had no legal capacity to sue, having failed to comply with the provisions of sections 2466 and 2468, Civil Code. It is unnecessary to quote in full the provisions of these familiar sections. In brief, they declare that a suit may not be maintained by a person or partnership transacting business under a fictitious name until a certificate giving the names and addresses of those making use of the name has been filed and published. In view of the interpretation now placed upon these provisions, that the sections are complied with if, at any time before proof must be made of the fact, the filing and publication of the certificate take place (*Rudneck v. Southern Calif. M. & R. Co.* [1920] 184 Cal. 274, 193 P. 775; *Isom v. Shields* [1924] 69 Cal. App. 515, 231 P. 587), we see no reason why the provisions of these sections should be stretched to cover a business not plainly within their purview.

[1-3] Common-law (or Massachusetts') trusts may or may not be partnerships, depending upon the degree of control that the beneficiaries have over the activities of the trustees. Where, as in the case under review, that control approximates absolute zero, they are held true trusts and not partnerships. See the extensive note in 7 A. L. R. 621. Plaintiffs, then, were not required to file a certificate as partners, for they were not. Nor do we believe that the reference of the sections to "a person transacting business under a fictitious name" applies to trustees of a common-law trust. We are not unmindful of the explanation of section 14 of the Civil Code, speaking of the use of words, that "the singular number includes the plural." As first enacted in 1872, section 2466 began: "No partnership or person may transact business by a fictitious name." The Code amendments of 1873-74

deleted the word "person" from the section; then in 1911 it was reinserted (*St. 1911, p. 440*), the reference to a partnership being left as it had been since 1894. It might well be argued that, had it been the legislative intent, either originally or as re-expressed in 1911, to have the section applicable to the various legal relationships under which two or more persons may transact business, it would have contented itself with the use of the word "person" and not specified both "person" and one form only of joint enterprise, that is "partnership." Section 14, Civil Code, also declares: "The word person includes a corporation as well as a natural person," and we know that a corporation is a method whereby "persons" transact business. Who has the temerity to hold that a corporation, both a person and a combination of persons, may not maintain an action without complying with the sections? Moreover, we see the trustees transacting business, not as natural persons, but solely in their representative capacity. The trust in this instance, furthermore, continues undisturbed by any change in the personnel of its trustees, and hence has at least one characteristic of a legal entity distinguishable from the persons who may for the moment have charge of its affairs and from those for whose benefit its affairs are conducted. We are persuaded that the judgment may not be upheld because of the absence of a certificate of the National City Finance Company from among those filed by persons and partnerships transacting business under fictitious names.

A brief survey of the events leading up to the execution of the notes sued upon is necessary to a discussion of the next two defenses. When the story begins, with which we are concerned, we find the defendant already in possession, by purchase, of stock in the Vanderbilt Newspapers, Inc., of \$30,000 par value. Then he was urged to take additional stock. Finally, when he was shown how it could be done without his putting up any money, he consented, buying \$30,000 worth August 17; \$40,000 more October 15; and then, November 5, all in the year 1924, \$100,000 worth. The deal each time was the same, half cash, half defendant's note to the corporation. Of these particular notes we hear no more. The cash was paid by plaintiffs for the defendant under an arrangement whereby they took the stock as security; he giving them notes payable in six months, the face of the notes equaling the cash advanced together with interest for six months at 6 per cent. The actual cash paid the last time was \$10,000 less than half the purchase price, but defendant was credited with having paid the full half, \$50,000; the \$10,000 being allowed plaintiffs, as a commission, by the Vanderbilt corporation. The first notes were renewed in February, 1925, and it is on these and those given in October and November this action is brought. As permit-

ted by the notes, the terms of which will be regarded more closely a little later, plaintiffs sold the stock, probably to obtain the money with which to make the cash payments; at any rate some time before the notes matured.

[4] In his final amendment to his answer, defendant, as an eleventh special defense, averred that his signature to the notes was secured through fraud, in this: (a) That plaintiff trustee, E. L. Junod, represented that the National City Finance Company was under the same management and control as the National City Bank of Los Angeles and the National City Bank of New York, and that said organizations were identical in responsibility, ownership, and management; (b) that Junod further represented to him that plaintiffs would hold the stock being purchased as collateral security for the loans to be made on his promissory notes. He alleged, furthermore, his reliance upon these statements and their falsity. In its fifteenth finding the trial court found these representations had been made, that they were not true, and that defendant had relied upon them and been defrauded. An additional misrepresentation is included in the findings, to the effect that the National City Finance Company was a responsible, reputable, substantial, and national institution. It should be noted that the finding does not indicate who made these representations to the defendant. The most serious fault with it, however, is that it is unsupported by, and is contrary to, the evidence. That defendant entered the three successive deals with a misunderstanding of some things may be true, but the evidence does not show that the plaintiffs were responsible or that they made any of the representations alleged or found, and it does show that defendant went into the transactions relying, not on the plaintiffs, whom he had not known, but on an agent of the corporation, Mr. Harvey, whom he had known. It is not without significance, in this connection, that it was not until almost two years after his first answer was filed, during which time he filed some five other answers, original and amended, to the complaint and the two complaints in intervention, that the defendant for the first time suggests that he had been influenced by fraudulent representations. The fifteenth finding, unsupported by the evidence, fails as a support for the judgment.

[5] The ninth finding is the remaining one which is relied upon to support the judgment from which the plaintiffs and the two interveners have appealed. By it two events are found never to have taken place: A demand for payment of the notes by plaintiffs; a tender back to defendant of the stock pledged with plaintiffs. We are of the opinion that plaintiffs' failure to perform either of these acts is, in and of itself, no defense. A demand is not a condition precedent to bringing action even on a note payable on demand. Ziel,

Bertheau & Co. v. Dukes (1859) 12 Cal. 479; Ex parte Howtitz (1906) 2 Cal. App. 752, 84 P. 229. It certainly is not required before suit in a case, such as this, where there was an unconditional promise to pay within a fixed time. See Danielson v. Neal (1913) 164 Cal. 748, 130 P. 716.

[6] Whether or not an offer to return the stock was a condition precedent to plaintiff's right to judgment depends upon the nature of the transaction into which plaintiffs and defendant had entered. The notes and receipts determine this. Each of the twelve notes was in the same form, and read, so far as material to our problem (except for differences in dates and amounts), as follows:

"November 5th, 1924. For value received, 6 months after date I promise to pay to the National City Finance Co., or order, the sum of Ten Thousand Three Hundred—(\$10,300.00) dollars with interest at the rate of 6 per cent. per annum after maturity.

"As security for the payment of the above note I hereby assign to the said National City Finance Co. the following securities: 200 Shares Vanderbilt Newspapers Inc.—Preferred 100 Shares Vanderbilt Newspapers Inc.—Common. We further agree to renew the note for three additional periods of six months each—if necessary, at the same rate of interest. It being understood that I waive all right to any dividends paid on the above securities to stockholders of record from this date to the date above note is paid, and it is further agreed that the said National City Finance Co. may, through its agents so authorized, hypothecate, transfer, sell or assign the aforesaid securities, or any part thereof, its only obligation in respect thereto being to return to me on the payment of the above note, on the date of maturity thereof, an equal number of shares of stock of the same class of said company. * * *

"[Signed] W. O. Lewis."

Each receipt given the defendant by plaintiffs recited that the stock was received "to be treated as set forth in a note of even date * * * a copy of the provisions relating thereto being set forth on the back thereof."

As a result of these instruments, all parties hereto contend, and we agree, defendant appears as pledgor of the corporation stock, and the plaintiffs received it as pledgees. As pledgees, they were under no obligation to offer to return the pledge to the defendant before bringing suit on the debt secured and obtaining judgment. Sonoma Valley Bank v. Hill (1881) 59 Cal. 107; French v. McCarthy (1899) 125 Cal. 508, 58 P. 154; Traders' Bank v. Wilcox (1919) 42 Cal. App. 24, 183 P. 256. Failure of plaintiffs to offer to return the pledged stock is not, of itself, a barrier to the judgment sought.

[7-9] Because the three appeals from the judgment (taken by plaintiffs and the two in-

terveners) present the same problems, in our discussion we have not found it necessary to refer to one appeal rather than another. The appeal from the order denying a motion to set aside the judgment and enter a new one upon the findings, raises no question not already considered. *Condon v. Donohue* (1911) 160 Cal. 749, 118 P. 113. With the reversal of the judgment, the appeal from such an order becomes moot, and should be dismissed. As an appeal will not lie from an order denying a motion for a new trial (2 Cal. Jur. 174), that appeal should be dismissed. The debate, in which appellants and respondent have engaged, concerning the propriety of the order granting a new trial after the first trial of this action, must be a no-decision affair, for that order is not subject to review on an appeal from the judgment rendered on the second trial. *Furlow Pressed Brick Co. v. Balboa Land & Water Co.* (1921) 186 Cal. 754, 761, 200 P. 625.

The judgment appealed from is reversed; the appeals from the two orders are dismissed.

We concur: HOUSER, Acting P. J.; YORK, J.

117 Cal.App. 50

PEOPLE v. SARGENT.

Cr. 1163.

District Court of Appeal, Third District, California.

Sept. 23, 1931.

Rehearing Denied Oct. 8, 1931.

1. Criminal law ☞1153(1).

It is for trial court to determine whether accused's general reputation at his former residence is too remote in time to be admissible.

2. Infants ☞20.

Permitting people's witness to testify respecting accused's general reputation for morals at his former residence eighteen months before offense of lewd conduct with children charged *held* not abuse of discretion (Pen. Code, § 288).

3. Criminal law ☞747.

Weight to be given conflicting testimony respecting accused's reputation for morals *held* for jury (Pen. Code, § 288).

4. Criminal law ☞1169(6).

Any error in admitting evidence under certain count was not prejudicial, where accused was acquitted on such count.

5. Infants ☞20.

Evidence sustained conviction under statute making an offense lewd or lascivious conduct with children under fourteen years for purpose of gratifying sexual desires (Pen. Code, § 288).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Henry C. Sargent was convicted of violating Penal Code, § 288, and he appeals.

Affirmed.

E. L. Webber and Lowell Palmer, both of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PRESTON, P. J.

The appellant, Henry C. Sargent, was charged by information filed by the district attorney of Napa county with four separate and distinct violations of section 288 of the Penal Code, committed upon four different boys. The jury acquitted him of the charge contained in the first three counts and convicted him of the charges contained in the fourth count. A motion for a new trial was made and denied by the trial court and judgment of imprisonment in the state prison was pronounced. This appeal is from the judgment and, also, from the order denying a new trial.

[1-3] Appellant contends that the court erred in admitting evidence that his general reputation for morals in San Francisco prior to his coming to Napa county was bad. This contention is based upon these facts: A number of witnesses called by the appellant testified that the appellant's general reputation for morals was good, and at least one witness testified without objection that he had known appellant in San Francisco for about six years before he came to Napa county and that his reputation in that city for morals was good. Appellant had been away from San Francisco for about eighteen months or two years prior to the commission of the offense of which he stands convicted. To rebut this testimony, the people placed upon the witness stand Mr. J. C. Astredo, formerly chief probation officer of the juvenile court of the city and county of San Francisco. Mr. Astredo testified that he had known appellant in San Francisco, and while the appellant resided there, his reputation for morals "was not good." Appellant now insists that this evidence was too remote and, therefore, incompetent and highly prejudicial.

We find no merit in this contention. The rule is well settled that it is a question for the trial court to determine whether or not general reputation in the place of former:

residence is too remote in point of time to be allowed in evidence. *Broderick v. Broderick*, 40 Cal. App. 550, 181 P. 402; *People v. Cord*, 157 Cal. 562, 108 P. 511; 10 Cal. Jur. 1048. We cannot say that the court abused its discretion in allowing the witness Astredo to testify as to appellant's general reputation in San Francisco eighteen months prior to the commission of the crime charged. His testimony was in direct conflict with that given by one or two of appellant's witnesses and covered the same place and the same period of time. The weight to be given all this testimony was a question for the jury.

[4] In the first count of the information, the offense is alleged to have been committed on the ——— day of December, 1930. The court permitted the district attorney to offer proof over the objection of appellant, indicating that this specific offense occurred in July, 1930, about six months previous to the date alleged. Appellant contends that the admission of this evidence was highly prejudicial to his rights. Conceding that the admission of this testimony, under the allegations of the first count of the information, was improper, we are unable to perceive how appellant could have been prejudiced thereby, for the reason that the jury acquitted him upon the charge, to which the objectionable testimony was directed.

[5] It is also urged that the evidence is insufficient to support the verdict and judgment. A careful examination of the entire record convinces us that there is no merit in this contention. Appellant admits the physical acts charged against him in said fourth count of the information upon which he was convicted, but denies that such acts were done with the intent of arousing, appealing to, and gratifying the lust, passions, or sexual desires of himself, but, on the contrary, contends that he was actuated solely by a desire to correct a wrong impression that the complaining witness had as to the functions of his sexual organs, and that in order to do so, it was necessary to handle the sexual organs of the boy, etc. The jury, by its verdict, rejected this explanation of appellant as being unworthy of belief.

We deem it entirely unnecessary to recite the many sordid details of the offense appearing in evidence. Suffice it to say that the evidence fully warranted the conclusion reached by the jury. No reasonable person could be expected to believe appellant's story, in the face of all the other facts and circumstances appearing in the record.

Other points raised by appellant have been carefully considered and found to be without substantial merit.

A further discussion of the case seems entirely unnecessary.

The record shows that appellant has at all times since his arrest been represented by two able and experienced attorneys who have been industrious and vigilant in protecting their client's rights. We find that appellant was denied no substantial rights and that he was fairly tried and justly convicted upon evidence which admits of no reasonable doubt.

We are satisfied that the judgment and the order denying a new trial should both be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

116 Cal.App. 736
ALLWEIN v. ASBURY TRUCK CO. et al.
(two cases).
Civ. 6902.

District Court of Appeal, Second District, Division 2, California.

Sept. 22, 1931.

Rehearing Denied Oct. 22, 1931.

1. Automobiles ⇨159.

Negligence of driver of motor vehicle must be determined by his conduct from time emergency arises until its termination.

2. Trial ⇨194(16).

Instruction on negligence of automobile driver, where confusing emergency arises, *held* erroneous as instruction on evidence.

3. Automobiles ⇨246(21).

Instruction on truck driver's negligence, when confusing emergency arose which naturally would overpower ordinarily careful driver, *held* erroneous as misleading jury.

4. Automobiles ⇨246(21).

Instruction exonerating from negligence one driving with due care when confusing emergency arises which momentarily prevents intelligent action *held* erroneous as relieving driver from duty to exercise care after emergency.

5. Trial ⇨295(6).

Instruction that person suddenly confronted with danger would not be held to strict accountability *held* erroneous when considered with instruction on emergency.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Actions by Pauline Allwein, by R. M. Allwein, her guardian ad litem, and by R. M. Allwein, individually, against the Astbury

Truck Company and another. Judgment was entered for defendants, and, from an order granting plaintiffs' motion for a new trial, defendants appeal.

Affirmed.

Harry D. Parker, of Los Angeles, for appellants.

Preisker, Goble & Twitchell, of Santa Maria, for respondents.

WORKS, P. J.

These two cases were tried together, as they involve exactly the same questions, both of fact and law. The actions were for damages, and arose because of the running down of two children by a motortruck. Judgment went for defendants, but the trial judge made an order granting a new trial. The defendants have appealed from this order.

The new trial was granted by the trial judge upon the ground that two instructions he had given to the jury were erroneous. A brief statement of facts must precede a discussion of the questions of law presented by the appeal. Respondent Pauline Allwein, aged twelve years, and Raymond Allwein, aged six, were the children of respondent R. M. Allwein. The two were walking westward, along the north side of a paved highway. The motortruck came up behind them, and, as it approached, it was also proceeding, up to some distance from them, along the right side of the road. Along and near this north, or right, side of the highway a ditch had been dug, and the soil from it had been piled beside the paved highway and up to its edge. Pauline testified that she saw the approaching truck a considerable distance behind her and her brother, whom she led by the hand, and that, because the pile of dirt prevented them from moving off the highway to the right, they crossed it diagonally at a rapid walk, reached the unpaved area to the south of it, and had taken five or six steps along the area and parallel to the pavement when the truck struck them. On the contrary, the driver of the truck testified that, as he neared the children, he turned the truck toward the south, thus occupying about the middle of the pavement, in order that the children might have room to proceed along its northerly edge, but that, when he came up to within five or six feet of them, they started to run across the highway ahead of him, that he turned the truck again toward the south, in order to avoid them, but could not do so. After being struck, the two children were lying on the unpaved area south of the pavement. Raymond was killed and Pauline was injured. There was much other evidence, conflicting in its nature, upon the question whether the driver of the truck was negligent, but it is unnecessary here to set it down.

[1-4] One of the instructions brought in question by the appeal reads thus: "You are 3 P. (2d)—21

instructed that where a driver was driving his car with due care and caution and a confusing emergency arose, which naturally would overpower the ordinary careful driver of a motor vehicle so that momentarily or for a time he is not capable of intelligent action, and as a result injuries are inflicted upon a third person the driver is not negligent."

We are satisfied that this instruction was erroneous. Appellant defends it because of the inclusion of the clause, near its beginning, "that where a driver was driving his car with due care and caution," this language being followed by the expression "and a confusing emergency arose." The clause upon which appellant relies is of no moment or weight whatever in the present case, and might as well have been omitted from the instruction. The language might be needed in a case in which there was evidence that the defendant was driving negligently immediately before an emergency, for that negligence might have been carried over into the emergency period. Here, however, the driver's conduct before the emergency was free from negligence. In this case, therefore, the question whether the driver of the truck was operating it with "due care and caution" before or even at the time the emergency arose is entirely beside the question as to whether he was negligent as charged in the complaint. His negligence, or his innocence of it, must be determined by his conduct from the moment the emergency arose until the moment of its termination. The instruction is lame upon that question. We think it is not helped by the reference in it to "the ordinary careful driver." That expression refers only to the overpowering of the intelligence of such a driver upon a confusing emergency arising, and relates in no sense to the care or conduct required of him during the time immediately following the arising of it.

We think the instruction in the present case might well have been taken by the jury to mean that a confusing emergency had arisen, and it was therefore an instruction upon the evidence. Granting the validity of the instruction for any purpose, the court should have inserted in it something to the effect that "if you find from the evidence that a confusing emergency arose," etc.

We think, also, that the instruction may have been construed by the jury as one informing its members that the judge believed that the emergency "naturally would overpower," and that the driver of the truck was an "ordinary careful driver."

We are not going too far in saying that the clause "so that he is not capable of intelligent action," with its context, informed the jury that the driver of the truck was not bound to exercise any care whatever after the emergency arose, and that he could not therefore be charged with negligence. If a man is not

capable of intelligent action, what degree of care is he capable of exercising? In other words, the instruction did not inform the jury that a man confronted by a confusing emergency should exercise any care of any degree, but that, not being capable of intelligent action, he need exercise no degree of care.

In short, the instruction must have been very confusing to the jury.

[5] The other instruction involved on the appeal was as follows: "You are instructed that one suddenly confronted with danger may use such means as would appeal to a person of ordinary prudence in a like situation, without being held to a strict accountability as to whether the course chosen was the most judicious."

The propriety of this instruction is affected by the language incorporated in it after the word "situation." It is not necessary, however, for us to say, and we do not decide that the instruction standing alone, was actually improper. Certainly, when construed together with the instruction we have first considered, as it must be under the law, it was erroneously given.

The validity of the two instructions is assailed on other grounds, but we find it unnecessary to consider them.

Order affirmed.

We concur: IRA F. THOMPSON, J.;
ARCHBALD, Justice pro tem.

117 Cal.App. 36

SCHMIDT et al. v. DENNING et al.

Civ. 7994.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1931.

1. Homestead ☞69.

Lot with one building thereon constructed into four separate flats *held* properly claimed as homestead (Civ. Code, § 1237 et seq.).

2. Fraudulent conveyances ☞38.

That owners of property filed declaration of homestead to hinder and delay their creditors is not ground for setting aside declaration (Civ. Code, § 1237 et seq.).

3. Homestead ☞100.

Judgment against owners of homestead based on claim for damages for deceit in pro-

curing exchange of property *held not to give* claimant standing to attack homestead declaration (Civ. Code, § 1237 et seq.).

4. Homestead ☞100.

That homestead may be used to protect transactions bordering on fraud is immaterial, court being required to follow constitutional and statutory provisions relating to homesteads (Civ. Code, § 1237 et seq.).

Appeal from Superior Court, Los Angeles County: Wm. Frederickson, Judge.

Action by William Schmidt and another against C. E. Denning and another. Judgment for the plaintiffs, and the defendants appeal.

Reversed.

Porter & Sutton, of Los Angeles, for appellants.

Porter C. Blackburn and Marion P. Betty, both of Los Angeles, for respondents.

STURTEVANT, J.

The plaintiffs commenced an action against the defendants to obtain a decree setting aside a purported homestead. From a judgment in favor of the plaintiffs, the defendants have appealed.

To understand the points made by the respective parties, it is necessary to briefly state chronologically the facts of the case. On April 24, 1924, the defendants owned the lot and the building thereon on which the declaration of homestead was subsequently filed. The property is designated by numbers 1314-1316-1318 and 1320 Colton street, Los Angeles. On the same date the plaintiffs owned a lot in Contra Costa county situated near the city of Oakland. The plaintiffs and defendants executed a contract of exchange. The plaintiffs conveyed to the defendants their lot, and defendants conveyed to the plaintiffs their lot in Los Angeles. As a part of the consideration, the plaintiffs executed to the defendants a mortgage in the sum of \$4,000, and they also executed a deed of trust to secure a promissory note in the further sum of \$4,500. On June 18, 1925, the plaintiffs commenced action No. 164203, Los Angeles Records, against the defendants. At the same time they caused to be recorded a *lis pendens*. That action sounded in deceit, and in their prayer the plaintiffs asked for damages.

After the plaintiffs commenced said action, they stopped making payments on their notes which were secured by the mortgage and deed of trust. Soon after some of the defaults arose the defendants caused the property described in the deed of trust to be sold under the terms of that instrument. At the sale the defendants bought it, and then they com-

menced an action in ejectment, action No. 188230, Los Angeles Records. In due time judgment was entered in favor of these defendants, and they were put in possession. So far as the record discloses, no appeal was taken from that judgment. After these defendants were let into possession, they filed, on May 18, 1927, a declaration of homestead. On its face it was regular in all respects. It is the homestead that these plaintiffs commenced this action to have set aside.

Action No. 164203 later came on for trial and decision. On June 2, 1927, a judgment for \$8,500 was rendered in favor of these plaintiffs against these defendants. The record does not show that an appeal was taken. Neither does it show that an execution was taken out, nor that any proceedings were had under section 1245 et seq. of the Civil Code.

However, on July 25, 1927, the plaintiffs commenced this action No. 229908, Los Angeles Records, to have the above-mentioned declaration of homestead set aside. The complaint was amended several times. It pleaded two separate counts. In the first count the plaintiffs pleaded the same false representations which they had pleaded in action No. 164203. They did not plead any other acts of fraud, and, in particular, they did not plead any such acts of and concerning the framing or recording of the said declaration of homestead. However, they did plead that the defendants were insolvent, and there was at least an attempt to allege that these defendants had executed the declaration of homestead for the purpose of delaying and defrauding their creditors. In the second count the plaintiffs pleaded facts showing, or tending to show, that the property described in the declaration of homestead consisted of a lot with one building thereon; that the building was so constructed as to make four flats, two upstairs and two downstairs, and that each flat had a separate entrance and a separate number. In their answer the defendants inserted three defenses. They interposed denials of nearly every allegation contained in the first count of the plaintiffs' amended complaint. They alleged that they were bona fide purchasers. They also interposed denials as to each allegation contained in the second count of the plaintiffs' amended complaint.

The court signed a set of findings in which it found that the allegations contained in the first count of plaintiffs' complaint were true.

As to the allegations contained in the second count, the court made a finding as follows: "It is true that the said property hereinafter described consists of a four-flat income-producing structure, suitable for the occupancy of four separate families; and it is true that four separate flats have an equal number of separate street numbers, namely, 1314, 1316, 1318, and 1320 Colton street, city of Los Angeles. Said premises are and were at the time of the said declaration of homestead suitable for residential purposes and the defendants are and were at the time of the filing of said declaration of homestead residing in one of the flats located on said premises."

[1] The attack made by the plaintiffs in their second count, the contention that the property was not the proper subject out of which to carve a homestead because the building consisted of flats, may not be sustained. The point has been directly ruled against the attack. *Estate of Levy*, 141 Cal. 646, 75 P. 301, 99 Am. St. Rep. 92.

[2, 3] The fact that the defendants filed a declaration of homestead to hinder and delay their creditors is not actionable. That result is to be expected from the very existence of a statute allowing the creation of homesteads. *Fitzell v. Leaky*, 72 Cal. 477, 483, 14 P. 198. The fact that the defendants are insolvent is of like import. The very object of enacting statutes permitting the creation of homesteads is to prevent insolvent persons from becoming homeless. The fact that the claim of the plaintiffs consists of an award of damages for deceit does not give the plaintiffs any standing to attack the homestead. To so hold would be to read into the statute (Civ. Code, § 1237 et seq.) provisions that the Legislature has ex industria left out.

[4] As contended by the plaintiffs, it may be said that it follows that a homestead under some circumstances may be used to protect transactions bordering on fraud. Be that as it may, the courts must follow the Constitution and the statutes enacted under it. "With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead." *Beaton v. Reid*, 111 Cal. 484, 487, 44 P. 167.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J

116 Cal.App. 769

Ex parte HARKINS.

Cr. 1644.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1931.

Habeas corpus ⇨55.

Where habeas corpus petitioner, contending evidence did not support order committing him for contempt, presented no transcript of testimony, writ *held* denied.

Application by William H. Harkins for a writ of habeas corpus against the Sheriff of the City and County of San Francisco on the ground of illegal detention under a commitment for contempt for failure to pay money.

Writ denied.

Fred W. Comba, of Redwood City, for petitioner.

PER CURIAM.

It is the claim of the petitioner that the evidence is insufficient to support the order. The petitioner has presented no transcript of the testimony. The writ is denied under the authority of *In re Rasmussen*, 56 Cal. App. 368, 205 P. 72, and *Brune v. Superior Court in and for City and County of San Francisco* (Cal. App.) 297 P. 566.

117 Cal.App. 66

JENSEN v. BURTON et al.

Civ. 6840.

District Court of Appeal, Second District, Division 2, California.

Sept. 24, 1931.

1. Appeal and error ⇨931(3).

Where both parties waive findings, every intentment favors judgment, and, on issues pleaded, presumption is that judge, in effect, found all facts necessary to support judgment.

2. Mortgages ⇨282(4).

Where mortgagors, having executed mortgage note, conveyed land to assuming grantee, who later quitclaimed to mortgagee, land, even in mortgagee's hands, must be deemed principal, and mortgagors sureties.

3. Mortgages ⇨295(1).

Mortgagors conveying land to assuming grantee, who later quitclaimed to mortgagee,

were not such strangers to land as to be precluded from raising question of merger.

4. Mortgages ⇨295(1).

Since mortgaged land is primary fund for payment of mortgage note, person acquiring such fund must be regarded as having applied it to payment of mortgage.

5. Estates ⇨10(1).

In law, merger always occurs when greater and lesser estate coincide in same person in same right without any intermediate estate.

6. Equity ⇨62.

Equity does not necessarily follow rules regulating merger in law.

7. Estates ⇨10(1).

Question of merger is one of intention, actual or presumed, of person in whom interests are united.

8. Mortgages ⇨295(1).

That mortgagors conveyed to assuming grantee, who quitclaimed to mortgagee, there being no intervening interest or lien, made prima facie case of merger extinguishing debt.

9. Mortgages ⇨295(1).

Mortgagee's intention that merger shall result may be shown by mortgagee's assuming to deal with estate as absolute owner, as by leasing entire property to stranger.

10. Appeal and error ⇨1011(1).

Judge's decision, pursuant to prima facie case, could not be disturbed, notwithstanding persuasive contrary evidence.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Peter Jensen against R. C. Burton and another, with a cross-complaint by defendants. Judgment for defendants, and plaintiff appeals.

Affirmed.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for appellant.

C. E. McDowell, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

From a judgment in favor of defendants on a complaint filed on a promissory note plaintiff has appealed.

In 1917 plaintiff, then and now a resident of Iowa, sold a farm belonging to him to defendants, who were also residents of that state at the time. The latter gave plaintiff the promissory note sued on, in the sum of \$12,000, se-

cured by a mortgage on the farm, which was made subject to a first mortgage of \$18,000, placed thereon by defendants to raise a part of the purchase price of said farm. During the same year defendants made an agreement with one Holmes whereby the latter agreed to purchase the farm subject to the two mortgages above mentioned, which he assumed, giving in addition his unsecured note for \$6,500 without interest until March 1, 1919, at which time he was to pay \$4,000, the balance to be carried at 6 per cent. interest until paid. Holmes paid the interest on the mortgages until March 1, 1925. The bank in which he was accumulating his interest money failed before the date for payment came, viz., March 1, 1925, and, fearing that the holder of the first mortgage, the interest on which was also in default, would foreclose and put a receiver in possession of the farm and harvest whatever crops he might plant for that year, Holmes entered into an agreement with plaintiff whereby he quitclaimed to the latter, on March 16 of that year, all of his interest in the premises, and plaintiff immediately leased the farm to a brother of Holmes, who, in conjunction with the latter, farmed the property for two seasons and until the holder of the first mortgage took possession under a sheriff's deed. Suit to foreclose the first mortgage was filed November 25, 1925, judgment of foreclosure entered December 11, and the farm sold thereunder on January 13, 1926, to the plaintiff in the foreclosure action for the sum of \$21,014.75, being the amount due on the first mortgage together with attorney's fees and costs of foreclosure and sale. No redemption thereof having been made, the sheriff issued his deed to the holder of the first mortgage on January 15, 1927. Defendants having been residents of Los Angeles county for a number of years, and plaintiff's security having been taken by said foreclosure suit, the latter brought action on the note in the county named, with the result mentioned.

Defendants filed their answer and cross-complaint, admitting the execution of the note and denying that the amount of attorney's fees allowed was a reasonable one, and, in addition to putting plaintiff upon his proof that the principal of the note and interest had not been paid, as separate defenses alleged conveyance of the property to Holmes and that the latter and plaintiff had entered into certain agreements by which the latter released Holmes from all liability to pay said note and mortgage so assumed by him, and without the knowledge of defendants, and that plaintiff thereby waived any and all claim against defendants and estopped himself from making such claim. We find no evidence, however, in support of this defense. The answer also set up as a defense the transfer from Holmes to plaintiff above mentioned in consideration of the cancellation by the latter of all obligations of Holmes to pay said note and mortgage, and

upon the agreement that the note and mortgage "should be canceled and become null and void"; "that it was the express intention that said transaction should operate, and these defendants allege that it did so operate and merge in the plaintiff the fee title to said lands and the ownership of said note and mortgage securing the same; that it was the intention and the agreement between said parties that said transaction should operate as a cancellation and satisfaction of said note and obligation, and that said note did then and there and thereby become satisfied in full with all of the interest thereon then and thereafter due and payable, if any."

[1] Findings were evidently waived by both parties, as we do not find any in the record before us, and no point is made on account of the absence thereof. In such case "every intendment is in favor of the judgment, and, therefore, upon all of the issues raised by the pleadings, it must be presumed that the trial court, in effect, found all the facts necessary to support the judgment in favor of the plaintiff." *Gray v. Gray*, 185 Cal. 598, 599, 197 P. 945.

The only question argued in the briefs is the one of merger and satisfaction of the note. Appellant urges that the evidence is wholly insufficient to support the judgment, and presents two contentions. The first is that respondents, not having any interest in the land, and being strangers to the title to it, cannot raise the question of merger; the second, that merger is a question of intent, and "that nowhere in the evidence in this case is there anything to show there was any intention to merge."

[2-4] Appellant cites as authority for his first contention the case of *Simpson v. Hall*, 47 Conn. 417, which is to the effect that the benefit of a merger "and the right to insist upon its enforcement belong to those only who are interested in the estate." In that case, however, the party claiming a merger had resulted from the conveyance by one Munson of certain mortgaged real estate to the assignee of the mortgage covering such property had neither an interest in the mortgaged property nor any liability on the note secured by the mortgage being foreclosed, and it would appear that he was a stranger indeed. In the instant case the land, even in the hands of plaintiff, must be considered as the principal and the defendants Burton as the sureties (*Braun v. Crew*, 183 Cal. 728, 731, 192 P. 531), and consequently they had a real interest, as under such circumstances, the land being the primary fund for the payment of their personal obligation, "whoever acquires that fund and the mortgage also must be regarded as having applied the fund to the payment of the mortgage." Quotation from *Bank v. Reis*, 136 Ill. 242, 26 N. E. 646, quoted with approval in *McDonald v. Magirl*, 97 Iowa, 677, 66 N. W. 904, 905.

See, also, *Braun v. Crew*, *supra*. Hence defendants were asserting a right that belonged to them, in pleading the merger and alleged consequent satisfaction of their own note.

[5-10] Is there any evidence that would support a finding that such transaction resulted in a merger and consequent satisfaction of the note sued on here? "In law, a merger always takes place when a greater estate and a less coincide and meet in the same person in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would continue to exist at law; and sometimes preserve it, when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united." *Rumpp v. Gerkens*, 59 Cal. 496, 501. When it was shown that plaintiff became the owner of the fee and at that time was also the owner of an incumbrance covering the property, with no intervening interest or lien, a *prima facie* case of merger was presented under the rule above set out, and that seems to be the law of the state of Iowa, where the transaction occurred. *McDonald v. Magirl*, *supra*. The courts of that state also seem to hold that in such a case the law presumes that the purchaser bought the land at its value, less the amount of indebtedness secured thereon, and so the purchaser's mortgage merged in the fee and extinguished the debt. *McDonald v. Magirl*, *supra*. We stand, therefore, with a *prima facie* case of a merger which extinguished the debt. In addition to the presumption of value, there is testimony from which the court could draw the conclusion that the value of the farm at the time of the conveyance to plaintiff was a sum in excess of the indebtedness on both mortgages. In addition to the *prima facie* case, plaintiff testified that Holmes gave him possession under the quitclaim deed, and that he immediately rented the farm to Thomas Holmes, the former's brother, that both brothers continued to live on the farm, working it jointly, and that he received about \$1,800 in rent during the two years. Where one "assumes to deal with the estate as absolute owner, and conveys it to another, it proves a merger." *Linforth v. Montgomery*, 195 Cal. 49, 231 P. 735, 737. "The intention of the mortgagee that a merger shall result may be shown by his conduct, as where after acquiring the equity he conveys or leases the entire property to a stranger." 41 C. J. 778, § 873. It also appears that at no time prior to the filing of the present action did plaintiff make any effort to collect either interest or principal of the indebtedness from either of the Holmes or of the defendants. Under the provisions of his mortgage, plaintiff had the right to have a receiver appointed to take possession of the

land, but did not avail himself thereof, evidently preferring to exercise the authority over it as owner. It would seem to be clear that there is evidence from which the court could have found that a merger was intended and that the value of the land was such that not only the mortgage but the debt was extinguished. The fact that plaintiff, his grantor, Holmes, and the notary in whose presence the quitclaim deed was executed testified that plaintiff said he did not want to do anything to prevent him from holding the defendants on the second mortgage and note would seem merely to create a conflict in the evidence on the question of merger. The trial court having decided such question, it is our duty to presume that a finding was made to the effect that a merger resulted which extinguished the debt; and, even though there is very persuasive evidence to the contrary, nothing remains for an appellate court to consider.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

116 Cal.App. 714

BOYLE v. STEWART.

Civ. 7798.

District Court of Appeal, First District, Division 2, California.

Sept. 21, 1931.

1. Automobiles ⇨245(82).

Motorcycle officer's contributory negligence in assuming that motorist contemplated left turn and attempted to pass on right held for trier of facts (St. 1923, p. 560, § 133, as amended by St. 1929, p. 542, § 57).

2. Automobiles ⇨244(47).

Evidence warranted finding motorcycle officer was not contributorily negligent in attempting to pass to right of automobile going in same direction (St. 1923, p. 560, § 133, as amended by St. 1929, p. 542, § 57).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Hugh A. Boyle against Mrs. Olin Stewart. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bronson. Bronson & Slaven, of San Francisco, for appellant.

William H. Hollander, of Oakland, for respondent.

STURTEVANT, J.

The trial court, sitting without a jury, rendered a judgment in favor of the plaintiff, awarding him damages for injuries suffered in an automobile collision. The defendant appealed from the judgment.

The accident occurred at about 8 p. m. in the evening on September 5, 1929, on San Pablo avenue, at a point a few feet south of Dartmouth avenue safety station. The defendant was driving south, and the plaintiff, a police officer, was going in the same direction, riding on a motorcycle. It was the theory of the plaintiff that the defendant was guilty of negligence because, at the time of the accident, and for a distance of three thousand feet back from the place of the accident, the plaintiff was blowing his siren; that the defendant heard it for as much as twelve seconds before the impact, but she did not drive her car to the right-hand side of the road and stop until the emergency vehicle had passed (section 133, California Vehicle Act (St. 1929, p. 542, § 57). There was evidence to sustain that theory, and the defendant does not seriously contend to the contrary.

[1, 2] However, the defendant vigorously asserts that the plaintiff was guilty of contributory negligence because he did not exercise more care than he did. He was driving sixty miles per hour. The defendant was driving about twenty-five miles per hour. There was considerable traffic on San Pablo avenue, some going north and some going south. The defendant was driving in or near the middle of the road shortly before the plaintiff approached from the rear. At the same time another automobile was traveling in the same direction as the defendant, but on her right. As the plaintiff continued to approach, he saw the automobile swerve slightly to the right, and the plaintiff assumed that the defendant was in the act of making a left-hand turn into Dartmouth avenue, and in the same instant he attempted to pass on the defendant's right. As he was doing so, the defendant continued the course to her right, and the plaintiff collided with the right-hand side of her car. He had been bottled-up between those two automobiles. At this time, when it is all over and there is a full opportunity to cogitate on dangers or absence of dangers, the defendant makes a forcible argument that the plaintiff did not take the safest path. The plaintiff replies that under the circumstances of such sudden and terrifying peril produced by another the injured person is not held to the same strict accountability as in positions more favorable for the exercise of deliberate and accurate judgment. *Scott v. San Bernardino*, 152 Cal. 604, 612, 93 P. 677; *Courvosier v. Burger*, 61 Cal. App. 470, 477, 215 P. 93. Moreover, all of these matters were to be weighed and considered

by the trier of the facts; the court sitting without a jury. At this time we can see that there was an instant when in the mind of the plaintiff it transpired that he had misjudged the intentions of the defendant. But this court is not able to say when that instant was or to say that at that instant it was still possible for, and that it was the duty of, the plaintiff to alter his course or change his speed. It follows that the trial court did not err in holding that the plaintiff was not guilty of contributory negligence.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 31
JANSING v. BOWEN.
Civ. 7779.

District Court of Appeal, First District, Division 1, California.
Sept. 23, 1931.

1. Venue ⇨69.

Unless answer has been filed at time demand for change of venue is made, counter motion to retain case on ground of convenience of witnesses will not lie.

Counter motion will not lie, for the reason that until the issues of fact are settled by answer, the court cannot determine what testimony will be material.

2. Venue ⇨70.

Where no answer had been filed, and plaintiff did not challenge legal sufficiency of nor question merits of, defendant's motion for change of venue, defendant *held* entitled to have action transferred to county of his residence.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Marie Jansing against F. Bowen. From an order denying motion for change of venue, defendant appeals.

Reversed.

E. H. Christian, of Oakland, for appellant.

A. J. Stebenne, of Redwood City, for respondent.

KNIGHT, J.

Plaintiff brought this action in San Mateo county to recover damages for the alleged breach of a contract to install a heating apparatus in an apartment house in Redwood

City; and defendant appeared in the action by filing a demurrer to the complaint, and a motion for a change of venue to the county of Santa Clara based upon the ground that he was a resident of that county. At the time the matter came on for hearing, plaintiff presented a counter motion to retain the action in San Mateo county upon the ground of convenience of witnesses; and subsequently the trial court denied defendant's motion. From the order made in that behalf defendant prosecutes this appeal.

[1, 2] The law is well settled that unless answer has been filed at the time the demand for change of venue is made, a counter motion to retain the case on the ground of convenience of witnesses will not lie, for the obvious reason that until the issues of fact are settled by answer the court cannot determine what testimony will be material. *Sheffield v. Pickwick Stages*, 191 Cal. 9, 214 P. 852; *Gordon v. Perkins*, 203 Cal. 183, 263 P. 231; *San Jose Hospital v. Etherton*, 84 Cal. App. 516, 258 P. 611; *Dawson v. Dawson*, 83 Cal. App. 119, 256 P. 491; *Woods v. Berry*, 105 Cal. App. 90, 286 P. 1073; *McSherry v. Penn. C. G. M. Co.*, 97 Cal. 637, 32 P. 711; *Pascoe v. Baker*, 158 Cal. 232, 110 P. 815; *Cook v. Pendergast*, 61 Cal. 72; *Heald v. Hendy*, 65 Cal. 321, 4 P. 27; *Armstrong v. Superior Court*, 63 Cal. 410. There was no answer filed in the present case; and therefore, since plaintiff did not challenge the legal sufficiency of defendant's moving papers, nor question the merits of his motion, he was entitled to have the action transferred to the county in which he resided. The order appealed from is reversed.

We concur: TYLER, P. J.; CASHIN, J.

117 Cal.App. 108

PEOPLE v. PAYNE.

Cr. 54.

District Court of Appeal, Fourth District, California.

Sept. 24, 1931.

1. Larceny ☞3(1).

Question of intent is controlling in prosecution for grand theft.

2. Larceny ☞68(2).

Intent is generally evidenced by surrounding circumstances, and is determinable by jury under evidence in grand theft prosecution.

3. Larceny ☞65.

Evidence of realty salesman's failure to deliver to employer and misappropriation of

bonds received from purchaser of lots held sufficient to establish case of grand theft.

4. Larceny ☞26.

Subsequent agreement between accused and victim of grand theft to turn transaction into loan to accused could not affect crime already committed, and evidence of such agreement was properly excluded.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Miles M. Payne was convicted of grand theft, and he appeals.

Affirmed.

O. A. Jacobs and Ira Kroese, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was accused by an information filed by the district attorney of Orange county of the crime of grand theft. It was alleged that on or about the 4th day of September, 1930, he did willfully, unlawfully, and feloniously steal, take, and carry away three \$500 "Straus" bonds of the value of \$1,500 in gold coin of the United States, the personal property of Mrs. Nellie F. Wagner. The case was tried before a jury, which returned a verdict finding appellant guilty as charged. From the judgment pronounced upon him, and from the court's order denying his motion for a new trial, he has taken this appeal.

The evidence discloses that Clifford F. Reid, Incorporated, was selling agent for lots in the Hollywood Riviera in Los Angeles county, Cal. It maintained a branch office in the city of Santa Ana, California, out of which appellant worked as a licensed salesman.

On September 4, 1930, appellant went to the home of Mrs. Wagner in the city of Anaheim, Cal., and discussed with her the purchase of a lot in the Hollywood Riviera. He took her to see the lot on the afternoon of this date, and told her that she could make considerable money if she bought it at the purchase price of \$3,650. She told him that she had nothing except three \$500 bonds of the Straus Company to pay on the lot. He replied that the bonds would be accepted as a payment of \$1,500 on the purchase price, and the two returned to Anaheim, where appellant made out a contract of purchase and sale of the lot on the forms furnished him by his employer. These were signed by Mrs. Wagner and by appellant. The next morning appellant returned to Mrs. Wagner's home, and they then went to the bank and secured the bonds from her safety deposit box, which

she delivered to him, he delivering one copy of the contract to her.

Appellant did not deliver the bonds nor their value to Clifford F. Reid, Incorporated, nor did he report the sale of the lot or turn over the contract to his employer, all of which the terms of his contract of employment required him to do. As Clifford F. Reid, Incorporated, had no knowledge of the purported sale of the lot to Mrs. Wagner, it was sold to another purchaser after September 5, 1930. The theft of the bonds was evidently discovered some time in December, 1930, as the treasurer of Clifford F. Reid, Incorporated, testified to a conversation he had with appellant shortly before Christmas of that year in which appellant admitted that he had neither delivered the bonds he had obtained from Mrs. Wagner, nor their value, into the company, nor had he reported the sale to it. He promised to obtain \$1,500 from his father, who was in Colorado, to replace the value of the bonds and deliver it to the treasurer of the company on the Wednesday before Christmas. This he did not do.

Upon this evidence the people rested their case. Appellant called Mrs. Wagner as his witness and offered to prove that some time subsequent to September 5, 1930, "there was a transaction between Mrs. Wagner and the defendant wherein this particular transaction as to the purchase of a lot was called off, and Mrs. Wagner allowed Mr. Payne to borrow the fifteen hundred dollars; that subsequent to that time Mrs. Wagner also made a further loan to Mr. Payne of two thousand dollars, and that the two loans are evidenced by this note of thirty-five hundred dollars which Mrs. Wagner accepted. That subsequent to the loan and in 1931 Mrs. Wagner accepted a check for five hundred dollars as payment on the thirty-five hundred dollar note. The second transaction being on November 28, 1930, wherein Mr. Payne borrowed two thousand dollars from Mrs. Wagner, as evidenced by a Straus bond for one thousand dollars and cash for one thousand dollars, and that through the transaction with Mrs. Wagner a note was then given to her for the thirty-five hundred dollars that was borrowed by Mr. Payne." The trial court sustained an objection of the people to this offer of evidence made on the part of appellant.

Appellant made a further offer of proof of a receipt dated November 28, 1930, signed by appellant, to Mrs. Wagner for \$2,000, being \$1,000 in cash and a \$1,000 Straus bond, No. 903, on the Aynesworth apartment building in Seattle, Wash. He made a further offer of proof of a promissory note in the principal sum of \$3,500, dated December 17, 1930, due ninety days after date, with interest at 7 per cent. per annum, payable to Mrs. Nellie F. Wagner and signed by appellant, and a further offer of proof of a receipt dated April 17, 1931, for a cashier's check for \$500

which appellant paid Mrs. Wagner on account of the principal sum of this note. Objections to this proffered testimony were sustained.

The sole question presented on this appeal is whether or not the court erred in sustaining the objections to the evidence offered by appellant and in excluding the proof under the offers made by him. In considering this question, it should be observed that, without objection, appellant was permitted to elicit the following from Mrs. Wagner:

"Q. Subsequent to the time you testified you had a conversation with Mr. Payne when you were at the bank and he took the three bonds that have been referred to, did you have any other transaction with him regarding that \$1500.00? A. No.

"Q. Did you have any further transaction with him regarding that \$1500.00? A. No.

"Q. At any time? A. Not at all.

"Q. You never talked with him about it? A. No; only when he said he had sold the lot and there was \$20.00 put up and asked me if I would like to sell it and I said I would, and he said there was \$20.00 put up and if he didn't take it, I would get the \$20.00, and that is all that was ever said.

"Q. Now, then, didn't he just a few days after you were at the bank there, come over and have a conversation with you regarding the purchase of this lot and this particular money? A. Absolutely not.

"Q. And he never had any further conversation with you at any time regarding this \$1500.00? A. No."

[1-4] It is said in 15 California Jurisprudence, 906: "A felonious intent to steal the property is an essential element of the offense of larceny. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent wholly and permanently to deprive the owner thereof." The question of intent is controlling in a prosecution for this offense. Intent may be and generally is evidenced by the surrounding circumstances, and is a question to be determined by the jury under the evidence before it. In the instant case, appellant's intent to steal the bonds is apparent when he failed to deliver them to his employer and to report the sale of the lot which he was required to do under the terms of his employment. Evidence of these circumstances, together with the fact of the misappropriation of the bonds, established a case of grand theft against him. A subsequent agreement between himself and Mrs. Wagner to rescind the sale and turn the transaction into a loan could not affect the crime already committed. The wrongdoer and the injured party, by themselves, are not permitted to thus relieve the criminal from the responsi-

bility of his acts. There is nothing in the evidence to indicate that Mrs. Wagner knew of the theft of the bonds prior to the middle of December, 1930. Because appellant gave her a note for their value, together with \$2,000 which he had otherwise obtained from her, was no defense to the charge against him of stealing her bonds, and had no place in the evidence before the jury.

From the record before us, the case was evidently tried upon the theory that the appellant stole personal property belonging to Mrs. Wagner, and not upon the theory that the theft was accomplished by fraudulently appropriating the bonds or by what was formerly denominated embezzlement. If, however, we should assume that the theft was accomplished by means of embezzlement, which assumption the evidence does not justify, still the provisions of sections 512 and 513 of the Penal Code do not require the introduction of the proffered evidence before the jury hearing the case under the circumstances disclosed by the record. *People v. Harris*, 100 Cal. App. 78, 280 P. 178.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 64

In re CLARK'S ESTATE.

McLELAND v. CLARK et al.

Civ. 7901.

District Court of Appeal, Second District, Division 1, California.

Sept. 24, 1931.

Wills ⚡260.

Will contest instituted within year after probate, but over six months after amendment shortening time to six months became effective, held barred (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860, § 2).

Will was probated April 8, 1929, at which time Code Civ. Proc. § 1327, allowed a year after probate for the filing of the petition to revoke the probate, but St. 1929, p. 860, § 2, which became effective on August 14, 1929, cut the time down to six months, and the petition was filed on February 25, 1930, so that more than six months had elapsed after the effective date of the amendment, and the right to contest the will was barred.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Petition by Alta J. McLeland to revoke the probate of the will of John G. Clark, deceased, opposed by Daniel B. Clark and others. From an order sustaining demurrer without leave to amend to the petition, and from the judgment, petitioner appeals.

Affirmed.

Friedlander & Gray, Lorrin Andrews, and Vernon S. Gray, all of Los Angeles, for appellant.

R. T. Walters, of Los Angeles, for respondents.

YORK, J.

This is an appeal from an order sustaining demurrer without leave to amend to the petition of contestant to revoke probate of the will of decedent, and from the judgment of dismissal entered pursuant thereto.

The will of decedent was admitted to probate and letters testamentary issued on April 8, 1929. On that date, section 1327 of the Code of Civil Procedure provided that any interested person may at any time *within one year* after probate file a petition to revoke probate of the will. An amendment to this section (St. 1929, p. 860, § 2), which became effective on August 14, 1929, cut down to six months the time within which a contest could be initiated. On February 25, 1930, the contestant, alleging that she was a pretermitted heir of the decedent, filed her petition to revoke the probate of the will. A demurrer that the petition was barred by section 1327 was sustained without leave to amend, and contestant appeals from such order and from the judgment of dismissal entered pursuant thereto.

Appellant maintains that the court committed error in sustaining the demurrer for the reason that the law, as it stood at the time the will was admitted to probate, is the governing factor, and that the amendment applies only to wills probated after its effective date. In other words, that appellant had one year from the date the will was probated—April 8, 1929—within which to commence her action to revoke it. Respondents, on the other hand, contend that the law which was in force at the time the petition to revoke probate was filed, applies; and that appellant having failed to commence her contest within six months after the effective date of the amendment, the demurrer was properly sustained. In support of their contention, respondents cite the case of *In re Whiting's Estate* (Cal. App.) 294 P. 502. In that case the contest was filed two days short of one year after the will was admitted to probate, but within two months and fourteen days after the amendment to section 1327, *supra*, became effective. A demurrer grounded upon the amended section was sustained. The contestants appealed, contending that they had a

full six months after the effective date of the amendment within which to contest the will, and therefore their petition was filed in time. The court upheld contestants' views and in the course of its opinion cited the case of *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 P. 451, 452, in which it was stated: "But a man has no vested right in the running of the statute of limitations until it has completely run and barred the action; and, when a change in the statute is made during the time of its running, that time is not a credit to the defendant, under the new law. *The whole period contemplated by the new law must lapse, to bar the action.* [Italics ours.] Such are the general rules applicable alike to criminal and civil actions, unless the new act itself expresses a contrary intent." From this it would seem that when six months had elapsed after the effective date of the amendment, appellant's right to contest the probate of the will here involved was barred.

The order and judgment appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

116 Cal.App. 729

**ENFANTINO v. UNITED STATES FIRE
INS. CO. et al.**

Civ. 7490.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1931.

1. Insurance ☞665(2).

Finding that indorsement shortening term of fire policy was not delivered to insured, but only to insurance solicitor, *held* supported.

2. Insurance ☞100.

Evidence established insurance solicitor to whom indorsement shortening term of fire policy was delivered was not insured's agent; hence delivery to agent was not delivery to insured.

3. Insurance ☞559(1).

If insurer, within time for presenting proofs of loss, denies liability or refuses to pay loss on other grounds, insurer waives necessity for proofs.

4. Insurance ☞559(1).

Declarations of insurer's agents that insured had no insurance because policy had expired constituted denial of liability sufficient to waive necessity of proofs of loss.

5. Insurance ☞555.

Provision against waiver of condition of fire policy *held* inapplicable to stipulations to be performed after loss.

Policy provided that no officer, agent, or other representative of insurer should have power to waive condition of policy except by writing indorsed thereon.

6. Insurance ☞556(1).

Insurance agent with general authority might waive conditions regarding notice and preliminary proofs of loss.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by J. P. Enfantino against the United States Fire Insurance Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Charles W. Haswell, of San Francisco, for appellants.

Chauncey Tramutolo and Robert E. Hatch, both of San Francisco, for respondent.

PER CURIAM.

An appeal by defendants United States Fire Insurance Company and North River Insurance Company from a judgment in favor of plaintiff in the sum of \$1,500.

The complaint alleged that on or about August 25, 1925, in consideration of a premium of \$45, defendants issued a policy of insurance upon certain alfalfa hay owned by plaintiff for a term of six months; that during the policy period, to wit, on January 1, 1926, the hay was totally destroyed by fire. It was further alleged that defendants waived the provisions of the policy requiring notice and proof of loss, and that plaintiff had otherwise kept and performed all the provisions of the policy.

Defendants alleged that, before the fire, the policy was indorsed and modified so as to shorten the term from six to four months; that consequently the policy expired before the fire occurred; further, that plaintiff failed to comply with the requirement that a written proof of loss be filed within sixty days from the date of the fire.

The cause was tried by the court, which found that plaintiff had performed all the conditions and provisions of the policy by him to be performed, and that defendants waived all conditions precedent therein to be performed by him; also that defendants within sixty days after the loss denied liability under the policy, and induced plaintiff to believe that a proof of loss need not be filed; further that the policy was never altered or amended so

as to shorten the term to a date before the fire occurred, and no indorsement so changing the term was ever delivered to plaintiff.

[1] With regard to defendants' claim that an indorsement shortening the term, to be attached to the policy, was delivered to the plaintiff, the evidence sufficiently supports the finding that there was no actual delivery to the plaintiff, but to one Broadhurst, who, defendants contend, was plaintiff's agent.

[2] It has been held that, where an insurance agent requests insurance from a company whom he does not represent, he is acting for the insured. *Solomon v. Federal Ins. Co.*, 176 Cal. 133, 167 P. 859. Broadhurst testified that he was employed as an insurance solicitor by A. L. Branch Company of Stockton, Cal., and solicited the insurance from the plaintiff. It was further testified that Branch was the agent of defendants and authorized to issue the policy in question; further, that the written indorsement was sent by defendants' general agents in San Francisco to Branch at Stockton, Cal., by whom it was to have been delivered to the plaintiff; and, in addition, the record contains evidence that Broadhurst was also a duly licensed agent for both companies and not an insurance broker during this period. This testimony disposes of the contention that Broadhurst was plaintiff's agent in the transaction.

[3,4] It is admitted that no proof of loss was filed, but the rule is well settled that, if the insurer within the time limited for presenting proofs of loss denies liability or refuses to pay the loss on grounds not relating to the proofs, he thereby waives the necessity for proofs (26 Cor. Jur. Fire Insurance, § 522, p. 406; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 P. 786; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233; *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 219, 111 P. 507; *Buxton v. International Indemnity Co.*, 47 Cal. App. 583, 591, 191 P. 84; *Lee v. United States Fire Ins. Co.*, 55 Cal. App. 391, 395, 203 P. 774; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 P. 941.

The evidence shows that, after the fire and before the time for presenting proofs expired, both the local agent of the insurers and the manager for their general agent declared to plaintiff that he had no insurance; their claim being that the policy had expired. These statements constituted a sufficient denial of liability within the above decisions.

[5,6] The policy contained a provision that no officer, agent, or other representative should have a power to waive any condition of the policy except by writing indorsed thereon or added thereto; but, as held in *McCullough v. Home Ins. Co.*, 155 Cal. 659, 102 P.

814, 18 Ann. Cas. 862, this provision had no reference to the stipulations to be performed after the loss had occurred, such as giving notice and furnishing preliminary proofs; and an agent with general authority might waive these conditions. *Bank of Anderson v. Home Ins. Co.*, supra. As the court said in *Ramirez v. United Firemen's Ins. Co.*, 46 Cal. App. 451, 189 P. 309, 311, "where the question of the waiver of such provision is involved, an appellate court should not, in order to reverse the judgment, scan too closely the evidence upon which the trial court refused to declare a technical forfeiture."

The evidence sustains all the findings necessary to support the judgment, and no error is shown which would warrant a reversal.

The judgment is affirmed.

116 Cal.App. 687

LACY v. PIONEER SOUTHWEST STAGES, Inc., et al.
Civ. 590.

District Court of Appeal, Fourth District, California.

Sept. 18, 1931.

Appeal and error ⇐395, 554(2).

Failure to file undertaking or make arrangements to pay for transcript, and absence of proceedings for bill of exceptions, justifies dismissing appeal.

Appeal from Superior Court, San Bernardino County.

Action by Lloyd Lacy against the Pioneer Southwest Stages, Incorporated, and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss the appeal.

Appeal dismissed.

Wardwell D. Evans, of San Bernardino, for respondent.

MARKS, J.

Respondent has moved this court to dismiss this appeal upon the grounds of the failure of the appellants to perfect their appeal and file the necessary record on appeal as required by law. The record before us shows due service of the moving papers upon the attorney for the appellants, but he did not appear or resist the motion.

On the 20th day of April, 1931, the appellants filed a notice of appeal from a judgment rendered in favor of the respondent in the sum of \$1,500. On the same day there was filed with the clerk a request to prepare

the transcript on appeal. The appellants failed to file any undertaking with the clerk to pay the cost of said transcript and failed to pay for the same or make any arrangements with either the clerk or the reporter to pay for the costs of making such transcripts. It further appears that no proceedings are pending in the court below for the preparation of a bill of exceptions.

It appearing from the record that the appellants have failed to conform to the provisions of law prescribing their duties in preparing the record on appeal, the motion to dismiss the appeal is granted, and the appeal is hereby dismissed. *Hughes v. DeMund*, 195 Cal. 242, 233 P. 94.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 47

KIPP SUPPLY CO. v. RICHFIELD OIL CO.
OF CALIFORNIA et al.

Civ. 6602.

District Court of Appeal, Second District, Division 1, California.

Sept. 23, 1931.

Sales ⇐479(8).

In action to recover value of oil well machinery and equipment sold under conditional sales contract, alleged conversion held question for jury.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Kipp Supply Company against the Richfield Oil Company of California and others. From a judgment of nonsuit, plaintiff appeals.

Reversed, and cause remanded.

Bailie, Turner & Lake, of Los Angeles, for appellant.

Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for respondents.

YORK, J.

This is an action in conversion to recover the value of certain oil well machinery and equipment. At the trial of the cause the plaintiff presented its case, and, at the conclusion thereof, defendants made a motion for a nonsuit, which motion was granted. From the judgment based thereon this appeal is taken by the plaintiff.

The facts involved in the controversy are these: The plaintiff sold on conditional sales contract to C. P. Harrel on February 4, 1925,

a lot of machinery and equipment to be used in oil-drilling operations upon certain real property situated in Athens; and under date of March 2, 1925, sold another lot of similar equipment under a like contract to E. E. Short, which was delivered to another parcel of land situated in the city of Los Angeles, upon which latter parcel a party named Brice owned an oil lease. Said Brice, on March 11, 1925, assigned his interest in the oil lease to John W. Henderson, and made an agreement with him, whereby Henderson was to drill upon the property in return for a percentage of the oil produced, the contract reciting that Brice had made arrangements to secure and pay for out of oil, etc., certain drilling equipment. A similar agreement was made between Harrel and Henderson as regards the parcel of land in Athens. Henderson then assigned his interests to the Henderson Petroleum Company on March 28, 1925, which company in turn assigned all its property and assets to the Richfield Oil Company on October 21, 1926, and was later officially dissolved by a decree of court. Meantime—on May 14, 1926—the plaintiff corporation made an assignment of its assets for the benefit of creditors, reserving to itself any surplus after satisfaction of creditors.

The complaint herein alleged that, during the period of ownership of the various pieces of machinery and equipment by the plaintiff, and on or about July 1, 1925, the Henderson Petroleum Corporation and John W. Henderson, being then in possession of all of said personal property, and with full knowledge of plaintiff's ownership and right of possession thereof, unlawfully, and without consent of the plaintiff, converted the same to their own use and disposed thereof to the defendant Richfield Oil Company.

The answer of defendants denied knowledge or notice of any right or interest of the plaintiff in or to the said personal property, and alleged that the plaintiff, by its own negligence, clothed said Short and Harrel with all indicia of ownership and title in and to the said personal property, allowing them to treat the property as their own, and to deceive and defraud the defendants by the assertion that they (the said Short and Harrel) were the owners of said property, free and clear of any lien or incumbrance thereon in favor of any person; and that, for a good and valuable consideration in hand paid to them by the Henderson Petroleum Corporation, they (the said Short and Harrel) duly and regularly executed a bill of sale to said personal property.

The motion for nonsuit contained four grounds, but upon this appeal these have been abandoned by respondent, with the exception of one ground, to wit: "That the conversion of the defendants has not been proven and that no unlawful or improper or illegal do-

minion has been exercised by the defendants or any of them over the property."

Various documents—including the two conditional sales contracts—were introduced in evidence, whereby it was shown that title and right of possession to the equipment here involved was to remain in plaintiff until fully paid for; that the equipment was to be used for the purpose of drilling a well on the premises described, and not for the purpose of resale or any other purpose, and that, in case of a violation of any of the covenants, terms, or conditions of said agreement, the plaintiff could take possession of said property without previous notice or demand of performance. While the evidence conclusively shows that Henderson assigned his interest in the oil wells to the Henderson Petroleum Corporation, and that that company assigned all of its assets to the Richfield Oil Company, there is no evidence of any assignment of either of the conditional sales contracts by Short or Harrel to the defendants. The president of the plaintiff corporation testified that he did not know where the equipment was located at the time of trial, although it was stipulated in the course of the trial that the Richfield Oil Company had been in full possession and control of the said equipment since on or about November 1, 1926.

The terms of the conditional sales contracts prohibited the resale of any of this property, and we are of the opinion that there was sufficient evidence adduced by plaintiff tending to prove a conversion by defendants, which would justify the submission of the case to the trial court. The motion for nonsuit was therefore improperly granted.

The judgment is reversed, and the cause remanded for further trial.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 32

LAWRENCE v. OAKES et al.

Civ. 7984.

District Court of Appeal, First District, Division 2, California.

Sept. 23, 1931.

1. Chattel mortgages ⇨109.

Under mortgage securing note and all other indebtedness, whether balance due on book account kept by mortgagee was considered as one debt or several *held* immaterial, as regards enforcement of mortgage as security therefor.

The mortgage was given to secure the note and all other indebtedness that might then or thereafter be due, subject to lim-

itation that lien of mortgage should not exceed sum specified.

2. Appeal and error ⇨101(1).

Findings on conflicting evidence are conclusive.

3. Chattel mortgages ⇨283.

In mortgage foreclosure proceeding, court may shape decree to afford complete relief as between parties.

4. Chattel mortgages ⇨283.

Where mortgage created lien on all crops growing or to be grown until debt was paid, judgment ordering sale of all crops grown to date of entry of judgment *held* proper.

Ordering sale to date of entry of judgment was proper, although mortgagee's complaint was filed in August, 1926, and no supplemental complaint was filed and judgment was not entered until April, 1928.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Carl F. Lawrence against William C. Oakes and others, in which the defendant E. G. Potter, receiver for the Stewart Fruit Company, filed a cross-complaint against William C. Oakes and another. From a judgment for cross-complainant, cross-defendants appeal.

Affirmed.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles (Abe Richman, of Los Angeles, of counsel), for appellants.

Charles A. Christin and Knight, Boland & Christin, all of San Francisco, for respondent.

SPENCE, J.

The Stewart Fruit Company, one of the defendants in the above-entitled action, through E. G. Porter, receiver for said company, filed its cross-complaint against William C. Oakes and Mary Rose Oakes as cross-defendants seeking to foreclose a mortgage covering crops grown upon the premises of said cross-defendants. From a judgment in favor of cross-complainants decreeing foreclosure of said mortgage, cross-defendants appeal.

We will refer to said cross-defendants as the mortgagors and to the Stewart Fruit Company as the mortgagee. On November 21, 1922, the mortgagors who were indebted to the mortgagee in the sum of \$8,864.97 executed a promissory note to cover said indebtedness secured by the mortgage in question. The mortgage covered "all crops of citrus fruits now growing and to be grown during

the seasons of 1922-1923-1924 and 1925 upon the trees and vines standing, growing and to be grown during said seasons" upon the lands therein described. It further provided that, "in the event said promissory note shall not be fully paid at maturity, it shall in like manner be secured by, and this mortgage shall likewise fully cover, all crops of the same character, growing or to be grown upon said premises, until said promissory note shall be fully paid, both principal and interest." It further provided that it was also given "to secure all other indebtedness and obligations that may now or hereafter be due, owing or existing from said mortgagors * * * to said mortgagee * * * during the continuance of this mortgage, not to exceed in all the sum of five thousand dollars, exclusive of the sum mentioned in said promissory note with interest. * * * Thereafter advances were made regularly by the mortgagee to the mortgagors until about February, 1926, when the company went into the hands of the receiver. These advances were charged to the mortgagors upon the books of the mortgagee and credit entries were made for the crops delivered to the mortgagee by the mortgagors under the terms of the mortgage. In the cross-complaint it was claimed that the sum of \$19,431.38 remained unpaid to the mortgagee upon the promissory note and advances after crediting the mortgagors with the sum of \$13,080.37 for crops delivered to the mortgagee. By way of defense the mortgagors claimed that at the time of the execution of the promissory note the amount due to the mortgagee was \$3,864.97 and not \$8,864.97. They further claimed that it had been mutually agreed between them and mortgagee that they should have a further credit of \$7,000 upon the 1925 crop. Upon both of these issues raised by way of defense the evidence was conflicting. The trial court found that the sum of \$13,864.97 was due, owing, and unpaid on account of said promissory note and said advances. By the terms of the mortgage the lien was limited to this amount, and as indicated by the trial court, a finding of the amount of indebtedness in excess of said sum would have been immaterial in the foreclosure proceedings.

[1] On this appeal the mortgagors as appellants contend that there were two debts, the one being the mortgage debt and the other being an unsecured debt. They thereupon argue that the proceeds of the sale of the mortgaged crops, to wit, the sum of \$13,083.37, must be applied to the payment of the mortgage debt and that the respondent was only entitled to foreclose for the balance of \$784.60 and not for the full sum of \$13,864.97 as decreed by the court. We find no merit in this contention. The mortgage was given to secure the note and "all other indebtedness and obligations that may now or hereafter be

due" subject to the limitation that the lien of the mortgage should not exceed the principal sum of \$13,864.97. It is immaterial whether the balance due on the book account kept by the mortgagee be considered as but one debt or as several debts. All debts and obligations were secured by the mortgage subject only to the limitation above mentioned. We are therefore of the opinion that the trial court, upon finding that the total sum secured was due and unpaid, correctly decreed foreclosure in that amount. The cases cited by appellant are not in point and the facts here are more closely analogous to those in *Frank H. Buck Co. v. Buck*, 162 Cal. 300, 122 P. 466; *Myers v. Shain Lumber Company*, 178 Ark. 174, 10 S.W.(2d) 20; *Farmers' Union Warehouse Co. v. Barnett Bros.*, 22 Ala. App. 524, 116 So. 810; and *Geo. M. Paschal & Bro. v. Bohannon*, 59 Okl. 139, 158 P. 365. It is true, as pointed out by appellant, that in each of the foregoing cases the mortgage placed no limitation on the total amount of other indebtedness secured thereby, but we believe that the only effect of the limitation in the present case was to place a limit upon the amount of the balance for which foreclosure might be had.

[2] Nor do we find any merit in appellant's contention that the mortgagors were entitled to a further credit of \$7,000 by reason of an alleged agreement with the mortgagee. It is sufficient to state that there was a sharp conflict in the evidence relating to whether or not such an agreement was made. The findings of the trial court are therefore conclusive.

[3, 4] One further point is urged by appellants. The cross-complaint against appellants was filed in August, 1926, and by the prayer asked "that the mortgage in favor of the Stewart Fruit Company be foreclosed and their property therein described be sold. * * *" The judgment dated April 10, 1928, covered the crops grown up to that time. Appellants contend that the trial court erred in decreeing foreclosure of the crops grown after the filing of the cross-complaint in the absence of a supplemental complaint. In our opinion this contention is likewise without merit. By its terms the mortgage was a lien upon all crops "growing or to be grown" until the debt was paid. A court of equity in a foreclosure proceeding may properly shape its decree to afford complete relief as between the parties (11 C. J. 729, § 553), and under the provisions of the mortgage and prayer of the cross-complaint the trial court correctly ordered the sale of all crops grown up to the date of the entry of judgment. No supplemental complaint was required.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

117 Cal.App. 1

PEOPLE v. ROBERTSON.

Cr. 214.

District Court of Appeal, Fourth District, California.

Sept. 22, 1931.

Rehearing Denied Oct. 6, 1931.

1. Larceny ☞57.

In prosecution for grand theft of chickens, evidence did not show defendant's intention to stop payment on check at time it was given in payment of chickens.

Facts disclosed that defendant was engaged in buying chickens for his brother, with authority to write checks therefor on his brother's account; that he contracted to purchase 1,800 chickens from complaining witness at 85 cents per chicken; that he gave a check for \$300 when contract was entered into and in a few days another for \$200; that, when defendant went to take the chickens, he took the best 900, and gave a check for \$628, which, with former checks, paid for the 900 at 85 cents, and that he refused to take any more; and that his brother subsequently stopped payment on the check for \$628.

2. Larceny ☞12.

Contract price being paid for portion of chickens taken, failure to take remainder under contract did not establish grand theft.

3. Larceny ☞6.

Alleged theft, where payment on check given for chickens was stopped, was difference between value of chickens taken and contract price paid.

4. Larceny ☞59.

Uncorroborated statement by owner that value of chickens taken was \$1.25 in that vicinity held insufficient to fix value where taken.

5. Larceny ☞65.

In prosecution for grand theft of chickens, evidence held insufficient to sustain conviction.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Frank Robertson was convicted of grand theft, and he appeals.

Reversed.

Earl D. Killion, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Elmer Heald, Dist.

Atty., and D. H. Wolford, Deputy Dist. Atty., both of El Centro, for the People.

BARNARD, P. J.

The defendant was accused, in an information filed by the district attorney of Imperial county, of the crime of "Grand Theft, in that on or about the 1st day of November, 1930, in the County of Imperial, State of California, the said Frank Robertson unlawfully took the property of one J. C. Poe, consisting of nine hundred domestic fowls of the value of \$1125.00." He was tried by the court sitting without a jury, found guilty, and sentenced to imprisonment in the penitentiary. This appeal is from the judgment and from an order denying a new trial.

It appears from the evidence that about the middle of October, 1930, Paul Robertson, a brother of the appellant, was engaged in the business of buying and shipping chickens in the city of North Hollywood, and the appellant, as agent for his brother, was engaged in buying chickens in Imperial county. Taking the evidence most favorable to the respondent, it appears that on October 15, 1930, the appellant, as the agent of his brother, entered into a contract with the complaining witness, J. C. Poe, wherein he agreed to purchase from Mr. Poe 2,000 chickens, with the privilege of culling 200, making a net of 1,800 chickens at 85 cents per head. The appellant had authority to sign checks on his brother's bank account to cover the purchase of chickens in Imperial county, and at the time of this purchase he gave such a check to Poe for \$300 on account of the purchase price, agreeing to take delivery of the chickens within a few days. Some ten days later, the chickens not yet having been delivered, Poe went to the home of the appellant in El Centro, and received an additional payment of \$200 on the deal. On or about October 25, 1930, the appellant went to Poe's ranch for the purpose of taking delivery of part of the chickens. While there is a sharp conflict in the testimony as to what occurred on this occasion, Poe testified that the appellant desired to change the deal and take the best half of the chickens at 95 cents a head, which he refused. No chickens were taken on that day. On November 1, 1930, the appellant returned to Poe's ranch, stated that he had come after the chickens, that he desired to take the larger ones first, and that he would come after the others in a few days. Poe agreed to this, provided the feed bill would be paid, and assisted the appellant in loading 900 of the chickens. Appellant then gave Poe a check on his brother's bank account for \$628, this being for 900 chickens at 85 cents, less \$200, the second payment theretofore made, plus \$63 for cost of feed. It further appears that on November 3, 1930, another

employee of P. E. Robertson arrived in North Hollywood with another load of chickens. This employee having told him about the Poe deal, P. E. Robertson called the appellant on the telephone and asked what the facts were. During this conversation, P. E. Robertson told the appellant that he intended to see his attorney about stopping payment on this \$628 check, inasmuch as Poe had not lived up to his contract, and told his brother to come to Los Angeles. After consulting his attorney, P. E. Robertson stopped payment on the check, and at the same time issued another check payable to Poe for \$278. On the same day, on his instructions, his attorney sent this check to Poe with a letter explaining that, since Poe had breached his agreement to sell them 3,000 chickens, they had decided to pay him for 900 chickens actually delivered, instead of holding him to the contract, and that this check, together with the \$500 already paid, would cover the 900 chickens delivered at 85 cents each, plus \$13 for feed. On November 5 or November 6, appellant went to North Hollywood, and at that time was told by his brother that payment on the check had been stopped. It was stipulated at the trial that payment on the check was stopped by the brother and not by appellant, and that this was not done in appellant's presence.

[1] Respondent argues that the appellant, in obtaining possession of the best 900 chickens at 85 cents per head, was guilty of grand theft; it being contended that the only question at issue is whether or not, at the time of taking the chickens, there existed in the mind of the appellant an intention to feloniously take the same. While conceding that the fact that the chickens were paid for at 85 cents per head is some evidence that the appellant did not intend to steal them, it is argued that this is not conclusive upon that point. Respondent argues: "It is clear that whether or not defendant is guilty of grand theft, depends on whether or not there existed in his mind at the time he gave the check for \$628 any intention to cancel payment on the check and thereby deprive the defendant of his property. It is true that defendant himself did not stop payment on the check, that this was done by his brother, on whom the check is drawn. But if defendant knew that his brother had such an intent, or if the defendant intended to advise his brother to adopt this means of obtaining the chickens, the offense is grand theft." Respondent then points out, as direct evidence of an intent to stop payment of the check, the testimony of one Mrs. Meredith, who testified that, some two weeks after the chickens were delivered, the appellant came to a feed store operated by herself and her husband, and then told her that he intended to stop payment on the check when he gave it. While Mrs. Meredith made that statement on cross-examination, her direct testimony was that the appellant

came into her place of business and desired to talk to her husband about the check he had given to Poe; that he stated that he knew that Mr. Meredith was going to get a check from Poe, and he wanted him to get Poe's personal check and not take the check he had given to Poe, because he knew he was going to stop payment on that check. He further stated that he did not want the Merediths' affairs tied up, because he was going to stop payment on the other check. This is the only evidence shown by the record tending to show an intent on the part of the appellant to stop payment on the check at the time it was given, and, in view of the purpose for which appellant came to the Merediths, and of the fact that Mr. Meredith was present when the check was given, it hardly seems conclusive. In any event, as conceded by respondent, even if the intent to stop payment on the check existed at the time it was given, it was incumbent upon the prosecution to show that some act on the part of the appellant followed that intent. While arguing that, if appellant knew that his brother had such an intent, or if he intended to advise his brother to adopt this means of obtaining the chickens, the offense would be grand theft, respondent fails to point to any evidence of those material things in the record. We can find no evidence whatever that appellant then knew of any intention on the part of his brother to stop payment on the check, that he intended to advise his brother so to do, that he ever did advise his brother to do so, or that he did any act or thing thereafter which led to payment being stopped. The uncontradicted evidence is that his brother told him three days later that he intended to consult his attorney for the purpose of seeing if he could not stop payment on the check, and that appellant first learned that payment had been stopped some five or six days later, when he was told this fact by his brother.

[2-4] It fully appears that the chickens taken were paid for at the contract price, and the fact that certain other chickens were not taken in accordance with the contract, while constituting a breach thereof, neither necessarily makes the taking a theft nor establishes it as a grand theft. The appellant was charged with stealing 900 chickens of the value of \$1,125. Under any circumstances, if any theft was committed it was not that of the entire chickens, but was the taking of the excess of the value of these particular chickens over the average contract price. There is no evidence as to what this excess was, except a statement by the complaining witness that the market value in the Imperial Valley, of the chickens taken was \$1.25 each. In addition to evidence in the record showing its unreliability, this statement is hardly sufficient to fix the value at the place where the chickens were taken. *People v. Ciani*, 104 Cal. App. 596, 286 P. 459.

[5] Assuming that there is some evidence of intent on the part of the defendant, there is no evidence of any act carrying out the intent and no evidence of the value of the unidentified portion claimed to have been taken. We are well aware that devices of this sort are frequently used to defraud farmers out of their crops and produce, and doubtless this general situation had its influence upon the trial court. The methods used in this transaction are far from commendable. It seems clear that either the defendant or his brother intended to break the contract they had made, and between them they did break it. We may even suspect that one or both of them intended to, and perhaps did, commit a crime, but upon the record before us certain links in the chain of evidence are missing.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

116 Cal.App. 353

**AMERICAN EXCHANGE NAT. BANK v.
SOFFEL.**
Civ. 6594.

District Court of Appeal, Second District, Division 1, California.
Sept. 25, 1931.

Hearing Denied by Supreme Court
Oct. 26, 1931.

Appeal and error §173(1).

Defense not raised in trial court in action on trade acceptances could not be considered by appellate court on petition for rehearing.

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

On petition for rehearing.

Petition denied.

For original opinion, see 2 P.(2d) 533.

Burton Briggs Crane, of Los Angeles, for appellant.

Sherman & Sherman, of Los Angeles, for respondent.

PER CURIAM.

In this petition appellant lays much stress upon the proposition that there was a defect in the indorsements on the trade acceptances, in this: That the acceptances, which were introduced in evidence without any explanation of the indorsements, show on their face that the Nature Products Company, at the

time when it transferred the acceptances to respondent, was a prior party to whom the instruments had been negotiated back after transfer to other indorsees; and that by necessary inference it appears that the company transferred the acceptances to respondent by delivery without further indorsement. Appellant contends that under these circumstances, and by reason of the fact that the transfer to respondent was not accompanied by a new indorsement, respondent took the instruments merely as a holder for value, and not as a bona fide holder thereof in the ordinary course of business as the negotiable instruments law expressly provides.

For the purposes of the argument let it be conceded (without deciding) that this would be a good defense if it had been presented in the lower court. In that event the plaintiff would have had the opportunity to show, and possibly it might have shown, that the names indorsed on the acceptances, following the name of the Nature Products Company, were all names of officers and directors of the company, who had never had possession of the acceptances and whose names had been placed thereon solely and only for the purposes of sale of the acceptances to the plaintiff. These, or some other explanatory facts which the plaintiff might have produced in evidence, were very evidently omitted from the trial because the defense now urged was not presented to the court. An examination of the record of the trial shows that appellant was there claiming and contending that respondent was not a holder of the acceptances in due course and for value, solely for the reason that, as appellant contended, respondent had received the instruments for purposes of collection and not as an outright purchaser. Respondent, on the other hand, conceded that if it was not such bona fide holder in due course of business, the defense would be good because the defendant had accepted the instruments without consideration therefor.

Under such circumstances we are of the opinion that the point now urged as the principal ground for rehearing was not properly before us for consideration on its merits. In *Isenberg v. Sherman*, 299 P. 528, on a petition for rehearing the Supreme Court denied the rehearing and in so doing used language which is pertinent here: "The point cannot be considered on this appeal for the reason that it was never made in or presented to the trial court. * * * These, and many other facts appearing in the record, conclusively indicate that, during the trial of this case, at no time was there urged the point that these particular 185 shares were illegally seized for the reasons now sought to be urged. Under well-settled principles of law, we are bound to hold that this point cannot now be considered."

The petition for rehearing is denied.

116 Cal.App. 733

WILLIS v. PAUL
Civ. 8052.

District Court of Appeal, Second District, Division 1, California.

Sept. 22, 1931.

1. Appeal and error — 478.

Applicant for supersedeas to stay execution pending appeal must show that his failure to perfect undertaking in lower court was owing to accident, surprise, inadvertence, or excusable neglect.

2. Appeal and error — 478.

To obtain supersedeas, good faith of appellant in attempting to file his undertaking on appeal in lower court must be shown.

3. Appeal and error — 479(1).

Facts held not to entitle appellant to writ of supersedeas to stay execution pending appeal.

Facts disclosed that appellant made three unsuccessful attempts to file an undertaking on appeal, and an attempted fourth undertaking was held by the trial court to have been filed too late; that throughout a period of approximately two months, during which such undertakings were being filed, in order to prevent the approval by the trial court of such proposed undertaking appellee was required to and did attend six separate hearings thereon; and that persons who had failed to qualify as sureties on previous attempted undertakings were proposed as sureties on subsequent undertakings.

Appeal from Superior Court, Los Angeles County.

Action by James L. Willis against Samuel Paul. From the judgment, defendant appeals.

On petition for writ of supersedeas by Samuel Paul, to stay execution of a judgment in favor of James L. Willis, pending appeal.

Writ denied.

E. M. Smuckler, Kaye & Johnstone, and Philip S. Schutz, all of Los Angeles, for appellant.

Michael Lavelle, of Los Angeles, and Paul Garber, of Bakersfield, for respondent.

HOUSER, J.

From the completed record herein it appears that following the recovery of a judgment by plaintiff from the defendant, the giving by the former to the latter of a notice of its entry, and the issuance of an execution on such judgment, the defendant gave notice

to the plaintiff of his intention to move for a new trial, which latter motion having duly come on for hearing, was by the court denied. In the meantime, and by means of several separate, consecutive orders secured by the defendant from the trial court, by which the execution of the judgment was stayed, the plaintiff was prevented from satisfying the same for a period of over two months. Thereafter, the defendant, having given notice of appeal from the judgment, filed an undertaking on appeal. On exception taken by the plaintiff to such undertaking, the sureties thereon failed to justify. Thereupon the defendant filed a second undertaking which resulted in its rejection by the trial court for the reason that it was insufficient in form. A third undertaking filed by the defendant also failed of its purpose because of the inability of the sureties thereon to justify; and on a judicial hearing of the matter, an attempted fourth undertaking was held by the trial court to have been filed "too late."

It also appears that throughout a period of approximately two months, during which such undertakings were being filed, in order to prevent the approval by the trial court of either of such proposed undertakings, the plaintiff was obliged to and did attend six separate hearings thereon, and that as to each of three of such hearings, on application by the defendant to the trial court, the time for serving notice thereof was shortened. It is also worthy of note that as to the sureties on the several undertakings presented by the defendant, L. Margolis and Samuel Wiener failed to justify on the first undertaking; that said L. Margolis, who also signed as Leizer Margolis, also attempted to qualify as a surety on each of the four undertakings on appeal; that the said Samuel Wiener was also a proposed surety on the fourth undertaking on appeal, but thereon attempted to qualify for only one-half the amount of same; that although each of the following, to wit, Leizer Margolis, Gitel Margolis, Nathan Gazin, and Yetta Gazin, who sought to become sureties on the third undertaking, failed to justify, yet each of them proposed to be a surety on the fourth undertaking and therein claimed to qualify for the full amount of said undertaking. However, in addition thereto, on the fourth undertaking three new names appeared as sureties, wherein each of them attempted to qualify for one-half the amount of said undertaking.

In such circumstances as they now appear, on application made by appellant for a writ of supersedeas, this court issued its order that pending the hearing thereof the plaintiff be enjoined and restrained from enforcing the said judgment.

[1] In the leading case of *Hill v. Finnigan*, 54 Cal. 493, it is held that an appellate court

possesses inherent power "to secure to the appellant the fruits of a successful appeal, * * * and * * * make an order to operate as a supersedeas." However, such an order accruing to the appellant will not issue in his behalf as a matter of right. In the case of *Williams v. Borgwardt*, 115 Cal. 617, 47 P. 594, in effect it is ruled that unless the applicant make a showing by which it may appear that his failure to perfect an undertaking in the lower court was caused by reason of accident, surprise, inadvertence, or excusable neglect, the appellate tribunal should not relieve him from his embarrassment. To the same effect are *Nonpareil Mfg. Co. v. McCartney*, 143 Cal. 1, 76 P. 653; *Segarini v. Bargagliotti*, 193 Cal. 538, 226 P. 2; *Reliance Acceptance Corp. v. Lundblade*, 96 Cal. App. 371, 274 P. 360.

[2] It is also a prerequisite to the obtaining of a writ of supersedeas that, in attempting to file his undertaking on appeal, the good faith of the petitioner in the lower court be apparent. *Foster v. Fernandes*, 200 Cal. 274, 252 P. 726.

[3] Without again reviewing the several acts and the general conduct of the petitioner in the instant matter, it suffices to say that this court is not favorably impressed either with the good faith of the petitioner, or with his attempted compliance with either of the other requirements upon which the exercise in his favor of the discretion of the court must depend.

The petition is denied, and the order of this court by which the plaintiff was restrained from enforcing the judgment is vacated.

We concur: CONREY, P. J.; YORK, J.

116 Cal.App. 712

HARTJE v. OLCOTT.

Civ. 7624.

District Court of Appeal, First District, Division 1, California.

Sept. 21, 1931.

1. Appeal and error ☞842(4).

Question of proximate cause is one of fact for trial court, sitting as jury.

2. Appeal and error ☞989.

Where trial court's findings are challenged for insufficiency of evidence, reviewing court is limited to inquiry whether facts reasonably support inferences drawn therefrom.

3. Carriers ☞318(1), 346(1/2).

Facts disclosing circumstances under which door on jitney bus slammed on passenger's thumb, held to support finding of negligence and absence of contributory negligence.

The evidence disclosed that passenger after entering tonneau of jitney bus attempted to close door from the inside; that while passenger was in a standing, bent-over position, and about to close door and sit down, defendant started ahead with a jerk and at a rapid rate of speed, throwing plaintiff off balance and causing the door to slam violently on his thumb and inflicting severe and painful injuries thereto.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Robert J. Hartje against Walter G. Olcott. Judgment for plaintiff, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, and Theodore Hale, Barry J. Colding, and Carroll B. Crawford, all of San Francisco, for appellant.

Harold C. Hennessy and Aaron Vinkler, both of San Francisco, for respondent.

KNIGHT, J.

The trial court sitting without a jury awarded plaintiff \$600 damages on account of personal injuries suffered by him while riding as a passenger for hire in an automobile operated by defendant as a "jitney bus," and defendant appeals, contending that the evidence is insufficient to sustain the trial court's findings upon the issues of negligence and contributory negligence.

It appears from the evidence without dispute that upon entering the tonneau of the automobile (a seven-passenger sedan), plaintiff took hold of the handle on the inside of the door to close it, and while he was still in a standing, bent-over position, about to close the door and sit down in one of the "jump" seats, defendant started ahead with a jerk and at a rapid rate of speed, throwing plaintiff off balance and causing the door to slam violently on his thumb, inflicting severe and painful injuries thereto, which placed him under the care of a surgeon and incapacitated him from work for some six weeks.

[1-3] In our opinion the foregoing facts are amply sufficient to sustain the trial court's findings on the issues above mentioned. Defendant argues that the only inference to be drawn from the evidence is that plaintiff's injury was proximately caused "by plaintiff himself in so taking hold of the door

that when he closed it his thumb was injured," and not, as claimed by plaintiff, by the manner in which defendant started the automobile. The question of proximate cause, however, was one of fact to be determined by the trial court, sitting as a jury; and it is well settled that where, as here, findings are challenged upon the ground of insufficiency of the evidence to sustain them, the power of the reviewing court is limited to an inquiry as to whether the facts reasonably support the inferences drawn therefrom by the trial court. Therefore, even though the circumstances be such that reasonable minds might differ upon the question of proximate cause, the conclusion reached by the trial court is controlling on appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

117 Cal.App. 22

PEOPLE v. INGLES.
Cr. 213.

District Court of Appeal, Fourth District, California.

Sept. 22, 1931.

1. False pretenses ☞49(1).

In prosecution for grand theft based on obtaining property of prosecuting witnesses through false representations, evidence *held* to support conviction.

2. Criminal law ☞568.

Criminal intent may be inferred from general circumstances surrounding transactions.

3. Criminal law ☞374.

Other similar transactions carried on by defendant are sufficient to prove guilty knowledge and criminal intent.

4. Criminal law ☞1037(1).

Complaint of misconduct of prosecuting attorney should be assigned as misconduct during the trial.

5. Criminal law ☞1144(15).

Presumption exists that jury obeyed instructions of trial court to disregard testimony stricken out.

6. Criminal law ☞730(3), 1037(1).

In prosecution for grand theft, prosecutor's introduction of testimony disclosing collateral transactions *held* not prejudicial misconduct, in absence of objection and in view of instructions to disregard such testimony when stricken out.

Testimony offered by prosecuting attorney tended to show collateral transactions wherein defendant defrauded and cheated another woman out of all the property she had. It did not appear at time evidence was admitted that it was inadmissible, and no objection thereto was made at the time. No instruction to disregard such testimony was asked by the defendant. After testimony was stricken, however, court definitely and pointedly instructed jury to disregard such testimony in determining defendant's guilt.

7. Criminal law ☞730(3).

In prosecution for grand theft, prosecutor's offer to disclose collateral transactions of swindling *held* not prejudicial misconduct in view of instruction to disregard statement.

After defendant's attorney had made statement concerning certain evidence which had been stricken out, the prosecuting attorney stated his desire to go into a certain conversation between witness and a banker in the presence of the defendant in regard to a collateral transaction wherein another person was swindled by the defendant. The court instructed the jury that the statement was entirely improper and that they should disregard same and refrain from drawing any inference adverse to defendant's interest from any suggestion contained in the statement of the prosecuting attorney to the effect that anybody had been swindled.

8. Criminal law ☞1169(5).

In prosecution for grand theft, introduction of evidence under conspiracy counts in indictment before such counts were stricken out *held* not prejudicial, in view of instructions.

Reception of evidence under conspiracy counts which were subsequently stricken out was not prejudicial as it appeared that most of the facts testified to were actually denied by the defendant during his testimony. Furthermore, the trial court carefully instructed the jury to disregard the testimony stricken out.

Appeal from Superior Court, San Diego County; Clarence Hardin, Judge.

Martin Ingles was convicted of grand theft, and he appeals.

Affirmed.

Curtis Hillyer and Irve C. Boldman, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and B. L. Comparet, Deputy Dist. Atty., both of San Diego, for the People.

BARNARD, P. J.

The grand jury of San Diego county returned an indictment against Martin Ingles, Gladys Ingles, and Linda Armstrong, charging in eight separate counts the crimes of conspiracy to commit the crime of grand theft, and grand theft. The odd-numbered counts charged the crime of conspiracy to commit grand theft from four separate persons or sets of persons. The even-numbered counts charged the commission of grand theft from these respective parties. Before trial, on motion of the people, counts I, II, V, and VI were dismissed. During the trial the remaining counts were dismissed against all of the defendants, except the fourth and eighth counts against the defendant Martin Ingles. As it finally remained, the indictment in the fourth count charged Martin Ingles with feloniously taking the property of Lottie Dinklage and Charles H. Dinklage, consisting of a Republic of Cuba bond of the value of \$12,000, and in the eighth count charged Martin Ingles with feloniously taking the property of Emma J. Peabody, consisting of a first mortgage of the value of \$2,500. The defendant was convicted on the fourth and eighth counts, and this appeal is from the judgment which followed and from an order denying a motion for a new trial.

Appellant's principal contention is that the evidence is not sufficient to sustain the judgment, it being contended that it fails to show a felonious intent, corroboration of the testimony of the complaining witness that false pretenses were made, and that any fraud was committed. In short, the appellant argues "where a prosecutor gets out of the transaction just what he bargained for, no offense is committed." While this may be true, it cannot be said that a person gets what he bargains for although he gets the same article, if the article is of a value far less than that for which he bargained. *People v. Helmlinger*, 69 Cal. App. 139, 230 P. 675. Appellant relies largely upon conflicts in the evidence, with which we cannot be concerned.

[1] First considering the fourth count, there is evidence to show that Dinklage and his wife moved from Kansas City to San Diego in May, 1930; that on July 20, 1930, they met the appellant on a boat trip from San Diego to San Pedro and return; that on their arrival at San Diego the appellant entertained them at his home and for some time thereafter showered them with social attentions; that a day or two after the boat trip the appellant invited them to drive to a ranch owned by him, but instead took them to Glen Abbey Memorial Park; that he told them sections in that park were then worth \$1,000 a section, and that he had recently sold one for \$1,000; that there were twenty sections, belonging to a friend of his, which would be

sold under a mortgage and lost unless immediately sold; and that he was going to take ten sections himself and would sell them the other ten for \$400 a section. Appellant sold them ten sections for \$4,000, taking in payment four bonds of the Republic of Cuba, having a face value of \$1,000 each. The appellant continued to entertain the Dinklages with automobile rides, dinners, and shows, and a few days after the other transaction he told them he was interested in increasing their income and traded them certain shares of stock in Imperial Royalties Company and in Monarch Royalties Corporation for Republic of Cuba bonds of the face value of \$8,000. It appears that the appellant represented that the Imperial Royalties stock was worth \$24 per share and the Monarch Royalties stock was worth \$4 per share; that he gave them certain circulars issued by these companies; and that he pointed out to them that whereas their Cuban bonds brought them in \$36.50 per month, this stock would bring them \$62.10 per month. While appellant contends that no misrepresentations of fact were made, there is evidence to show that he represented that the cemetery sections belonged to a friend of his and were about to be sold under a mortgage; that he would take half of them and sell the other half to the complaining witnesses; and that the sections were worth \$1,000 a section. Also, that he represented as a fact that the Imperial Royalties stock was worth \$24 a share but he would sell it for \$14 a share, and that the Monarch stock was worth \$6, but would be sold to the complaining witnesses for \$4 per share. As to the truth of these representations there was evidence that the sections in Glen Abbey were at that time worth from \$90 to \$275. One witness, who was secretary of the company selling that property, testified that the value of sections in the block in which these sections were, was not more than \$250 or \$275. Another witness testified that their value was from \$90 to not exceeding \$150 per section. There was evidence of actual sales at \$90. In reference to Imperial Royalties stock, there was expert evidence that in July and August, 1930, the bidding price on this stock was \$12.50 to \$15 and the asking price \$16 to \$19, and that the different portions of the Monarch stock was worth from 40 cents to \$6. Summarizing the evidence, it appears that the sections in Glen Abbey and the stocks sold to the complaining witnesses by appellant, if as represented, would have been worth \$17,794; that they were actually worth \$8,649.80; and that the appellant received for them twelve bonds of the Republic of Cuba of the actual value of, and actually sold for, \$11,280. Appellant insists that there was no corroboration as to the making of false pretenses in reference to the cemetery lots, no contention being made that there was a lack of corroboration in connection with the sale of the

corporation stocks. In fact, no such contention could be made as to the corporation stocks, as in addition to the testimony of several witnesses, the appellant had in his own writing made a list of the various stocks with the values represented, and with figures showing that the income from the stocks he was selling them would be \$62.10 per month as opposed to \$36.50 per month income on the Cuban bonds. Both of these transactions were involved in the fourth count, and if no corroboration existed as to the making of the false pretenses in reference to the cemetery lots, the evidence as to the other part of the transaction would still be sufficient to support the judgment as to that count. In addition, in reference to the cemetery lots, it appears that the appellant signed an agreement to sell those lots to the Dinklages, in which he sets forth that he "also agrees that \$400 per section is under the regular market price for same." We think that this, with the other circumstances shown by the record, constitutes ample corroboration. *People v. Mace*, 71 Cal. App. 10, 234 P. 841. There is ample evidence in the record that the representations made were believed by the other parties and relied upon by them, and that the exchange would not otherwise have been made.

[2, 3] Appellant urges that no criminal intent is shown. It is well established that criminal intent may be inferred from the general circumstances surrounding the transactions, and that other similar transactions carried on by a defendant are sufficient to prove guilty knowledge and criminal intent. *People v. King*, 23 Cal. App. 259, 137 P. 1076; *People v. Helmlinger*, supra. The record in this case contains nearly 1,100 pages, and in addition to evidence of similar misrepresentations made to a number of other people, the surrounding circumstances are amply sufficient to justify the jury in ascribing to the appellant the requisite knowledge and intent.

In reference to the eighth count wherein the appellant was charged with feloniously taking the property of Emma J. Peabody, it appears that the appellant represented to her that a block of stock was being sold to liquidate an estate; that the appellant had bought all that he could and had borrowed \$2,500 more to put into this stock; that there was a little more of the stock than he could handle which he would let her have; that the stock was at that time worth at least \$3; and that he would let her in on it at \$1.50. From the evidence it appears that she paid \$2,700 for stock which was of the value of \$1,332. For the reason that the sentence on the eighth count was made to run concurrently with that on the fourth count, we feel it would serve no useful purpose to make any extended analysis of the evidence in reference to this count. However, no claim is made of lack

of corroboration as to the making of the false pretenses in connection with this count, and the other questions raised are similar to those urged in connection with the fourth count. We feel compelled to hold that the evidence is sufficient to sustain the judgment under both counts.

[4-6] The appellant strenuously maintains that the district attorney was guilty of misconduct during the trial, sufficiently prejudicial to require a reversal. One witness, Julia Daniels, testified that she purchased a section in Glen Abbey memorial park for \$360, as an investment; that after being warned by her banker the deal was changed and she took only one-third of a section for \$120, for her own use. Subsequently she found that the deed given her covered wrong lots and she complained to the district attorney. Her examination shows the following: "Q. What was said or done in the bank? A. Well, the banker said that he thought that I had better know more about this deal, because this was the same gentlemen that had cheated a Mrs. Edwards out of all she had." Appellant now urges that this evidence had no relation to the case, was introduced for the purpose of prejudicing the defendant, and that the introduction thereof constitutes prejudicial misconduct on the part of the district attorney. In the first place, it may be observed that at the time this evidence was offered a number of counts remained in which the appellant and two other persons were charged with conspiracy to take the property of certain other people. It by no means appears that this evidence was not admissible at that time. It does appear that no objection was made to the testimony complained of at the time it was given; that it was not assigned as misconduct at any time during the trial; and that the appellant did not ask that the jury be instructed to disregard it. It appears that after the witness had been cross-examined and recross-examined by the appellant, a motion was made to strike the testimony. It further appears that after the conspiracy counts were dismissed this testimony was stricken from the record, together with all of the other testimony given by this witness. It also appears that the jury was very definitely and pointedly instructed to disregard this testimony, and on several occasions was instructed to disregard all evidence which had been stricken. It has been held that complaint of misconduct should be so assigned during the trial. *People v. Beggs*, 178 Cal. 79, 172 P. 152; *People v. Vaughn*, 25 Cal. App. 736, 147 P. 116, 117; *People v. Mancuso*, 23 Cal. App. 146, 137 P. 278. While conceding the rule, appellant relies upon the claim that an exception exists when the facts are such that no instruction that could be given by the trial court would serve to cure the error. citing several cases including *People v. Adams*, 92 Cal. App. 6, 267 P. 906; *People v.*

De Vries, 52 Cal. App. 705, 199 P. 867; People v. Hail, 25 Cal. App. 342, 143 P. 803; People v. Wells, 100 Cal. 459, 34 P. 1078; People v. Pantages (Cal. Sup.) 297 P. 890, 895. It may be conceded that certain acts of misconduct on the part of a district attorney may be of such a character that their prejudicial effect could not be removed by any instruction which the court might give. We think this is not a case of that character. Even if it were held that it was not admissible at the time it was offered, nothing appears to indicate that this testimony was offered for a wrongful purpose, or that the offering thereof constituted misconduct on the part of the district attorney. When the counts in support of which it was offered were stricken, the testimony was also struck out. The court fully and emphatically instructed the jury to disregard the same and it must be presumed that the jury obeyed these instructions. Nor do we think its previous admission could have had such a prejudicial effect as could not be cured. We are unable to agree with appellant that the question of his guilt was so close that it appears that a conviction could not have been had, had this evidence not been received.

[7] A further claim of misconduct on the part of the district attorney is made in regard to the following: During the trial the attorney for appellant referred to the testimony of Mrs. Daniels, which had been stricken out, and asked the privilege of asking the witness then on the stand a question in relation to a portion of this testimony. The deputy district attorney then stated: "If the court please, if Mr. Hillyer is going into that, I would like to go into the conversation at the bank in the presence of this defendant in regard to Mrs. Edwards of La Mesa, being swindled, what the banker said in his presence." Counsel for appellant then assigned this as deliberate misconduct on the part of the district attorney and asked that the jury be admonished to disregard it. The court then instructed the jury as follows: "I think the statement was entirely improper and the jurors will entirely disregard Mr. Muir's statement, and refrain from drawing any inference adverse to the interests of the defendant from any suggestion contained in Mr. Muir's statement to the effect that anybody had been swindled."

We think this instruction, asked for and given, was sufficient and that no prejudicial error appears. People v. Warr, 22 Cal. App. 663, 136 P. 304; People v. Ong Git, 23 Cal. App. 148, 137 P. 283; People v. Ward, 105 Cal. 335, 38 P. 945.

[8] Appellant next urges that he was denied a fair trial through the fact that evidence was introduced upon the charges of con-

spiracy, and later stricken, giving him no chance to refute the same. The appellant himself had previously moved to strike out most of the evidence so stricken. When the motion to strike was later made by the prosecution, the attorney for appellant stated that he had no objection to the granting of the motion. No objection was made at any time to the striking out of this evidence, and the action appears proper since the counts under which it was introduced had been dismissed. It further appears that most of the facts so testified to, were actually denied by the appellant during his testimony. The jury was carefully instructed to disregard the testimony stricken and we find no error therein. People v. Foster, 198 Cal. 112, 243 P. 667. In connection with this point appellant argues that appellant and his wife could not legally be charged with conspiracy under the rule laid down in People v. Miller, 82 Cal. 107, 22 P. 934, and that this conclusively shows that no evidence should have been received upon the conspiracy charges. Conspiracy was also charged against appellant in connection with a third person, and no reason appears why evidence in support thereof was not admissible.

No other points are raised which require consideration. In our opinion the evidence supports the verdict and no errors appear sufficiently prejudicial to require a reversal.

The order and judgment are affirmed.

We concur: MARKS, J.; JENNINGS, J.

117 Cal.App. 113

ANDERSON v. BOARD OF MEDICAL EXAMINERS.
Clv. 7772.

District Court of Appeal, First District, Division 1, California.
 Sept. 25, 1931.

1. Physicians and surgeons ☞11(3).

Accusation following statutory language gives medical examining board jurisdiction if statute sufficiently advises accused of particular kind of unprofessional conduct alleged (St. 1913, p. 732, § 14, as amended by St. 1927, p. 99).

2. Physicians and surgeons ☞11(3).

Accusation following statutory language, charging unprofessional conduct by aiding and abetting unlicensed person to practice system and mode of treating sick and afflicted, held sufficient to give medical examining board

jurisdiction (St. 1913, p. 732, § 14, subd. 7 (a), as amended by St. 1927, p. 99).

It was contended that the phrase "aid and abet," as used in accusation in question, involved merely conclusion of pleader deduced from facts and circumstances which should have been pleaded. The words "aid" and "abet," however, are commonplace words, the meaning of which is well understood, and St. 1913, p. 732, § 14, subd. 7 (a), as amended by St. 1927, p. 99, which declares that aiding or abetting any unlicensed person to practice system or mode of treating the sick or afflicted constitutes unprofessional conduct, is sufficiently explicit to inform the accused of the particular kind of unprofessional conduct with which he is charged.

3. Physicians and surgeons ☞11(3).

Proceedings before medical examining board to revoke certificates are not governed by technical rules of criminal pleading (St. 1913, p. 732, § 14, as amended by St. 1927, p. 99).

4. Fraud ☞1.

Term "fraud" has no fixed, definite meaning, but is legal inference drawn from facts and circumstances alleged and proved.

[Ed. Note.—For other definitions of "Fraud," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; C. G. Goodell, Judge.

Action by Pearl Josephine Anderson against the Board of Medical Examiners of the State of California. Judgment for the Board, and plaintiff appeals.

Affirmed.

Paul W. Schenck, of Los Angeles, for appellant.

Richard M. Lyman, Jr., of San Francisco, for respondents.

KNIGHT, J.

After trial before the State Board of Medical Examiners upon charges of unprofessional conduct, plaintiff's certificate to practice medicine and surgery in this state was revoked, and subsequently she instituted this proceeding in the superior court for the purpose of annulling the order of revocation upon the ground that the accusation upon which it was based was legally insufficient to confer jurisdiction on said board to hear and determine the matter. Judgment was entered in favor of the board, and plaintiff has taken this appeal therefrom.

The sworn complaint initiating the proceedings before said board contained seven counts, and the order of revocation was based

upon the board's affirmative finding that the charge set forth in the first count was sustained. The remaining counts were dismissed. The essential allegations of the first count were as follows: "Said Albert Carter further alleges and complains that since the issuance of said certificate of license to practice medicine and surgery to said Pearl Josephine Anderson by said Board of Medical Examiners, the said Pearl Josephine Anderson has been guilty of unprofessional conduct as the same is defined under the terms and provisions of subdivision 7 (a) of section 14 of the State Medical Practice Act of the state of California, Statutes of 1913, as amended, and in that behalf alleges more particularly as follows, to-wit: That on or about 16th day of December, 1927, and for some time immediately prior thereto, the said Pearl Josephine Anderson, did, in the city of Los Angeles, county of Los Angeles, state of California, aid and abet one Clodine Brown to practice a system and mode of treating the sick and afflicted, the same Clodine Brown being then and there without and not having a valid unrevoked certificate of license from the Board of Medical Examiners of the State of California, or any license, or certificate, or certificate of license, entitling her, the said Clodine Brown, to practice a, or any, system or mode of treating the sick and afflicted in the state of California, as she, the said Pearl Josephine Anderson then and there well knew." The point urged by plaintiff against the legal sufficiency of said count is that the phrase "aid and abet" as used therein is the conclusion of the pleader deduced from facts which should have been pleaded. In other words, it is contended that the accusation is fatally defective in failing to set forth the specific acts relied upon as constituting aiding and abetting.

[1] The rule followed in this state in determining the question of the legal sufficiency of accusations filed with the Board of Medical Examiners seems to be that if the language of the statute upon which the accusation is based is sufficiently explicit to advise the person charged thereunder of the particular kind of unprofessional conduct of which he is accused, an accusation following the language of the statute is legally sufficient to confer jurisdiction on the board to hear and determine the matter. *Lanterman v. Anderson*, 36 Cal. App. 472, 172 P. 625; *Suckow v. Alderson*, 182 Cal. 247, 187 P. 965; *Tapley v. Abbott*, etc. (Cal. App.) 295 P. 911.

[2, 3] Section 14 of the Medical Practice Act, as amended in 1927 (Stats. 1927, p. 99), which grants power to the Board of Medical Examiners to revoke certificates to practice for "unprofessional conduct," contains some eighteen subdivisions defining various acts which shall be deemed to constitute "unpro-

fessional conduct"; and subdivision 7 (a) of said section, upon which the first count herein was based, declares that " * * * the aiding or abetting any unlicensed person to practice any system or mode of treating the sick or afflicted" shall constitute "unprofessional conduct." As will be noted, the accusation herein follows the language of the statute, which, construed in the light of the cases above cited, appears to be sufficiently explicit to inform the person charged of the particular kind of unprofessional conduct of which he is accused. As said in *People v. Wong Hing*, 176 Cal. 699, 706, 169 P. 357, the words "aid" and "abet" are commonplace words, the meaning of which is well understood; and it is held that the legal definition thereof is no different from their meaning in common parlance. 7 Cal. Jur. 888. In so holding the court in *People v. Bond*, 13 Cal. App. 175, 109 P. 150, in quoting from *State v. Tally*, 102 Ala. 25, 15 So. 722, says that the word "aid" means to assist, to supplement the efforts of another; whereas the word "abet" includes the elements of knowledge of the wrongful purpose of the perpetrator and counsel and encouragement of the illegal act. Moreover, it is well settled in this state that proceedings before the Board of Medical Examiners are not to be governed by the technical rules of pleading which may be invoked in criminal actions. 20 Cal. Jur. 1063; *Suckow v. Alderson*, supra; *Dyment v. Board of Medical Examiners*, 57 Cal. App. 260, 207 P. 409, 411. In this regard the court in the latter case says: "It is of course, needless to cite authorities upon the proposition that neither as to pleadings nor as to evidence must the procedure in trials before medical boards be marked by the refinements and subtleties which are characteristic of the conduct of actions in courts of law. The cases upon this point are both uniform and numerous." But even in those jurisdictions where the common-law distinction still exists between principals and accessories, it is held that an accusation charging a person with being an accessory need not set forth specifically the facts relied upon as constituting and aiding or abetting, it being necessary only to follow the language of the statute defining an accessory. 1 *Ruling Case Law*, p. 152. It is evident, therefore, that the rule of construction here contended for by plaintiff is even more technical than the one applied in criminal actions.

[4] Plaintiff relies mainly upon the decision in the case of *Dyment v. Board of Medical Examiners*, supra, wherein the accused was charged with having "procured by fraud and misrepresentation a certificate to practice medicine," and it was held that the accusation was legally insufficient to confer jurisdiction upon the board to hear and determine the matter because it did not set

forth any of the facts relied upon as constituting fraud and misrepresentation. The word "fraud," however, unlike the words "aid" and "abet," has no fixed, definite meaning. It is an inference of law to be drawn from facts and circumstances alleged and proved. *People v. McKenna*, 81 Cal. 158, 22 P. 488. It "can and does assume so many shapes that courts and authors have ever been cautious in attempting to define it. Each case in which it is claimed that fraud is involved must be considered under its own facts." 12 Cal. Jur. 705. Stated in other words, "It is utterly impossible to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception." *Pomeroy's Equity Jurisprudence* (4th Ed.) vol. 2, p. 1802. Therefore, it has always been held that an allegation of fraud in general terms presents no issuable fact; and that the facts constituting the fraud must be pleaded with particularity. *People v. McKenna*, supra, citing among other cases *United States v. Watkins*, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649. Furthermore, the *Dyment* Case did not involve a charge of "unprofessional conduct," the obtaining of a certificate by fraud and misrepresentation not being classified as such in the act, and not being included within any of the eighteen subdivisions of section 14 defining that term. It constitutes a separate and distinct ground for revocation. For the two reasons above stated we do not deem the decision in that case controlling here.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

116 Cal.App. 716
WHITE v. SHEPARDSON.
Civ. 6620.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1931.

*Rehearing Denied Oct. 16, 1931. Hearing Denied by Supreme Court Nov. 16, 1931.

Automobiles $\S$ 243(17).

In death action, testimony showing decedent automobile driver's cautious habits at street intersection in question and other places before collision held inadmissible (St. 1923, p. 553, $\S$ 113, as amended by St. 1927, p. 1436, $\S$ 30).

Automobile collision resulting in death of plaintiff's intestate occurred at blind street intersection within St. 1923, p. 553, $\S$ 113, as amended by St. 1927, p. 1436, $\S$ 30, limiting lawful speed at such intersections to 15 miles per hour. Testimony offered by plaintiff concerning the habits

of decedent in relation to the manner of driving his automobile at the intersection in question and at other places prior to the time of the accident was admitted. There were eyewitnesses to the collision, including the actual conduct of the deceased.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by W. G. White, administrator of the estate of William F. White, against W. S. Shepardson. Judgment for the plaintiff, and the defendant appeals.

Reversed.

Culver & Nourse and Forrest A. Betts, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

CONREY, P. J.

The accident occurred at the intersection of two highways near Azusa in Los Angeles county. The defendant was driving a Cadillac automobile going west on Fifth street, and William F. White, now deceased, was driving a Dodge automobile going south on Los Angeles street. The plaintiff, as administrator of the decedent's estate, brought the action as permitted by statute, on behalf of the heirs at law, viz., the widow and children of said William F. White. Pursuant to the verdict of a jury, judgment was entered against the defendant, and he appeals therefrom.

At the time of the accident, there were only five persons present. White was alone in the Dodge car. In addition to defendant Shepardson, in the other car, there were his wife, their daughter, Mrs. McCook, and their son, J. B. Shepardson. The evidence is sufficient to establish actionable negligence of the defendant. The questions open for discussion on this appeal relate to the defense of contributory negligence, which was duly pleaded by the defendant.

The plaintiff, in presenting his evidence, anticipated the contributory negligence defense by offering evidence for the purpose of proving that the decedent was not negligent in the driving of his automobile at the time and place of the accident. In addition to the circumstantial evidence that arose from the condition of the automobiles and of the street immediately after the accident, the plaintiff offered testimony of the plaintiff concerning the habits of decedent in relation to the manner of driving his car at the intersection in question, and at other places, prior to the time of the accident. The witness, being a son of the decedent, testified that he had at various times been present with decedent while the latter was driving his car over the intersection, and other intersections also, and that on those occasions his father drove slowly across the said intersections, and looked

both ways. This evidence was received in the face of objections to the competency, relevancy, and materiality of such evidence. The defendant and Mrs. Shepardson and their son all testified to facts which were in themselves sufficient to establish negligence of decedent. The place where this event occurred is what is commonly known as a blind crossing. On each of the four corners there were trees which obstructed the view of persons approaching the intersection. Under such conditions, under the terms of the California Vehicle Act (Section 113 [St. 1927, p. 1436, § 30]), the lawful speed for driving an automobile at such intersection was limited to fifteen miles per hour. According to the testimony of these witnesses, decedent came to the crossing at a speed of at least thirty-five miles per hour and continued over the crossing at that speed. Against this evidence, otherwise uncontradicted, there was only the aforesaid testimony of the plaintiff, together with the presumption that the decedent took ordinary care of his own affairs. Code Civ. Proc., § 1963, subd. 4; *Smellie v. Southern Pacific Co.* (Cal. Sup.) 299 P. 529. The case thus stands in a condition such that, while the evidence is legally sufficient to sustain the implied finding that decedent was not guilty of contributory negligence, nevertheless the evidence in favor of the defendant on that issue is so strong that, if said testimony of the plaintiff, William G. White, was improperly received, the error of the court in admitting the evidence would be extremely prejudicial, and therefore it would follow for that reason that the judgment should be reversed.

As authority in support of the ruling of the trial court admitting in evidence the testimony concerning the cautious habit of the decedent in driving his car over said intersection, and in other like situations, respondent relies principally upon the decision of the Supreme Court in *Wallis v. Southern Pacific Co.*, 184 Cal. 662, 195 P. 408, 409, 15 A. L. R. 117. The court there not only sustained the ruling admitting the evidence, but suggested that, "if the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses." However, in that case the court considered that the defendant's objection was limited to the condition that the evidence introduced was inadmissible if there was direct evidence of eyewitnesses to the fact, and then held that, "accepting this theory of the law, we doubt if the foundation appears in the evidence here to exclude this testimony." In *Starr v. Los Angeles Ry. Corp.*, 187 Cal. 270, 281, 201 P. 599, 603, where the trial court had permitted the plaintiff to introduce evidence as to the previous conduct and habit of the conductor of defendant's car

as to sitting down and talking to passengers, the Supreme Court held that such evidence was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his conduct was not competent to establish the condition at the time of the accident. Referring to the Wallis Case, the court said: "We need not here consider the effect of the exception to this general rule considered in Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117, where circumstantial evidence only is relied upon, and there are no eyewitnesses." In *People v. Crossan*, 87 Cal. App. 5, at page 14, 261 P. 531, 535, this court gave some attention to the Wallis Case and the Starr Case, and arrived at the following conclusion: "We are unable to put any other construction on the language just quoted from the Starr Case than that the court intended to withdraw the dicta contained in the Wallis Case, and limit the inadmissibility [admissibility] of habit evidence to cases where circumstantial evidence only is relied on and there are no eyewitnesses. * * *

Since the Starr Case is a deliberate and carefully considered expression of the Supreme Court on this point, we feel bound to follow it, regardless of any opinion we might otherwise entertain on the matter, and hold that the trial court erred in admitting this habit evidence." It is evident that in the preceding quotation we should have used the word *admissibility*. It was pointed out that in the case then before us there were witnesses to the facts, as they actually occurred at the time of the transaction in which the fatal accident occurred, wherein the defendant was accused of manslaughter in the commission of a lawful act which might cause death, without due caution and circumspection. On account of this and other errors, the judgment was reversed. A rehearing of said cause was denied by the Supreme Court.

In view of the law as above stated, and taking into consideration the fact that there were eyewitnesses to the transaction now under review, including the actual conduct of the deceased, we think that the court erred in overruling the objections of defendant and in admitting said testimony. The fact that said eyewitnesses were not "plaintiff's witnesses" should not be accepted as adding anything to plaintiff's rights with respect to such testimony. The record shows that, when the testimony was offered and the objections made, the decision in Wallis v. Southern Pacific Co., supra, was brought to the attention of the judge by plaintiff's counsel, and we cannot doubt that the ruling of the court at the time was based principally upon that decision.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

116 Cal.App. 695
McCULLY v. GANO.
 Civ. 4299.

District Court of Appeal, Third District, California.

Sept. 19, 1931.

1. Pleading Ⓒ236(5).

Allowing attorney to amend his complaint, for breach of contract of employment by adding action based on quantum meruit *held* not abuse of trial court's discretion.

Allowing amendment was not an abuse of discretion, since the amendment conformed to proof and did not change the cause of action; it being clear that the added count referred to the same transaction.

2. Pleading Ⓒ236(1).

Amendments, under practice, are liberally allowed and rest mainly within trial court's discretion.

3. Pleading Ⓒ245(4).

Amendments may be made to complaint either during trial or after evidence is all in.

4. Pleading Ⓒ237(1).

Amendment to conform to proof may always be made, provided cause of action is not thereby changed.

5. Appeal and error Ⓒ1041(2).

Allowing amendment to complaint which would have supported judgment based upon amendment before amended *held* not prejudicial.

6. Attorney and client Ⓒ134(1).

Attorney discharged without cause before full measure of service contemplated by written agreement had been performed *held* not required to allege or prove reasonable value of services, which he was not permitted to perform, but could recover full amount called for in contract.

7. Appeal and error Ⓒ1078(1).

Assignments not pointed out and argued in briefs will be deemed waived or abandoned.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by Earl Justin McCully against Mrs. Jennie C. Gano. Judgment for plaintiff, and defendant appeals.

Affirmed.

Marshall D. Andrews, of Los Angeles, for appellant.

Earl Justin McCully, of Los Angeles, in pro per.

PRESTON, P. J.

The plaintiff, Earl Justin McCully, an attorney at law, brought this action against his former client, Jennie C. Gano, to recover the sum of \$2,581.30 for professional services alleged to have been performed by him for her under a written contract.

The cause was tried by the court without a jury and resulted in a judgment in favor of the plaintiff for the sum of \$700. From this judgment the defendant Gano prosecutes this appeal.

The facts are briefly these: Defendant and appellant employed plaintiff as her attorney to effect a property settlement with her husband with whom she was having domestic trouble. The contract was reduced to writing and executed and provided that plaintiff should receive for his services a certain per cent. of the value of the property finally recovered for his client.

Plaintiff entered into negotiations with defendant's husband and his attorney and finally procured for his client a property settlement more favorable to her than she had previously instructed plaintiff she would accept.

A preliminary contract setting forth the terms of settlement was drawn and signed by the defendant and her husband.

In order to convey title to the various properties owned by these parties, it was necessary for deeds and bills of sale, etc., to be executed between the parties. These instruments were all prepared and were agreeable to Mr. Gano, but Mrs. Gano, the defendant, flatly refused to sign any of these instruments and refused to complete the settlement, and discharged the plaintiff as her attorney and refused to pay him for the services he had rendered.

Why defendant refused to finally complete the settlement with her husband and execute the deeds and other writings we are unable to determine from the record. She testified: "I signed that agreement but did not accept the terms because they were not carried out. * * * I told him (plaintiff) I positively would not accept the terms there set out and I certainly told him why."

The court found, among other things, "that in all of his dealings with the defendant, the plaintiff carefully and at all times followed the instructions of his client and in all ways endeavored to secure for the defendant the things she informed him she wanted, and was in all respects diligent, fair and honorable in all his dealings with her, and in no manner took advantage, or attempted to take any advantage of her whatever."

The evidence is conflicting, but there is ample substantial evidence to support the above finding as well as all the other findings made by the trial court.

[1] Plaintiff's original complaint was filed February 11, 1926, and was in two counts, the first based upon a breach of the contract of employment, the second for the reasonable value of the services rendered. To this complaint and both counts thereof defendant filed an answer denying all the material allegations of both counts of the complaint. Thereafter and on September 27, 1927, plaintiff filed an amended complaint based solely upon the breach of the contract of employment, but with more elaborate averments than the original. To this amended complaint a similar answer as that made to the first count of the original complaint was filed.

The case went to trial upon these two last-named pleadings. Near the close of the trial, the plaintiff was permitted to amend his amended complaint by adding thereto a cause of action based on a quantum meruit, similar to the second cause of action in the original complaint. The court based its judgment entirely upon this added cause of action. The allowance of this amendment is the principal ground relied upon for a reversal. We find no merit in the contention.

[2, 3] Amendments under our practice are liberally allowed, and in the main that matter rests within the discretion of the trial court. Such amendments may be made to a complaint either during the trial or after the evidence is all in.

[4] An amendment to conform to the proof may always be made, provided the cause of action is not thereby changed. *Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44; *Donian v. Danielian*, 90 Cal. App. 675, 266 P. 817.

The amendment in this case conformed to the proof and did not change the cause of action. It is clear that the added count to the amended complaint refers to the same transaction. Our courts have held often that an amendment which changes the count from one upon an express contract to one upon quantum meruit does not substitute a new cause of action. *Merchants' Collection Agency v. Gopcevic*, 23 Cal. App. 216, 137 P. 609; *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; *Turner v. Bauer*, 28 Cal. App. 311, 152 P. 308.

[5] We fail to see how defendant could have been prejudiced by the allowance of the amendment, because such an amendment was unnecessary. All the facts required to support a judgment upon a quantum meruit are found in the complaint before the amendment in question was added, or, in other words, the complaint, as it stood before the amendment complained of, would support a judgment either for a breach of the contract or upon a quantum meruit.

There is likewise no merit in the claim that the findings and judgment are not supported by the evidence. The evidence is not only

amply sufficient to support the judgment rendered, but it would have also supported a substantial judgment on the theory of a breach of contract.

[6] It is clear that plaintiff was discharged by the defendant without cause and before the full measure of service contemplated by the written agreement had been performed. Under these conditions, plaintiff would not be required to allege or prove the reasonable value of the services, which he was not permitted to perform, but would be entitled to recover the full amount called for in the contract. *Countryman v. California T. Co.*, 35 Cal. App. 728, 170 P. 1069.

[7] Appellant contends that the court erred in the admission and rejection of certain testimony but fails to point out wherein the action of the court is deemed erroneous. We cannot be expected to prosecute an independent inquiry for error upon which the appellant may possibly be relying. We will notice only those assignments pointed out and argued in the briefs. All others will be deemed waived or abandoned. We find no merit whatever in the appeal.

Judgment affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

116 Cal.App. 689

TILDEN LUMBER & MILL CO. v. BACON LAND CO. et al.
Civ. 7584.

District Court of Appeal, First District, Division 1, California.

Sept. 19, 1931.

Rehearing Denied Oct. 19, 1931. Hearing Denied by Supreme Court Nov. 16, 1931.

1. Appeal and error ⇨173(6).

Ostensible makers of note who failed to object to its introduction or to impeach its genuineness or sufficiency could not, upon appeal, attack finding that they executed note.

2. Bills and notes ⇨129(1).

Note payable on or before February 1, 1928, or sooner if described building were sooner completed, matured in any event on February 1, 1928.

3. Appeal and error ⇨1008(1).

Judgment of trial court which construes note reasonably and consistently with parties' intent will not be set aside simply because another interpretation is possible.

4. Parties ⇨6(2).

Whoever holds legal title to demand is "real party in interest" and may sue thereon in his own name.

[Ed. Note.—For other definitions of "Real Party in Interest," see Words and Phrases.]

5. Pledges ⇨58(3).

Pledgee of note or assignee as security may maintain action against maker without making pledgor or assignor party.

6. Bills and notes ⇨357.

Pledgee, by reason of his interest as pledgee, is actual holder for value (Civ. Code, § 3108).

7. Bills and notes ⇨497(2).

Want of consideration does not throw upon holder burden of proving that he or privy acquired title as holder in due course, since statute defining defective title does not include want of consideration (Civ. Code, §§ 3126, 3136, 3140).

8. Bills and notes ⇨125.

Where note failed to specify period of time for calculating rate of interest, finding that it was annual rate held proper (Civ. Code, § 1916).

9. Judgment ⇨215.

Orally ordered judgment entered in minutes was not rendition of judgment, and court could change it (Code Civ. Proc. § 633).

10. Bills and notes ⇨488.

Complaint, on note, setting forth note showing date of maturity, was not generally demurrable for failure to allege maturity of note.

11. Pleading ⇨18.

Complaint, on note, setting forth note showing date of maturity, was not specially demurrable for uncertainty in setting forth date of maturity.

12. Appeal and error ⇨1040(10).

Error in overruling demurrer for uncertainty to complaint, which apparently could not have misled defendants nor affected their substantial rights, held not reversible.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by the Tilden Lumber & Mill Company against the Bacon Land Company and others. Judgment for plaintiff, and some of defendants appeal.

Modified, and affirmed as modified.

Clarence A. Henning, of San Francisco, for appellants.

Wilber S. Pierce, of Richmond, and John G. Robertson, of Oakland, for respondent.

PER CURIAM.

The above action was brought to recover on a promissory note assigned to plaintiff corporation. The note with the indorsements thereon is in words and figures as follows:

"\$11,270.00 Oakland, Cal., Sept. 10, 1926.

"On or before February 1st, 1928, we jointly and severally promise to pay to the order of Mark R. Monze and Beach C. Soule, Jr., the sum of eleven thousand two hundred and seventy dollars (\$11,270.00) with interest thereon at the rate of six (6) per cent from date until paid. Interest payable at maturity.

"If the building that is now projected should be erected and completed upon that certain lot described as follows: property situate on the eastern line of Franklin street distant thereon seven hundred and eighty-six (786) feet, two and one-half inches (2½) northerly from the point of intersection thereof with the northern line of Fourteenth street in the city of Oakland, on or before February 1st, 1928, the principal sum together with interest thereon of this note shall become due immediately upon completion of this building.

"In the event that suit is brought to collect this note or any part thereof we agree to pay such reasonable sum as the court may judge for attorney's fee.

"Bacon Land Company, a Corporation,

"By [Signed] L. C. Fraser, President,

"By [Signed] Thos. F. Watson, Secretary.

"[Signed] James T. Narbett, Vice Pres.

"[Signed] T. D. Sexton,

" J. M. McKee,

" Carl T. Doell.

" Robert A. Shuey.

"Oakland, Cal., Nov. 5, 1926.

"For a valuable consideration I hereby sell, assign and transfer all of my right, title and interest in and to the within note to Beach C. Soule, Jr., or order.

"[Signed] Mark R. Monze.

"Pay to order of Tilden Lumber and Mill Co.

"[Signed] Beach C. Soule, Jr."

The cause was tried before the court without a jury, and judgment was entered against defendants Sexton, McKee, Doell, Shuey, and Bacon Land Company, a corporation, each of whom has appealed from the judgment.

As grounds for the appeal it is contended that certain findings are unsupported, that the court erred in computing the amount of interest due on the note, and that plaintiff was not the real party in interest. The further claim is made of an irregularity in rendering an entering judgment, and that the demurrer of appellants Doell and Shuey should have been sustained.

[1] Appellants attack the finding that they executed the note, claiming that there was no evidence of such execution.

The note—which purports to have been executed by them—was introduced in evidence without objection. As held in the following cases it is not competent for appellants, after having allowed the note to be introduced without objection and without attempting to impeach its genuineness or sufficiency, to raise upon appeal an objection which might have been obviated at the trial. *Burnett v. Lyford*, 93 Cal. 114, 116, 28 P. 855; *Shain v. Sullivan*, 106 Cal. 208, 211, 39 P. 606; *Snyder v. United Properties Co.*, 53 Cal. App. 428, 200 P. 366.

[2, 3] The note provided that interest should be payable at maturity; and it is urged that there is no evidence of maturity and, consequently, no proof that interest was due.

The promise was to pay "on or before February 1st, 1928," but that "if the building that is now projected should be erected and completed" upon a certain lot described "on or before February 1st, 1928, the principal sum should become due immediately upon the completion of this building." This provision was clearly an acceleration clause, the note being due in any event on February 1, 1928. Such was the conclusion of the trial court, and its construction appears to us to be reasonable and consistent with the intent of the parties. In such cases the judgment of the trial court will not be set aside simply because another interpretation is possible. *Manley v. Pacific Mill, etc., Co.*, 79 Cal. App. 641, 250 P. 710.

The court found that prior to the maturity of the note the same was for a valuable consideration indorsed and delivered to plaintiff and that it was and is the holder thereof; also that "the plaintiff herein at all the times mentioned in the complaint was and still is the owner and holder of said note." The evidence shows that the note was indorsed to plaintiff as a pledge to secure the payment to it of the debt of a third person of which the sum of \$14,000 remained unpaid when the present action was brought. Plaintiff agreed to return the note to the indorsers when the debt should be paid. Appellants claim that under these circumstances plaintiff did not become the owner of the instrument and was not the real party in interest so as to authorize an action thereon in its name.

[4, 5] Whoever holds the legal title to a demand is the real party in interest and may sue thereon in his own name (*Iowa, etc., Land Co. v. Hoag*, 132 Cal. 627, 64 P. 1073; *Cortel-you v. Jones*, 132 Cal. 131, 64 P. 119), and a pledgee of an evidence of debt or an assignee as security may maintain an action against the debtor without making the pledgor or as-

signor a party (3 Cal. Jur., Assignments, §§ 41, 43, pp. 294, 296; 21 Cal. Jur., Pledges, § 42, p. 335).

Appellants Doell and Shuey alleged as to themselves a want of consideration for the execution of the note, but offered no evidence in support of their defense.

[6, 7] A pledgee is by reason of his interest as such an actual holder for value (Pezzoni v. Greenwell, 178 Cal. 649, 174 P. 60; 19 Cal. Jur., Neg. Instr., § 51, p. 858; Civ. Code, § 3108), and every holder is deemed prima facie to be a holder in due course. Civ. Code, § 3140. Except where an endorsement bears date after the maturity of the instrument every negotiation is deemed prima facie to have been effected before the instrument was overdue. Civ. Code, § 3126. Moreover, the rule appears to be settled that a mere want of consideration does not operate to throw upon the holder the burden of proving that he or one under whom he claims acquired the title as a holder in due course, as section 3136 of the Civil Code, defining defective title, does not include want or failure of consideration. 19 Cal. Jur., Neg. Instr., § 177, p. 1042; 8 Cor. Jur., Bills and Notes, § 1294, pp. 987, 988, and cases cited; Page v. W. F. Hallam & Co., 212 Ill. App. 462; Wheat v. Goss, 193 Ind. 558, 141 N. E. 311; Bank of Polk v. Wood, 189 Mo. App. 62, 173 S. W. 1093; Title Guarantee & Trust Co. v. Pam, 232 N. Y. 441, 134 N. E. 525; Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P. 411, 131 Am. St. Rep. 885.

[8] The note failed to specify the period of time by which the rate of interest was to be calculated, but the court found that the interest was payable at the rate of 6 per cent. per annum; and under the provisions of section 1916 of the Civil Code the finding was proper. Rogers v. Jones, 92 Cal. 80, 28 P. 97.

According to the findings, the sum of \$11,270 of the principal of the note, with interest thereon from September 10, 1926, to August 19, 1929, the date of the judgment, at the rate of 6 per cent. per annum, remained unpaid, and the sum of \$1,250 was fixed as a reasonable attorney's fee. The correct amount of the interest on the note for the above period was \$1,989.15; but the amount as determined by the judgment was \$2,316.30, a difference of \$327.15, which error respondent concedes.

[9] At the conclusion of the trial the court orally ordered judgment for the plaintiff, with attorney's fees in the sum of \$500, which order was entered in the minutes. Appellants contend that the order was in effect a rendition of judgment as to the amount of the attorney's fees, which the court had no power to change.

There is no merit in this contention. The findings required by section 633 of the Code of Civil Procedure were not waived; and,

as held in the following cases, the clerk's entry in the minutes of the court did not constitute a judgment but was only a record of a portion of the proceedings in the case. Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; Aspegren & Co. v. Sherwood, etc., Co., 199 Cal. 532, 250 P. 400; Delger v. Jacobs, 19 Cal. App. 197, 125 P. 258.

[10-12] Lastly it is claimed that the maturity of the note was not alleged, and consequently no cause of action was stated against appellants Doell and Shuey.

The note, which was set forth in the complaint, showed the date of maturity, and the general demurrer of these appellants was properly overruled. Nor do we find merit in the contention that their special demurrer on the ground of uncertainty should have been sustained, as it is apparent from the complaint that they could not have been thereby misled nor were their substantial rights affected. Where such is the case, an error in overruling a demurrer for uncertainty is not ground for reversal. Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687; Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441.

With the one exception mentioned, the conclusions of the trial court are fully sustained, and no error is shown which would justify a reversal of the judgment. It will be necessary, however, to modify the judgment by deducting therefrom the sum of \$327.15 erroneously allowed as interest, and as so modified the judgment is affirmed. It is further ordered that each party bear his own costs of appeal.

117 Cal.App. 121

**GOLDEN STATE MILK PRODUCTS CO. v.
SOUTHERN SIERRAS POWER CO.**

Civ. 7574.

District Court of Appeal, First District, Division 2, California.

Sept. 25, 1931.

I. Electricity ☞ 11.

Where one power company, on purchasing another, inadvertently filed lower rate schedule, schedule re-establishing former rates held valid, notwithstanding absence of railroad commission's statutory finding approving increase (Deering's Gen. Laws 1923, Act 6386, §§ 15, 63 (a)).

It appeared that railroad commission's authorization for consolidation of power companies in question rested on assurance that there would be no change in rates, and when it was found that consolidated power company had mistakenly filed schedule of lower rates and that railroad commission had mistakenly allowed filing, power to correct such mistake existed, not

by virtue of Public Utilities Act, § 63 (a), Deering's Gen. Laws 1923, Act 6386, § 63 (a), which requires railroad commission's approval only when public utility desires to increase its rates, but rather by virtue of Public Utilities Act, § 15, Deering's Gen. Laws 1923, Act 6386, § 15, authorizing commission, for good cause shown, to allow changes without requiring the thirty days' notice therein provided for, by making an order specifying changes and by otherwise complying with statute.

2. Municipal corporations ⇨100.

Municipal boards obligated to keep records have power, even without statute, to amend records to speak truth.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Golden State Milk Products Company against the Southern Sierras Power Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Oliver B. Wyman, and Frederick T. Hyde, all of San Francisco, for appellant.

Henry W. Coll, Newman Jones, H. M. Ham-mack, and D. L. King, all of Riverside, for respondent.

STURTEVANT, J.

Claiming that the defendant had made and had collected excessive charges for its service, the plaintiff sued the defendant for the amount of the overcharge. Judgment went for the defendant and the plaintiff has appealed bringing up typewritten transcripts.

[1] Formerly the plaintiff was served by the Holton Power Company. The charges of that company were fixed by schedule "P-2." In January, 1924, that company sold its business to the defendant. Prior to the transfer the defendant had been serving some adjacent territory and its charges were fixed by schedule "P-22." When the railroad commission authorized the defendant to purchase the properties of the Holton Power Company, that permission rested on the assurance that the "consolidation will not result in any change of management or rates." In effecting the consolidation the defendant filed with the railroad commission "P-22" which by its terms purported to fix the charges to be collected from the plaintiff. Thereafter it was discovered that "P-22" was not a duplicate of the rate stated in "P-2" because condition "C" as written in the former document was not the same as in the latter. If the provisions of "P-22" were followed the result

would be that the charges made against the plaintiff would be less than the charges the plaintiff had been paying under "P-2." When these matters were called to the attention of the railroad commission, that body authorized the defendant to file a schedule designated "P-31" which purported to supplant schedule "P-22." The new schedule "P-31" fixed the same charges that were fixed by "P-2." However, "P-31" purported to authorize the charges which were made and which were in excess of those authorized by "P-22," and it is such alleged overcharges that are involved in this action. At this time the plaintiff contends that it is supported in its position by the clear provisions of the Public Utilities Act (2 Deering's General Laws 1923, p. 2683, Act 6386). It cites and relies on section 63(a). Both parties concede that schedule "P-22" was effective from the date it was filed until August 26, 1924. On that date the defendant filed schedule "P-31." By its terms it purports to authorize higher charges. Before the defendant filed that schedule the railroad commission did not make a finding that such increase was justified. For that reason the plaintiff claims schedule "P-31" is not effective and it cites section 63(a) of the Public Utilities Act. That section provides as follows: "Increase in rate only after showing. (a) No public utility shall raise any rate, fare, toll, rental or charge or so alter any classification, contract, practice, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified." The defendant makes two separate answers. It claims that even though schedule "P-31" was not effective the record does not justify the plaintiff in claiming that "P-22" then became the effective schedule. The second answer is that schedule "P-31" was legally filed and became operative from the date it was filed. The second answer we think is sound and we will not have occasion to discuss the first one.

As recited above, the defendant's permit to purchase the Holton Power Company (Order No. 12947) was issued on the condition that the purchase "will not result in any change of management or rates." Moreover, the rates of the Holton Power Company were fixed by "P-2" and those same rates are contained in "P-31." True it is that "P-22" fixed lower charges and true it is that the defendant filed it. But it is equally true that it was a mistake of the defendant in filing it and it was a mistake on the part of the railroad commission in allowing it to be filed for it was the fixed intention of all parties concerned that there should be no change in rates. When that mistake was discovered, power existed to correct it. That power is not to be

found in section 63 (a). That portion of the statute deals with the powers of a *utility to raise its rates*. As we have just shown no such act was attempted or is involved in this case. The power of the railroad commission to correct the mistake finds support in section 15 of the statute. The latter portion is as follows: "The commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item." The provisions of that part of the statute were apparently followed in every respect, and no defect in compliance is called to our attention.

[2] Furthermore all of the facts appeared on the records and files of the railroad commission. Those records and files showed that a mistake had been made and the full scope of that mistake. In the absence of express statutory authority, municipal boards, charged with the duty of keeping records, have the power and it is their duty to amend their records so they will speak the truth. 43 C. J. 517. When schedule "P-31" was filed and schedule "P-22" was refiled, the object sought to be accomplished by the purchase by this defendant of the properties of the Holton Company was made fully effective, and the error committed by filing on January 1, 1924, schedule "P-22" was cured. All of these matters are set forth with meticulous care in the findings and those findings are supported by the evidence.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

116 Cal.App. 740

PEOPLE v. MOE et al.*
Cr. 2093.

District Court of Appeal, Second District, Division 2, California.

Sept. 22, 1931.

Rehearing Denied Oct. 7, 1931. Hearing Denied by Supreme Court Oct. 22, 1931.

1. Homicide §234(5).

Evidence held to sustain conviction for murder by an associate.

While the defendant did not himself fire the fatal shot, there was circumstantial evidence connecting defendant with the assailant or one of them, as one who conspired to commit the crime. This evidence tended to show that defendant was associated with one of assailants before the crime and had driven him in automobile in front of home where the homicide was committed, and then had driven him away from scene of crime.

2. Homicide §228(1).

In prosecution for murder, corpus delicti held sufficiently established by evidence that other persons claimed to have been defendant's accomplices killed deceased.

3. Criminal law §563.

Elements of "corpus delicti" are certain facts forming basis thereof, and existence of criminal agency as to cause of such facts.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words and Phrases.]

4. Criminal law §563.

Corpus delicti may be established without showing that crime charged was committed by defendant.

5. Criminal law §675.

Where witness had testified without objection as to defendant's statements concerning his movements on afternoon of homicide, permitting another witness to give similar evidence held not error.

6. Homicide §170.

In prosecution for murder, admission of evidence that defendant was present with one of assassins on afternoon before homicide held not error.

7. Homicide §341.

Where evidence showed conspiracy in cold blood to commit murder, and evidence introduced to support alibi was conflicting within itself, error in submitting instruction as to homicide committed in course of robbery held harmless (Pen. Code, § 189).

8. Homicide §305.

Where defendant was claimed to have acted as accessory, refusal of instruction requiring jury to find that defendant was present and participated in murder held not error.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Charley Moe was convicted of murder, and he appeals.

Affirmed.

C. J. Orbison, of Los Angeles, for appellant.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 4 P.(2d) 234.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant Moe appeals from a conviction under a charge of murdering Carlisle Lord and from an order of the trial court denying his motion for a new trial.

[1] One of the points made by appellant is that the evidence in the cause was insufficient to justify the verdict against him.

Before we proceed to a discussion of that question, let us recite portions of the evidence which do not bear directly upon it but which are introductory to it. A Mr. Lassen and his wife, and Carlisle Lord, the father of Mrs. Lassen, lived together in a little house in the town of Waleria, which place is nearly fifteen miles—one witness says, with exactness, fourteen and six-tenths miles—from Long Beach. The house had a living room which was entered from a front porch by means of a door directly opposite a door opening into the kitchen, which latter room was in the rear of the living room. At one side of the kitchen was a small bedroom, occupied by Mr. Lord, with a door opening from the one room to the other. There was another bedroom in the house occupied by the Lassens.

On the evening of January 20, 1931, soon after dinner and after dark, the Lassens and Lord were engaged in playing rummy in Lord's bedroom. The latter sat on the edge of his bed and his daughter and son-in-law occupied seats at a table placed between the three. Not long after the card game was started a neighbor, Mr. Huffine, came to the front door and was admitted upon knocking, by Mrs. Lassen. He entered the bedroom but did not engage in the game, which went on between the original participants. When Mrs. Lassen admitted Huffine at the front door one of them, it is not certain which, called the other's attention to a coupé model automobile parked in front of the lot upon which the house stood, between the driveway which passed to one side of the house and a walk which led from the street to the front door. This car cuts a material figure in the question to which our present remarks are introductory, and it was observed by a number of the witnesses in the case. They all testified that it was of a dark color, they all said that it was a coupé, most of them said that it was a Ford, at least three said that it was a model A Ford, and one said that it was a 1929 Ford.

We now return to the room in which the card game was in progress. A few minutes after Huffine entered the room—probably not more than three or four—a noise was heard at the front door and Mrs. Lassen arose from her seat and proceeded thither. Through glass in the door she perceived a man stand-

ing close to it. Upon nearing the door she observed that the man had already swung open a screen in front of it and had his hand upon the knob of the door itself. Upon the door being opened this man, whom the evidence later showed was one Joe Ward, inquired whether Otto was in, Mrs. Lassen responding that no such person lived in the house. About this time Mrs. Lassen discovered a second man standing behind Ward and partially concealed by his body. This second man was defendant Brown. Disregarding Mrs. Lassen's response about Otto, the two men advanced into the living room, Brown having a "gun" in his hand. It may be observed here that Ward, during the proceedings which followed, so far as the evidence shows, never exhibited any weapon of any kind.

As the two men moved forward, driving Mrs. Lassen before them, she cried out, "There's a holdup here," whereupon her husband ran into the living room through the kitchen and endeavored to push the intruders toward the front door. Brown called upon him to stop and threatened, pistol in hand, to blow his head off if he did not. Brown then struck Lassen just over the temple with his weapon, the blow dazing him to such an extent that he staggered and held his head in his hands. Immediately Ward and Brown passed Mr. and Mrs. Lassen, entered the kitchen, and were moving toward the open door between the kitchen and the room now occupied by Huffine and Lord, the latter having arisen to his feet. In the meanwhile Lord had procured a .38-caliber revolver from near at hand—Huffine could not swear from where—and stood awaiting the invaders of the peace and quiet of his home. Firing commenced upon their appearance. Mrs. Lassen, who could see what was going on from her position in the front room, says that Brown fired the first shot. Huffine testified that Brown and Lord fired so nearly together that it was impossible to tell who discharged his weapon first. Five shots were fired in all, but an interval of a few seconds elapsed between the first two and the salvo of three. During or about this interval Mrs. Lassen passed the two men in the kitchen and fled through the back door leading from that room to the outside, calling for help, while Lassen went into the bedroom occupied by himself and his wife. Some time during the shooting Huffine crept across the bed in the room where the card game had been in progress, and, escaping through a window, ran to a neighboring house for the purpose of calling the police. After the firing Brown, wounded severely by a shot through his body, ran through the house, made an exit by means of the front door, entered the Ford, and was rapidly driven away by some occupant of the car. When he fled Ward was lying dead on the kitchen floor, while Lord lay on the bed-

room floor mortally wounded. He died a few minutes later. All of the facts above stated are amply supported by the evidence.

We now come to the evidence which bears more strongly upon the question whether Moe participated in the murder of Carlisle Lord. It was the theory of the prosecution that Moe drove Ward and Brown to the Lassen home in the Ford car, with a guilty knowledge of their purpose in going there, and that he drove the wounded Brown away.

We are satisfied that there was ample evidence to support a finding that some person, whether a man or a woman we do not for the present say, was seated in the car as it stood in front of the Lassen residence. This automobile we shall hereafter sometimes, for convenience, refer to as Brown's car, as there is some evidence in the record that Brown owned it, or owned a car similar in appearance to it. David F. Emery, a neighbor of the Lassens and living on the same street, heard the first two shots and immediately went to his front door and looked out. He saw a person seated in Brown's car smoking a cigarette. J. G. Andrews, another neighbor living about seventy-five feet from the Lassens and across the street, got up and "went out in front" after all five shots had been discharged and saw some one seated in the driver's seat of the car. Before the first shots were fired Bernice Webb saw a Ford car which looked like Brown's. It passed back and forth before her home and that of the Lassens, going each way twice. The first shots were fired about three minutes after she saw the car the last time. On this last appearance the vehicle was moving toward the Lassen house. Each time she saw it the car contained three persons. While the Ford was passing back and forth, she saw but one other car moving along the thoroughfare. This was a large sedan. Eddie Archer was walking along the street nearly across from Lassen's home, just after the shots were fired, having heard them from a little greater distance. He saw Brown's Ford standing before the house and saw a man run from the house and get into it. After he got in the car drove past Archer and he said that there were two or three persons in it, "but I did notice that there was more than one occupant in the car."

The next appearance of Brown was at the residence of Frank J. Branson in Long Beach. He arrived, badly wounded, on the evening of the shooting at Waleria, in a car driven by appellant. This is the first appearance of Moe under any direct evidence whatever, after the shooting. Up to this time and beginning at the moment when Brown's car drove to the door of the Lassen home the evidence against him is purely circumstantial. The vehicle in which Moe drove the wounded Brown to the Branson home was similar in

appearance to the latter's car. It will at once be seen by the casual observer that this first appearance of Moe was most significant, and the latter attempted to minimize its effect by a statement he made to Malcolm Kirkpatrick, a Long Beach police officer. Brown and Moe were tried together and Brown also made a statement. No part of this statement, generally speaking, could have been considered as bearing upon the question of Moe's guilt or innocence, it not having been made in his presence, and the trial judge very properly so instructed the jury; but a part of the statement was directly brought home to Moe in his conversation with Kirkpatrick, as will presently appear. Brown said in his statement that he was wounded in Wilmington, a place some miles removed from both Waleria and Long Beach, by some men who crowded his car to the curbstone and thus stopped him. Brown said he got out of his car and was then shot by one of these men. He further said that Moe was with him at the time. This statement was taken by the police before Kirkpatrick had his conversation with Moe. After testifying that Moe's statements were free and voluntary, Kirkpatrick thus continued:

"Q. Will you relate what was said at that time? A. I told him what Mr. Brown had told me about his being with him when he was over on the boulevard when he was stuck up, and so on. He says, 'That's not right.' He says, 'I was standing on the street, just got through eating in the restaurant in Long Beach, about State and Orange'—or 20th and Orange, I won't say which. And he said Brown drove up and asked him to get in and drive the car, and he said he thought Brown was drunk; and he said after he got in the car Brown told him where to drive him to and directed him to the house where we found him, which was Frank Branson's residence.

"Q. Did Mr. Moe say what part of the car he rode in after he met Ray Brown that night? A. Yes; on the driver's side.

"Q. He said he drove the car? A. He drove the car, yes."

There was evidence in the record which, if the jury elected to believe it, conclusively showed that the most material portions of Moe's statement were utterly false. When Moe and Brown arrived at Branson's house, Brown's car was left in the back yard of the place and remained standing there until long after the coming of the police officers who responded to calls sent them soon after the two men had arrived. Two of the officers examined the car, and both found a large and fresh blood stain on the back cushion, a stain in size about three by four inches. One of the officers testified that the stain began about three inches from the middle line of the back cushion and that it was all on the side of the seat opposite that half which was behind

the steering wheel. The other officer swore that the stain was near the edge of the cushion furthest removed from the side at which the steering wheel was located. They both testified that there was no blood on the part of the cushion behind the wheel. None of this evidence about the blood stain was contradicted. The jury was justified in finding that Brown was bleeding profusely when he entered his car after the shooting at Walteria, for there was evidence that drops of blood were later found along his course from the place of the shooting to the point at which the car stood. Brown was shot through the body, although a little to one side, as a bullet hole was present at each front and back, and he bled at both orifices even after reaching Branson's house. Taking all this evidence as a basis, the jury could only have found that Brown never occupied the driver's seat of the car at any time between his departure from Lassen's house and his arrival at Branson's. It is not possible that he could have occupied the driver's seat on the long drive from Walteria to Long Beach and left no blood stain on the cushion, and that he could have left such a stain on the other end of the cushion on the short drive from one part of Long Beach to another. These two ideas are utterly incompatible.

As Moe resorted to prevarication in his assertion to Kirkpatrick that the wounded Brown drove the car to the neighborhood of Twentieth and Orange streets, and as the uncontradicted evidence as to the blood stains shows that Brown, after he was wounded and entered the vehicle at Walteria, never occupied the driver's seat of the car, and considering other evidence stated above, it is difficult to perceive how the jury could have avoided findings to the effect that it was Moe who sat in Brown's car in front of the Lassen home and that it was he who drove Brown from the scene of the crime at Walteria to the residence of Branson. Some one sat in the car as it stood at the curbstone, some one drove Brown away very rapidly, as the nature of his wound and as a speedy escape from the scene of the crime both required; and it must have been very hard for the jury to believe that Brown "swapped" drivers in the middle of this stream of difficulty. Under all the circumstances already stated, and under other evidence yet to be mentioned, the jury, as it appears to us, must needs have found that as Moe transported Brown to Branson's, he also transported him over the entire road from Walteria. For the jury to have decided otherwise would have required too great a strain upon the credulity of humans, even if prone to error and victims of the siren song of deceit, as they are.

Moe and Brown arrived at Branson's at about 8:15 and Moe helped the wounded man into the house, where he was immediately put to bed. A physician was at once called

and arrived in a few minutes. He sent Branson and Moe for some ice to be used in treating his patient and they returned with it from a nearby drug store in five minutes or so. Several of the Long Beach police came a few minutes later. After they had made such an investigation as they deemed proper, they departed and with them took Moe to the Long Beach police station. Until thus removed Moe showed no disposition to leave Branson's premises, but sat and awaited the course of events, or sometimes moved about the house. Immediately upon Moe's arrival at Branson's he had told the householder the same fantastic fabrication he later communicated to Kirkpatrick. Under the rule that flight from the scene of a crime is evidence of guilt in its commission, Moe is entitled to no credit because he loitered about the Branson household until he was taken away by the minions of the law. Having told Branson, upon his arrival, a tale by which he endeavored to picture himself as a good Samaritan, he must have deemed it to his advantage to continue the role and remain near at hand in case anything further could be done for the man he would have us believe he had already so self-sacrificingly befriended.

It seems proper, for several reasons, to here set down a conversation between Moe and Deputy Sheriffs Bright and Cloud. Cloud testified: "We asked him his name, and the questions were by Captain Bright and answers by Mr. Moe. We asked him his name, his address and occupation. He gave us that. He stated that he was working at that—that he wasn't working at that time. We asked him where he was on the night of January 20th, and he said several places. We asked him to begin with in the morning of January 20th, as near as he could go over where he had been. He said that he and a man named Joe had gone to San Pedro in the afternoon to see Mr. Moe's wife; that is, Joe drove him over there in a Ford coupe, and after arriving there Mr. Moe got out of the car and stayed for some two hours and a half, and Mr.—this Joe came back after him, and they went from there to a print shop on West Eighth street, in San Pedro, where they met a Mr. Holt. Mr. Moe said he got out of the car and went into the print shop and had a few drinks with Mr. Holt, and then Mr. Moe came out and took Joe into the print shop and introduced him to Mr. Holt, and Mr. Moe didn't know the last name of Joe, so Joe told him to introduce him as Louie, and they had a few more drinks and got back in the car and went to Long Beach. He arrived there, as near as he could figure out, around dark or shortly before. Joe stopped the car in front of the poolroom at Twentieth and Orange, and Mr. Moe got out of the car and stayed around there for a while, and walked over to the poolroom at Seventeenth and State—I believe that is the address. He

said he stayed around there for a while, doing nothing in particular; and from there he walked to his home. He said it took him about ten minutes to walk there. He said he arrived at the poolroom about 6 o'clock, and that he was at his room in his hotel at 6:30. We called his attention to the fact that during his travels after he got out of the car in front of the poolroom he consumed about an hour and twenty minutes—(interruption). We asked him if he had seen anyone in the hotel, and he said yes—or, rather, had anyone seen him in the hotel at that particular time, and he said yes. 'Who, the landlady?' 'No, an old woman, not the landlady.' The question was, 'Did you speak to her, or her to you?' 'No, I didn't speak to her, and she didn't speak to me.' He said he stayed at his hotel for about a half an hour, or perhaps twenty minutes. He went down again to the poolroom at Twentieth and Orange street, and as he was standing out in front Mr. Brown drove by, drove up to the curbing, and says, 'Get in and drive me.' We asked Mr. Moe if anyone had seen him at that poolroom and he said no. He said, 'I could see who was in there, but no one could see me. I looked in through the window.' He said he asked Mr. Brown what was wrong with him. He said, 'Never mind, just drive me down to where I show you.' We asked him how Mr. Brown appeared, and he said, 'He appeared to me as being drunk.' And upon Mr. Moe's entering the car Mr. Brown got over from underneath the wheel—or behind the wheel and moved over to the passenger side of the car, and he drove Mr. Brown from there to 1720 Stanton place, and got out of the car, and Mr. Moe followed him, and they went into this house that later proved to be the home of Mr. and Mrs. Branson; and we asked him if Mr. Brown had told him anything on the road, and he said only that he had been driving for about a half an hour from over in the Wilmington district. After the arrival at the Branson residence they put Mr. Brown to bed and Mr. Brown asked for a doctor to be called, and the doctor was not home. Mr. Brown asked for a doctor to be called, and the doctor was called, and Mr. Branson and Mr. Moe went after some ice and brought it back and gave it to Mrs. Branson. And about that particular time the Long Beach police came in and took Mr. Moe to the police station. We asked him if Brown told him whether he was alone or not. He said he was alone; that another car forced him over to the curbing, and when he got out he thought it was a friend that he knew, and standing alongside of the car, one of them up and shot him. Mr. Moe stated that Brown, after he got out of the car, he noticed that he was bleeding very bad. We asked him if he had noticed whether or not there were no blood spots on the cushion behind the driver's wheel. He

said he knew that. We asked him if he realized that, if a man had driven half an hour, bleeding as bad as Mr. Moe said Mr. Brown was after he got out of the car, that there must have been blood behind the driver's wheel—not just a spot that would go in less than five minutes' driving time. He said he didn't know anything about that; all he knew was he picked Brown up at Twentieth and Orange and drove him to the Branson residence."

It is to be noticed that in the statements Moe made to the two officers he included the untruthful story he had already recited to Branson and Kirkpatrick—the story to the effect that Brown had picked him up at Twentieth and Orange, that Brown had moved over from the driver's seat, and that he (Moe) had then driven the sufferer to Branson's. The following portion of Cloud's testimony, relating to a matter which we have already noticed, is particularly worthy of attention: "We asked him if he realized that, if a man had driven half an hour, bleeding as bad as Mr. Moe said Mr. Brown was after he got out of the car, that there must have been blood behind the driver's wheel—not just a spot that would go in five minutes' driving time." Moe's only response to this truly searching question was that "he didn't know anything about that; all he knew was he picked Brown up at Twentieth and Orange and drove him to the Branson residence." In other words, that was his story, and he would stick to it.

Moe's statement that Brown was bleeding profusely when he got out of the car is illuminating. We have already seen that the wounded man was bleeding badly—so badly that the blood ran from the bullet hole through his torso to the ground—when he got into the car as it stood before the house of murder. As he was bleeding so badly when he started on the drive from Walteria, as the blood on the right side of the back cushion of the car was the only blood on the cushion, as he was bleeding profusely when he left the car, how could the jury possibly have found that at any time on the drive from Walteria to Branson's he occupied the driver's seat?

There is a circumstance yet to be mentioned which bears upon Moe's story told to his four auditors, and it may be put in the form of a question. If Brown had driven so far on his way to Branson's, where for some reason undisclosed by the evidence he apparently expected to find a haven of rest, why should he have called upon a stranger to help him cover the short remainder of his journey, painful though it must have been? The answer to this question accords with what we have already said concerning the untruthfulness of Moe's story. That this worthy prevaricated is established beyond doubt by a piecing together of as nicely fitting a mosaic

of circumstantial evidence as was ever constructed.

We conclude that the evidence firmly supports findings that Moe drove Ward and Brown to the place where the car stood before the Lassen residence, that he sat in the standing vehicle while his two companions did their bloody work and until the surviving one came, sorely wounded, to the car, and that he drove the stricken Brown to the Branson residence.

But appellant contends that the record fails to show that he did all these things with a guilty knowledge of the purpose of his companions. The fact that he did them all is some evidence that he was possessed of that knowledge, but we shall proceed more specifically with a discussion of the subject. Every one fit to be a juror knows that the automobile, originally intended for a peaceful and lawful use, has become throughout the world, and especially in the United States, one of the most efficient aids to the commission of crime known to history. The auto carries the criminally minded quickly to the scene of a contemplated criminal act and aids him to get quickly away after the crime is committed or has failed of a consummation. Every juror knows that to make a quick and therefore a successful "getaway" the active perpetrators of a crime must have some person, more passive than they in his connection with the offense, occupying and in charge of the car which has brought them to the scene. This is true for the reason that the motor must be started upon the appearance of the direct perpetrators, or must be kept running during their absence. The car must be occupied by such a person to the end that it be not hemmed in by other cars if the scene be in a heavily traveled district, that no occurrence or mishap of any other character shall impair or render inefficient the instrumentality provided for a getaway, and that the occupant of the car may keep a lookout for a possible interference by the police, or for other untoward events likely to interfere with a consummation of the crime and lead to an arrest of the active participants in it, and by some concerted signal apprise them of the danger. These passive but handy participants in the commission of crime are so necessary a part of the paraphernalia of criminal machinery that they have names which distinguish them from those for whom they act as chauffeurs, being called lookouts, lookees or doormen.

The jurors, with all this common knowledge in their possession, were well on their way to a finding that Moe acted with guilty knowledge when they considered the evidence that Moe sat in Brown's car awaiting the return of his companions from within the Lassen home and that he drove the survivor of the two to Branson's home, for with that

proof, granting that the jurors considered it as proof, many pertinent reflections came to their minds, among them these:

1. No men embarked upon such a mission as that which impelled the acts of Ward and Brown would be so foolish as to rely upon a lookout who was not possessed of a knowledge of their purpose. If they did so the lookout would be rendered useless, as he could not discharge the duties of his position. Indeed, without a knowledge of what his companions proposed to do, or, at least, that they were embarked upon a criminal enterprise of some sort, he could not know that he had been ushered into such a job.

2. If, despite all this, Moe was innocent when his companions started toward the Lassen home, he must soon have learned that the entrance of the two into the house was aggressive and forced. Mrs. Lassen testified that she left a light burning on the front porch after admitting Mr. Huffine, and that it was still alight when Ward and Brown entered the place. Moe might very well have seen the pistol in Brown's hand as he stood at the door, he might very well have heard the inquiry about Otto and Mrs. Lassen's response to it, and he might have observed the persistency with which the two men entered the house despite her response. Under the evidence we think the jury could have found that Moe saw and heard all these things, for the record shows that the lot upon which the Lassen house stood was 40 by 140 feet in size. The structure, therefore, could not have been a great distance from Moe, although there was testimony that it sat back from the street a "considerable distance," whatever that may mean. If he did see and hear these things, and he was an innocent man, the jury might have gone so far as to doubt whether he would have remained at his post. If innocent, he would have been tempted to flee the spot, either in the car or afoot, whether he yielded to the temptation or not.

3. Moe certainly heard the five shots, as they were heard by others who were much farther from the scene of conflict than was he. This fact must necessarily have impressed Moe as being more serious and calling more strongly for action on his part than anything which had preceded the firing. Whether he actually knew that the entry of Ward and Brown into the house was aggressive—a circumstance above referred to—he was sure to know that their presence in the house led to the shooting, for the reason that it followed immediately upon the entry. If he had been an innocent man—that is, innocent of knowledge of the purpose of his companions in entering the house—he would have driven away the car when the bombardment began, or would have incontinently and rapidly departed, even if afoot. But he awaited the outcome of the battle in the home, as would have been

expected of him as a lookout, looker, or doorman. In short, in his every move throughout the various steps of this lamentable occurrence Moe acted exactly as a lookout would.

4. After the shooting was over, Brown came out of the house—and he ran. Moreover, he came alone. If Moe was not possessed of guilty knowledge, why did he not await the coming of Joe Ward? He had brought two men to the house. If he was innocent, why did he so readily and hurriedly depart with one? No one could have told him that Ward was to remain in the Lassen house. No one decided that question except the god of battles, if there is one. There is no doubt that he drove away in great haste. There is no conflict of evidence on that question. We cannot say that there was direct evidence that Brown said as he clambered into the Ford, "They got Joe! Step on it!" for there is no such direct evidence. But the entire circumstances of the case show that he must have said something to that effect, or Moe would not have departed so hurriedly with his passenger and without the missing Joe Ward, destined to breathe no more. Here again, as ever, Moe acted the part of the trained lookout.

5. When Ray Brown ran out of the house, apparently sole survivor, on his side, of the conflict which had been waged there, why did not Moe, if he was an innocent man, and having heard the sounds of conflict, drive Brown to some public hospital or police station, so that the facts surrounding this battle which roused a neighborhood could be investigated, instead of taking him to a private residence in Long Beach?

6. Again, when further evidence of the conflict at Walteria was furnished by Moe's discovery, on arriving at Branson's and on helping Brown out of the car, that the latter was bleeding profusely, why did he not then take the latter to a public or police hospital instead of into Branson's house? This was his last chance, having passed other opportunities by, to show that he was an innocent man, although the preceding incidents were enough to inspire the conduct to be expected of a citizen free from guilt.

For a special purpose we refer to the statement of Moe made to Bright and Cloud and above set forth. We call particular attention to that portion of the statement which pertains to the trip to San Pedro which Moe took with one Joe. Moe said that he and Joe went to San Pedro in the afternoon, that Joe drove them over in a Ford coupe, that on the trip they saw a printer named Holt, to whom Joe asked Moe to introduce him as Louie, as Moe did not know Joe's last name, and that the two returned to Long Beach in Joe's car, arriving there "around dark or shortly before." It was at Twentieth and Orange that Joe let Moe out of the car.

There are several circumstances in this story which tended to show to the jury that Moe had knowledge of the purpose of Ward and Brown when he drove them to Walteria. Moe said he did not know Joe's last name. The jury was justified in disbelieving this story, for it was most unlikely, as the two men were together a good part of the afternoon, and as Joe drove Moe, evidently in Joe's car, from Long Beach to San Pedro and also on the return trip, that Moe did not know the name of the man who thus favored him. If the jury did not believe Moe its members were justified in finding that the tale was told with an ulterior purpose; for instance, to prevent evidence ever to arise that he and Joe Ward were closely associated together in the afternoon, for it will appear in a moment that there was evidence that Moe's companion was no other than the man who fell at the hands of Carlisle Lord in the evening, within from, say, two to three hours after Joe dropped Moe at Twentieth and Orange.

Moe's statement also shows that he was willing to associate closely with a man who traveled under an assumed name and was willing to introduce him to others by that name. The jury was justified in regarding this as a suspicious circumstance. It is to be remarked here, in passing, that the evidence shows that several of Moe's acquaintances knew him under an assumed name, that of Smiley. The printer Holt testified that he knew him by that name alone. Smiley is a well-known family name, but it must be confessed that this Smiley may possibly have been so-called because he had a well-favored countenance, a smiling face; indeed, as Byron has it in "Don Juan," that

"He was the mildest mannered man

That ever scuttled ship or cut a throat,"

although we think, under all the evidence, that the jury must have determined that Moe used Smiley as a family name, especially as there is no testimony that he was known as Smiley Moe.

There is another circumstance in the case which, taken in connection with Moe's statement to the officers, is most damaging to Moe's claim that it was not proven that he had guilty knowledge of the purpose of Ward and Brown in entering the Lassen home. The witness Holt was shown three photographs of Ward and identified them as "resembling" the man to whom Moe introduced him on the afternoon of January 20th. Here, then, was finally shown an intimate association between Moe and Ward from before 2 o'clock in the afternoon of the fatal day—for Holt testified that he first saw Moe in San Pedro at about 2—until about dark, when Moe says he was dropped at Twentieth and Orange, Long Beach. The jury was shown by information secured from the Weather Bureau, under stipulation, that

on January 20, 1931, it was dark at 5:11 o'clock. Whether this statement referred to Los Angeles, to Long Beach or to WALTERIA does not appear from the record, but the three places are so close together that this lack makes no material difference. It will be observed that Moe was dropped by Ward a little more than two hours before the killing of Lord. The conspirators—and we have now shown sufficiently that Moe was one of them—had then but a comparatively short time to prepare for the move on WALTERIA.

[2-4] Appellant contends that the corpus delicti was not proven as to Moe. The point is made upon the contention, as stated in the brief of appellant, that "the corpus delicti must be established by proof of two distinct elements, to-wit: first, a criminal act and, second, the accused's agency in the production of said act." Points similar to this have been made many times in California and they have never stood the test of judicial examination. It must be proved in every criminal case, of course, that the defendant was an agent in the commission of the offense which is the basis of the charge made against him; but the proof of this agency is no part of the proof of the corpus delicti. This proof of agency of a particular defendant is offered to show his complicity in the commission of the offense, the corpus delicti having been established by other evidence. Here the corpus delicti was plainly shown by evidence that Lord was killed by Ward and Brown acting in concert, no matter which of the two fired the fatal shot, and no matter how many accomplices in addition to the one who did not fire the shot might be brought into the case. "The two elements of corpus delicti are: (1) Certain facts forming its basis; and (2) the existence of criminal agency as the cause of them. To establish the corpus delicti it is not essential to show that the crime charged was committed by the defendant." *People v. Flores*, 34 Cal. App. 393, 167 P. 413; see, also, *People v. Britt*, 62 Cal. App. 674, 217 P. 767; *People v. Rodway*, 77 Cal. App. 738, 247 P. 532. "From something that is said in one of the briefs we infer that appellant entertains the view that a complete proof of the corpus delicti contemplates a showing that he committed the crime. If this is appellant's view, he is in error in holding it. 'To establish the corpus delicti it is not essential to show that the crime charged was committed by the defendant.'" *People v. Strider*, 96 Cal. App. 632, 274 P. 601. Indeed, in effect, the only question that Moe presents now is that which we have already been at such pains to discuss, the point that the evidence was insufficient to support the verdict against him.

[5, 6] It is also insisted that the trial court erred in admitting the evidence of Holt to the effect "that about 2 o'clock on the afternoon

of January 20, 1931, appellant was in the printer's shop of Holt with the deceased Ward." The objection to this evidence was that it was too remote and was not connected with the commission of the murder. The point is untenable for two reasons. The first is that before Holt testified the jury had already heard, without objection, the statement of Moe, coming to them from the lips of Cloud, and relating to Moe's movements during the afternoon of January 20. This statement was much more complete and, be it also observed, much more damaging to Moe than was the testimony of Holt. The second reason why the point now made is not tenable is that the testimony of Holt was plainly admissible, irrespective of waiver by failure to object to Cloud's testimony. Holt's testimony, taken together with Moe's statement, shows that, except for a period when Moe visited his wife, the two criminals were together from 2 in the afternoon until a comparatively short time before Lord was murdered. This latter point we have practically settled during our discussion of the question whether the evidence sustained the verdict against Moe.

[7] At the trial appellant offered the following instruction, but the court refused to give it: "The court instructs the jury that as to the defendant Charley Moe there is no evidence showing or tending to show that said defendant killed or participated in the killing of one Carlisle Lord while attempting to perpetrate the crimes of arson, rape, robbery, burglary or mayhem." We think this instruction might well have been given. There is not the slightest evidence in the record, direct or circumstantial, tending to show that Ward and Brown entered the Lassen home with intent to commit any of the offenses mentioned in the proffered instruction. Indeed, an analysis of the evidence—and we have read and studied the entire transcript of the testimony with unusual care—shows strong circumstantial evidence to the contrary. Still, we think the refusal to give the instruction was harmless. The reasons for this view we shall state below.

The trial court gave the following instruction: "The court instructs the jury that if a human being is killed by any one of several persons jointly engaged at the time of such killing in the perpetration of, or attempt to perpetrate, the crime of robbery, whether such killing is intentional or unintentional, or accidental, each and all of such persons so jointly engaged in the perpetration of, or attempt to perpetrate, such crime of robbery are guilty of murder of the first degree." We think the instruction should not have been given, but that it did no harm to appellant.

Let us now state the reasons for the attitude we maintain as to both these instructions. Moe was convicted of murder in the

first degree and the jury fixed his punishment at imprisonment for life. He contends that the refusal to give the first of the two instructions and the giving of the second forced the jury thus to fix his punishment, whereas, if the first instruction had been given and the second had been omitted, the punishment meted out to him might have been less drastic. But the jury must either have failed in its duty or it must have been composed of persons unfit to perform jury duty if it had not found Moe guilty of murder in the first degree, irrespective of the action of the trial judge in the matter of the two instructions. We think no one can read the record of the evidence without reaching the conclusion that Ward, Brown and Moe conspired together, in cold blood, to take the life of Carlisle Lord. "All murder which is perpetrated * * * by any * * * kind of willful, deliberate, and premeditated killing * * * is murder of the first degree." Pen. Code, § 189. And the evidence in the cause shows, without substantial conflict, that the acts of the conspirators have brought them within this language. The only defense made by Moe was that of alibi, but the evidence he produced was so conflicting within itself as to render the whole worthless. There were five witnesses on this subject. The testimony of one of them fixed Moe at a place and during a time which, if the testimony was true, rendered the testimony of all the others false; or if the four testified truly the one testified falsely. Also, taking the testimony of the four, so far as the record discloses, there was a conflict as to each with the other three. This latter circumstance is affected by the fact that the record is practically barren of showing as to the distances between points at which Moe was located by the different witnesses at different times, especially as the times fixed were all close together and as the record tends to show that Moe proceeded from one place to another on foot. We cannot perceive how the jury could have determined that Moe could have gotten from place to place in time to be where each witness said he was when the witness saw him.

In the face of such strong evidence of guilt we think the evidence offered to prove an alibi was so conflicting and unsatisfactory within itself that the jury could not have fathomed it. It furnished no substantial conflict with the evidence of guilt.

[8] The trial judge refused to instruct the jury as follows: "The court instructs the jury that before you can find the defendant Charley Moe guilty of the crime charged you must find beyond a reasonable doubt and to a moral certainty that the defendant Charley Moe was present and participated in the alleged murder as charged, and if you find from the evidence that the defendant Charley Moe was not present and did not participate in the

alleged murder of said Carlisle Lord you should find the defendant Charley Moe not guilty."

The judge gave the following instruction: "The court instructs the jury that the defendants Ray Brown and Charley Moe are jointly charged with the crime of murder. Before you can find the defendant Charley Moe guilty as charged you must find beyond a reasonable doubt and to a moral certainty that the defendant Charley Moe, together with one or more of the perpetrators of the alleged homicide, did, prior to said homicide, enter into a conspiracy to enter the home of Carlisle Lord with felonious intent, and if there is no evidence of such conspiracy and the defendant Charley Moe did not inflict the mortal wound upon said Carlisle Lord or cause the same to be inflicted upon him, then the court instructs the jury that you should find the defendant Charley Moe not guilty."

The one of this pair of instructions which was given rendered the refused one nugatory. Moreover, the latter was properly refused because the clause contained in it to the effect that "you must find beyond a reasonable doubt and to a moral certainty that the defendant Charley Moe was present and participated in the alleged murder as charged," if given, would probably have been construed by the jury to mean that it must find that Moe "was present" in the place; that is, in the Lassen house, and at the time when Carlisle Lord was shot down. There was no evidence of such a state of facts, nor was the trial opened with such a theory.

Appellant complains that the trial judge erroneously refused to give and erroneously gave various other instructions. These points are either disposed of by what we have said above concerning Moe's guilt under the facts, or the refused instructions were covered by instructions given.

In his reply brief appellant insists that the jury could not have found him guilty without basing inference upon inference, without piling conjecture upon conjecture, and cites in support of his position the case of *People v. Smith*, 55 Cal. App. 324, 203 P. 816. The opinion in the cited case was written by Presiding Justice Finlayson, formerly of this court, and is a classic upon the subject to which it relates, but it has no application here. In the present case the rule so carefully analyzed and applied in *People v. Smith* was not infringed. Each element necessary to establish the guilt of Moe was shown by the record and the jury was not called upon to base inference upon inference. Each element, in other words, was proved by the evidence, although it was circumstantial, and the point now made by appellant is no more than an arraignment of the principle that a man may be convicted of crime upon that kind of evidence. We need venture no more upon this

subject, however, as the argument of appellant is, in effect, determined by what we have said upon the question of Moe's guilt under the facts.

Judgment and order affirmed.

We concur: IRA F. THOMPSON, J.; CRAIG, J.

CALIFORNIA STANDARD FINANCE CORPORATION v. J. D. MILLAR REALTY CO. et al.*
Civ. 4309.

District Court of Appeal, Third District, California.

Sept. 21, 1931.

Rehearing Granted Oct. 21, 1931.

1. Bills and notes ⇨502.

Note *held* admissible, testimony showing prima facie delivery, transferee's ownership, and authority of payee's president to endorse note (Civ. Code, §§ 3133, 3140).

General manager of corporation to which note in question was transferred testified that his corporation purchased note from payee and was owner thereof; that nothing had been paid on note; that he knew maker of note; that he had no knowledge of any irregularity; that he purchased note in good faith; and that it was delivered by president of payee corporation.

2. Bills and notes ⇨338.

In "due course" implies holder's good faith in acquiring negotiable instrument and lack of knowledge of infirmity affecting validity (Civ. Code, § 3140).

[Ed. Note.—For other definitions of "Due Course," see Words and Phrases.]

3. Bills and notes ⇨524.

Presumption of ownership and delivery of duly indorsed negotiable instrument, which arises from possession thereof, is rebuttable (Civ. Code, §§ 3133, 3140).

4. Corporations ⇨432(12).

Possession of negotiable note payable to corporation, unqualifiedly and regularly indorsed through president or general manager, is prima facie evidence of his authority to indorse note (Civ. Code, §§ 3133, 3140).

5. Bills and notes ⇨310.

Assignment of negotiable instrument technically differs from negotiation by indorsement, since assignment may transfer instrument subject to equities, whereas negotia-

tion is not presumed to be so restricted (Civ. Code, § 3140).

6. Bills and notes ⇨508.

Either assignment or indorsement is evidence of title to instrument intended to be transferred, and proof of either under proper pleadings renders instrument admissible.

7. Bills and notes ⇨467(2).

Allegation that payee for valuable consideration assigned and transferred payee's title and interest in note *held* sufficiently broad to include transfer by indorsement (Civ. Code, §§ 3133, 3140).

While the complaint alleged an assignment of the note, it also pleaded the execution and transfer thereof by setting it out in full, including the indorsement.

8. Bills and notes ⇨506.

Maker *held* entitled to show failure of consideration because note represented payment for beneficial interest in securities illegally sold with indorsee's knowledge (St. 1917, p. 673).

It appeared that in action by indorsee corporation, answer of maker specifically denied that note in question was supported by consideration, and it was contended by maker at trial that note was given in payment for beneficial interest in certain securities issued without a permit contrary to St. 1917, p. 673, and that general manager of indorsee corporation had knowledge of such illegality or possessed information which should have placed corporation upon inquiry.

9. Bills and notes ⇨375.

That consideration failed because note represented payment for securities illegally issued *held* no defense unless indorsee had, or was chargeable with, knowledge (St. 1917, p. 673).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the California Standard Finance Corporation against the J. D. Millar Realty Company and another. Judgment for plaintiff, and defendant named appeals.

Reversed.

L. B. Stanton, of Los Angeles, for appellant.

Rollinson, McGann, Becker & Nelson, and Henry E. Phister, all of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment on a promissory note in favor of the holder there-

of in due course. It is contended the plaintiff took the note subject to all defects of title since the complaint alleges that it was assigned to it and failed to allege the note was indorsed by the payee prior to maturity. It is also asserted the court erred in precluding the appellant from offering proof of plaintiff's alleged knowledge of defect of title to the note for lack of consideration therefor.

The complaint, which was filed April 30, 1928, alleged that on September 27, 1927, for a valuable consideration, the defendant J. D. Millar Realty Company, a corporation, made and delivered to the defendant Hollywood Granite Company, Inc., its promissory note in the following words and figures:

"Los Angeles, Cal., Sept. 27, 1927.

"Six months after date, for value received the undersigned promises to pay to the order of Hollywood Granite Company, Inc., a corporation, at West Hollywood National Bank, Los Angeles, Calif., Seven Thousand Five Hundred Dollars, \$7500.00, with interest from date until paid, at the rate of 7 per cent per annum, payable quarterly, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection undersigned agrees to pay an additional sum of ten per cent on the principal as attorney's fees, principal and interest payable in gold coin of the United States.

"J. D. Millar Realty Company,

"J. D. Millar, President.

"G. T. Dolan, Secretary.

"(Endorsed)

"Hollywood Granite Company, Inc.

"By Hy Stebbens, Pres."

The complaint further alleges that on the same date which the note bears, for a valuable consideration, the payee "duly assigned, transferred and set over to the plaintiff herein all of its right, title and interest in and to said promissory note and plaintiff then became, and is now, the lawful owner and holder thereof."

Separate answers were filed by the respective defendants. Upon information and belief, the appellant's answer controverted the material allegations of the complaint. The due execution of the note was admitted.

[1] At the trial of the cause the general manager of the plaintiff corporation testified that it purchased the note about October 1, 1927, from the Hollywood Granite Company, paying therefor the sum of \$4,000, the balance being represented by a credit due to the plaintiff from the Hollywood Granite Company. The witness testified in that regard:

"Q. Did you pay the Hollywood Granite Company for it? A. Yes sir.

"Q. You are the owner of the note now? A. Yes sir.

"Q. And has there been anything paid on it? A. No sir.

"Q. At the time you purchased the note, Mr. Von Schlegell, did you know the people that executed it? A. Yes sir.

"Q. And did you have any knowledge of any irregularity of any kind in connection with it? A. No sir.

"Q. You purchased the note in good faith? A. Yes sir.

"Q. Who delivered the note to you? A. Mr. Stebbens, president of the Hollywood Granite Company. * * *

"Q. Just what was done? A. I gave him a check.

"Q. For how much? A. I gave him a check—I don't remember for how much, I think it was four thousand and some dollars plus credits on other items that they owed us."

Upon this showing, the note was received in evidence over the objection of the appellant that "there is no proof of delivery." The note contained an unqualified indorsement, as follows: "Hollywood Granite Company, Inc. By Hy Stebbens, Pres." The note was properly admitted in evidence. It was competent as prima facie evidence of the delivery of the instrument, the ownership thereof by the plaintiff, and the authority of the president of the corporation payee to indorse it. "Every holder is deemed prima facie to be a holder in due course." Section 3140, Civ. Code.

[2, 3] Under the Negotiable Instruments Act a holder of a negotiable promissory note in due course is one who takes the instrument in good faith for a valuable consideration complete and regular on its face, before maturity, without notice of previous dishonor, and without notice at the time of negotiation of any infirmity in the instrument or defect of title. The phrase "in due course" implies good faith on the part of the holder in acquiring the instrument, and a lack of knowledge of any infirmity which would affect the validity of the instrument. The holder or owner of a negotiable instrument is presumed to have acquired it in due course. The presumption of ownership and delivery of the instrument duly indorsed arises from its possession. This presumption is, however, rebuttable. Section 3133, Civ. Code; 8 C. J. 465, § 684; 1 Joyce on Defenses to Commercial Paper (2d Ed.) 874, § 645.

The evidence in the present case is that the plaintiff acquired the note in question for a valuable consideration. The note containing an unqualified indorsement of the corporation named in the instrument as payee thereof, purporting to have been signed by its president, was delivered by him to the plaintiff and offered in evidence as prima facie showing of the obligation due to it. The evidence shows it was delivered to the plaintiff for a valuable consideration by "Mr. Stebbens,

president of Hollywood Granite Company." It is contended there was no preliminary evidence that the president was authorized to indorse or deliver the instrument.

[4] The possession of a negotiable note payable to a corporation, and bearing the indorsement of the corporation, unqualified and regular in form, signed by its president or general manager, is prima facie evidence of the authority of the officer indorsing the instrument entitling a holder thereof in due course to recover, in the absence of evidence to the contrary. *Citizens' National Bank of Tacoma v. Wintler*, 14 Wash. 558, 45 P. 38, 39, 53 Am. St. Rep. 890. In the case last cited, similar to the case at bar, suit was brought by the holder of a promissory note which was indorsed by the general manager of the corporation payee. The answer admitted the execution of the note but denied it was issued for consideration or duly indorsed by the corporation. Evidence was adduced to the effect that Brown, who indorsed the note, was in fact the general manager of the corporation payee. The court said: "The possession by a third person of a negotiable promissory note, payable to a corporation, bearing the indorsement of such corporation, regular in form, and signed by its general manager, is sufficient to raise the presumption that the officer so indorsing it had authority to make the indorsement, and that the person having the possession thereof is the owner of the note. The production in evidence of the note in question, bearing the indorsement as above set forth, coupled with the proof that Brown was the general manager at the time when said note was so indorsed and delivered, was sufficient, prima facie, to entitle appellant to recover."

[5-7] The appellant contends there is a fatal variance between the allegation of the complaint with respect to the assignment of the note and the proof of its indorsement; that the note was therefore erroneously admitted in evidence. It is true there is a technical distinction between the transfer of a negotiable instrument by assignment and the negotiation thereof by indorsement. The former may convey the instrument to the holder subject to equities, while the latter is not presumed to be so restricted. 8 C. J. 384, § 568. Both an assignment and an indorsement are evidences of the title to the instrument intended to be transferred thereby. Proof of either an assignment or an indorsement under proper pleadings would entitle the note to be admitted in evidence. While the complaint alleged an assignment of the note, it also pleaded the execution and transfer of the note by setting it out in full, including the indorsement thereon. The complaint then alleged that for a valuable consideration the Hollywood Granite Company duly assigned, transferred, and set over unto the plaintiff all of its right, title, and interest in the note, and

that the plaintiff thereupon became the owner and holder thereof. This allegation is broad enough in its terms to include a transfer of the note by indorsement. Moreover, the objection to the introduction of the note in evidence was placed upon the sole ground that "there is no proof of delivery." The objection was not made upon the ground of variance between the allegation of transfer and the proof thereof, nor even upon the ground of incompetency. The note was properly admitted in evidence.

[8, 9] The appellant was erroneously precluded from adducing evidence tending to show the consideration for the note failed because the note was executed in payment of a beneficial interest in securities which were sold in conflict with the Corporate Securities Act of California (Stats. of Cal. 1917, p. 673), and that the plaintiff was charged with knowledge thereof. *Imperial Livestock, etc., Co. v. Tracy*, 208 Cal. 205, 281 P. 50.

Section 12 of that act provides that "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void. * * *" Section 2, subdivision 6, of the same act, defines the term "security" to include "all bonds, debentures, and evidences of indebtedness issued by any company."

The answer of the appellant specifically denied that the note in question was supported by a consideration. It was maintained by the appellant at the trial that the note was given by the appellant to the Hollywood Granite Company, Inc., in payment for a beneficial interest in a trust involving a "share in the profits, earnings or income" from the sale of real property, and that these securities were issued by the company in violation of the statute "without a permit of the commissioner authorizing the same." Even though this be true, it would not be a valid defense to the note unless the plaintiff had knowledge of that fact or possessed such information as should have placed it upon inquiry regarding the alleged infirmity. Mr. Rollington, the general manager of the plaintiff corporation, admitted he had some knowledge of the existence of the trust. He testified:

"Q. Now, didn't they inform you that that note was given for the purchase of a beneficial interest in a certain trust? A. Yes.

"Q. Did you investigate the trust? A. Yes, I investigated the trust."

Subsequently, the appellant offered the articles of trust in evidence. Plaintiff's objection to these articles was sustained. The appellant then in substance offered to prove that the note was executed in payment for a beneficial interest in a trust involving a certain subdivision enterprise, the securities of which were issued without authority of the commissioner in conflict with the Corporate Securities Act. The plaintiff had admitted some

knowledge of the existence of the trust. This may have charged him with knowledge of its nature. The offer was not as specific as it might have been. However, this offer was addressed to a legitimate defense which was one of the issues of the case, and should have been allowed. The objection to this offer was erroneously sustained. It therefore becomes necessary to reverse the case on this ground.

The judgment is reversed.

We concur: PRESTON, P. J.; PLUMMER, J.

117 Cal.App. 53

**WOOD, Superintendent of Banks, v.
KENNEDY et al.**
Civ. 409.

District Court of Appeal, Fourth District,
California.

Sept. 23, 1931.

Rehearing Denied Oct. 16, 1931. Hearing
Denied by Supreme Court Nov. 19, 1931.

1. Appeal and error ⇨907(3).

Appeal on judgment roll requires assumption that competent evidence supports all findings of fact and judgment.

2. Bills and notes ⇨49.

Accommodation maker for bank, who signed note he mistakenly thought secured upon promise he would not be held liable thereon, would not be liable to bank's successor in interest, in absence of intervention of creditors' interests.

3. Evidence ⇨22(1).

Court could take judicial notice that bank was insolvent and assets would be insufficient to pay depositors and creditors in full, though record in action on note by trustee liquidating bank failed to show such insolvency (Code Civ. Proc. § 1875).

Judicial notice could be taken in view of Code Civ. Proc. § 1875, requiring courts to take judicial notice of the public and private official acts of the legislative, executive, and judicial departments of the state and fact that information as to the insolvency of the bank was contained in the records in the office of the superintendent of banks, and in the records and files of the office of the clerk of the court, which records disclosed that files containing similar information were in the offices of the clerks of at least two other courts of record in the state, and fact that it was common and general knowledge in the county that the bank

was hopelessly insolvent and that its creditors and depositors would only be paid a fractional part of the moneys due them.

4. Bills and notes ⇨98.

Accommodation maker for bank which became insolvent, held estopped to deny liability upon note, notwithstanding he mistakenly believed note was secured and bank promised he would not be held liable thereon.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Will C. Wood, as Superintendent of Banks of the State of California, trustee in charge of the liquidation of Farmers' & Merchants' Bank of Imperial, in liquidation, against Jack Kennedy and J. C. Sharp, in which the last-named defendant filed a cross-complaint. From a judgment in favor of the last-named defendant, plaintiff appeals.

Reversed.

Whitelaw & Whitelaw, of El Centro, for appellant.

Utley & Nuffer, of El Centro, for respondent.

MARKS, J.

Appellant is the superintendent of banks of the state of California, and as such took possession of the property and business of the Farmers' & Merchants' Bank of Imperial on October 10, 1927. One of the assets of the bank which came into his possession was a promissory note dated February 2, 1926, in the principal sum of \$1,500, signed by Jack Kennedy and J. C. Sharp. The indorsements show interest paid to June 2, 1927, and a credit of \$170.16 on the principal. The complaint is in the usual form in actions of this kind.

Respondent filed an answer containing several special defenses. He also filed a cross-complaint for the recovery of the \$170.16 which had been credited as having been paid by him on the note. The trial court gave judgment against Kennedy for the \$1,500 principal of the note, together with interest. It rendered judgment in favor of respondent on the promissory note and on the cross-complaint. Appellant has judgment against Kennedy for the full amount of the principal and the unpaid interest of the note, and respondent has judgment against appellant for \$170.16. No appeal is taken from the judgment against Kennedy. The appeal is from the judgment awarding respondent the sum of \$170.16 and denying appellant relief as against respondent for the sum of \$1,329.84.

[1] The case comes before us on the judgment roll. We must, therefore, assume that

competent evidence was introduced in the court below to support all the findings of fact and the judgment.

Respondent's special defenses were all sustained by the trial court which found the following portions of his pleadings true: "The same (the note) was signed by him at the request of the said Farmers and Merchants Bank of Imperial as accommodation maker only and that he received no consideration for same, which the said Farmers and Merchants Bank of Imperial knew at the time of the making of said note. * * * At the time the offset in the sum of \$170.16, indicated on the back of said note, was credited thereon, (it) * * * was taken from the amount which he (Sharp) had on deposit in said bank on said date, and same was credited on said note without his permission, knowledge or consent. * * * That the signature of the defendant J. C. Sharp on the note sued on in plaintiff's complaint herein was given and made without consideration to the said J. C. Sharp. That at said time one George Dameron, then president of the Farmers and Merchants Bank of Imperial, and then and there acting in his capacity as such, requested and solicited defendant J. C. Sharp to sign said note as surety for the accommodation and benefit of said bank and then and there informed defendant J. C. Sharp that said note was secured by property sufficient to pay off same, which said property would be sold in the following spring and that there would be no actual liability to defendant Sharp resulting from the signing of said note. That it was agreed at the time between said defendant Sharp and the Farmers and Merchants Bank of Imperial, by and through its president, George Dameron, that defendant Sharp was not to be considered or to become responsible as surety or as security for said note. * * * That at the time of signing the note herein sued on defendant J. C. Sharp was told that said note was secured by a chattel mortgage which would adequately take care of the note, that the property would be sold the following spring and that there would be no liability as far as J. C. Sharp was concerned. That he inadvertently and through mistake signed said note, believing that said note was secured by a chattel mortgage on certain personal property adequate to satisfy said note, and which personal property was pointed out to defendant Sharp as being on a chattel mortgage securing the note defendant Sharp was to sign and that he thereafter signed said note under such mistaken belief that said note was secured by said chattel mortgage, and that had he known that said note was not secured by said chattel mortgage he would not have signed the same. * * * That on or about the 16th day of November, 1927, the Farmers and Merchants Bank of Imperial deducted from defendant J. C. Sharp's ac-

count in said bank the sum of \$170.16 and applied said amount toward the purported partial payment of the note sued on herein. That the taking of said defendant Sharp's money as aforesaid was without authority from him and was without his consent and that at said time defendant Sharp owed said bank nothing. That no part of said sum has been repaid to defendant Sharp, and same is now wholly due, unpaid and owing from said Farmers and Merchants Bank of Imperial to defendant J. C. Sharp. * * * That the said George Dameron, president of said Farmers and Merchants Bank of Imperial, acting as such, believed at said time he made the aforesaid representations to the said J. C. Sharp that said note was and/or would be secured by chattel mortgage on the aforesaid personal property and that thereafter said Farmers and Merchants Bank of Imperial, by and through its president, George Dameron, believing said note was secured by chattel mortgage, caused a sale to be had on the aforementioned personal property by and with the consent of the defendants J. C. Sharp and Jack Kennedy, which said property was located on the Vanderhooval ranch, about six miles west of the city of El Centro, California, and as a result of said sale said bank received sufficient funds and proceeds from the property so sold to more than satisfy said note, together with interest."

[2] It will appear from these findings: First, that the note sued upon was given without any consideration to respondent Sharp; second, that the identical note sued upon was given by mistake on the part of Sharp and Dameron, who believed Sharp was signing another note which was secured by a chattel mortgage; third, that as far as Sharp was concerned the action was brought by the successor in interest of the payee of the accommodation paper which was given by Sharp without any consideration; fourth, that the note was given by Sharp for the accommodation of the payee without consideration and with the direct and distinct promise that Sharp would not be held liable thereon nor would he be called upon to pay the whole or any part thereof.

Under ordinary conditions these four circumstances would furnish sufficient grounds to defeat an action on the note by its payee or its successor in interest, without notice and in due course of business. *Coghlin v. May*, 17 Cal. 515; *Williams v. Hasshagen*, 166 Cal. 386, 137 P. 9; *Hardison v. Davis*, 131 Cal. 635, 63 P. 1005; *First National Bank v. Reed*, 198 Cal. 252, 244 P. 368, 371; 19 Cal. Jur. 1011. In the absence of the intervention of the interests of creditors these authorities furnish ample reasons for the conclusion that no recovery could be had upon the promissory note which forms the subject matter of this action.

[3] Appellant insists that as the Farmers' & Merchants' Bank of Imperial became insolvent and came into his hands for the administration and liquidation of its affairs, the rights of third parties, depositors in and creditors of the defunct bank, have intervened and will estop respondent from denying his liability upon the note. This question has not been directly decided in this state. However, there is dictum in each of two cases which indicates that such estoppel might be enforced under proper evidence. *Bank of Orland v. Harlan*, 188 Cal. 413, 206 P. 75; *First National Bank v. Reed*, supra. In the latter case the court said: "We find no merit in plaintiff's contention that, the defendant having given his note with the purpose and intent to deceive the bank examiner, he is now estopped to assert that it is not a valid obligation. Those cases which hold that he is so estopped are distinguishable from the instant case. Those cases present situations wherein the bank became insolvent, wherein the rights of innocent third persons were involved, or wherein a consideration for the note was expressly found. The plea of estoppel is primarily for the protection of innocent third persons, who would suffer injury if the defendant were permitted to set up the true state of facts." The rule contained in the dictum in the *Reed* case is well established in many jurisdictions of the United States. See cases cited in 48 A. L. R. 720-728, and 64 A. L. R. 601-605, and *Pauly v. O'Brien* (C. C.) 69 F. 460, 461.

Respondent earnestly urges that the record before us does not show the insolvency of the Farmers' & Merchants' Bank of Imperial, and that, therefore, as no rights of creditors have intervened, the rule contended for by appellant cannot be held to apply to this case.

The only portions of the record relating to this question are as follows: It is alleged in the complaint "that on the 10th day of October, 1927, the plaintiff, as such Superintendent of Banks of the State of California, having reason to conclude that the Farmers and Merchants Bank of Imperial was then in an unsound and unsafe condition to transact the business for which it was organized, did on said date forthwith take possession of the property and business of said bank, and thereafter, and at all times since said date, the said Superintendent of Banks of the State of California has retained such possession of said bank and the property and business of said bank; and that said Superintendent of Banks did, on the 17th day of October, 1928, proceed to liquidate the affairs of said bank in accordance with the provisions of the Bank Act of the State of California; and since said 17th day of October, 1928, said Superintendent of Banks has been and now is Trustee in charge of the liquidation of said Farmers and Merchants Bank of

Imperial." The findings contain the following: "That on the 10th day of October, 1927, the plaintiff, as such Superintendent of Banks of the State of California, having reason to conclude that the Farmers and Merchants Bank of Imperial was then insolvent and in an unsound and unsafe condition to transact the business for which it was organized, did on said date forthwith take possession of the property and business of said bank and thereafter, and at all times since said date, * * * has retained such possession of said bank and the property and business of said bank; and that said Superintendent of Banks did, on the 17th day of October, 1928, proceed to liquidate the affairs of said bank in accordance with the provisions of the Bank Act of the State of California (St. 1909, p. 87, as amended), and since said 17th day of October, 1927, said Superintendent of Banks has been and now is Trustee in charge of the liquidation of said Farmers and Merchants Bank of Imperial." It must be admitted that these portions of both the complaint and findings were poorly drawn if they were intended to support the conclusion that the Farmers and Merchants Bank of Imperial was insolvent from and after the 10th day of October, 1927.

[4] The question presents itself, can this court go beyond the record before it in concluding that this bank was and is insolvent? Can it draw upon the knowledge which it possesses and has in common with a great many other people that the bank is hopelessly insolvent and can never repay its creditors and depositors the money due them? This information is contained in the records in the office of the Superintendent of Banks of this state. It is also contained in the records and files in the office of the clerk of this court, which records disclose that files containing similar information are in the offices of the clerks of at least two other courts of record in this state. It is common and general knowledge in the county of Imperial, from the judges of its superior court to its humblest depositor, that the bank is hopelessly insolvent and that its creditors and depositors will only be paid a fractional part of the moneys due them. It would be a travesty upon the justice which the courts of this state are supposed to sustain to close our eyes to that which we see, our ears to that which we have heard, and to attempt to erase from our minds the knowledge which is lodged therein, in order to sustain a judgment which deprives the creditors of the bank and its depositors the money justly due them. The law does not require any such moronic conduct from us.

Section 1875 of the Code of Civil Procedure requires us to take judicial notice of the "public and private official acts of the legislative, executive and judicial departments of this state and of the United States." It has been

held that the provisions of this section do not limit the matters of which judicial notice should be taken by the courts to those coming within its express terms. The subjects of which judicial notice should be taken have been extended far beyond the strict language of this section by many well-considered decisions. It could serve no good purpose to review all of them here. Many of them are digested and cited in 10 California Jurisprudence, 691 to 735, and in the 1929 and 1930 Supplement to this volume.

In the case of *Sheehan v. Vedder* (Cal. App.) 292 P. 175, 177, it was held that: "Section 1875 of the Code of Civil Procedure provides, in part, as follows: 'Courts take judicial notice of the following facts: * * * Public and private official acts of the legislative, executive and judicial departments of this state and of the United States. * * * In all of these cases the court may resort for its aid to appropriate books or documents of reference.' This section has been construed to permit a court to take judicial notice of a letter from the Commissioner of the General Land Office of the United States (*Southern Pacific Co. v. Lipman*, 148 Cal. 480, 83 P. 445; *Southern Pacific Land Co. v. Meserve*, 186 Cal. 157, 198 P. 1055); of the withdrawal of indemnity lands by the Secretary of the Interior (*Southern Pacific Railroad Co. v. Wood*, 124 Cal. 475, 57 P. 388); of regulations of the Department of the Interior requiring the issuance of a receiver's receipt and entry of homestead location (*Whittaker v. Pendola*, 78 Cal. 296, 20 P. 680); and of government surveys (*Rogers v. Cady*, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100)."

In the case of *People v. Tossetti*, 107 Cal. App. 7, 289 P. 881, 883, it was held that: "A search of authorities and text-books reveals that the scope of judicial notice has been widened in recent years. Prof. Wigmore says, 'The doctrine of judicial notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of today' (5 Wigmore on Evidence, § 2583); and, after discussion of certain phases thereof, courts are advised as follows: 'With these aspects of the principle in mind, a large field opens for reducing the tedious proof of notorious facts. The principle is an instrument of usefulness hitherto unimagined by judges. Let them make a liberal use of it; and thus avoid much of the needless failures of justice that are caused by the artificial impotence of judicial proceedings.' 'Judicial notice is a judicial short cut,' states Mr. Justice Olney in the case of *Varcoe v. Lee*, 180 Cal. 338, 181 P. 223, 'a doing away * * * with the formal necessity for evidence, because there is no real necessity for it.' The case of *Varcoe v. Lee*, supra, is most illuminating on the doctrine of judicial notice and its application. In that case it is said, after

quotations from *Ruling Case Law*: 'The three requirements so mentioned—that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction—all are requirements dictated by the reason and purpose of the rule, which is to obviate the formal necessity for proof when the matter does not require proof.' And thereafter is the following: 'What may be a proper subject of judicial notice at one time or place may not be at another. It would be wholly unreasonable to require proof * * * in the city of San Francisco of a city hall before a judge and jury made up of residents of that city and actually sitting in the building. But before a judge and jury in another county proof should be made. The difference lies in the fact being one of common knowledge in one jurisdiction and not in the other.' * * * That 'an appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice,' was stated in *Varcoe v. Lee*, supra; and the opinion of the court further is: 'In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favor of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge, and was probably assumed without strict proof for that very reason.' We take it that it is just as important that a judgment should be reversed when it is rendered by a court having no jurisdiction of a cause. This was done in *People v. Wong Wang*, 92 Cal. 277, 28 P. 270."

We believe that the instant case is one in which this court should take notice of the fact that the Farmers' & Merchants' Bank of Imperial is now, and was, at all times material to this action, insolvent; and of the further fact that its assets will not be sufficient to pay its depositors and creditors in full. This being the case, and the rights of innocent third persons being involved, respondent should not be permitted to escape the liability created by the placing of his note among the securities of the bank as one of its actual assets.

While upon the record before us we do not care to definitely hold that the signing of this note by Sharp and its delivery for the accommodation of the bank was for the purpose of fictitiously and fraudulently increasing its assets, still such a conclusion is logical. No connection is shown between Sharp and Kennedy. The findings disclose that the note was given to the bank upon its request and for its accommodation and upon its promise not to collect thereon from Sharp. This could

have suggested but one thing to him, namely, that the bank desired to place this note among its assets as good and collectible paper in the place and stead of a questionable obligation. As was said by Mr. Justice Ross in *Pauly v. O'Brien*, supra, and quoted in *Bank of Orland v. Harlan*, supra: "Upon these facts, I think it clear that the plaintiff is entitled to judgment. It is said for the defendant that the note sued on was without consideration. Not so, according to the agreed statement of facts, for it is there stated that it was executed in place of and to take up the note of Naylor, then represented by the bank officers to be past due, and to be secured by collaterals which were believed to be ample to pay it, and which they represented the bank wanted to get 'out of the past-due notes,' and which, together with the collaterals, were to stand as collateral to the note executed by the defendant, upon the execution of which the Naylor note was entered as paid on the books of the bank, and the defendant's note was entered thereon 'as a discount for its face.' It thus appears that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note, which, together with the collaterals, 'were to be collateral to the note' given by him. If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled

the bank officers to make a deceptive, and therefore fraudulent, showing of assets? Obviously, nothing."

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 125

PEOPLE v. MONTEZUMA.*

Cr. 1162.

District Court of Appeal, Third District, California.

Sept. 25, 1931.

As Modified on Denial of Rehearing Oct. 10, 1931. Hearing Denied by Supreme Court Oct. 23, 1931.

1. Homicide ☞253(1).

In homicide prosecution, evidence *held* to support conviction of murder in first degree.

2. Homicide ☞21.

Express malice as affecting degree of homicide is manifested by deliberate intention to take life of fellow creature.

3. Homicide ☞21.

Implied malice, as affecting degree of homicide, appears when no considerable provocation for killing existed (Pen. Code, § 188).

4. Homicide ☞341.

In homicide prosecution, evidence *held* to support implied finding that defendant killed deceased with malice aforethought, so that failure to more fully instruct jury regarding elements of manslaughter was not error.

Trial court instructed jury fully regarding necessary elements of crime of murder, and further gave correct instructions regarding circumstances which would reduce crime to manslaughter or constitute justifiable or excusable homicide. Subject of manslaughter was not mentioned by jury when asking for further information regarding penalties for crime of murder in first and second degrees. Defendant at trial made no claim of existence of facts which might reduce the killing to manslaughter, but his sole defense rested on denial that he killed the decedent or that he knew anything about the homicide.

5. Criminal law ☞824(3).

Failure to voluntarily charge jury respecting law of lesser degree of crime does not constitute reversible error, in absence of request for such instruction.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 4 P.(2d) 285.

6. Criminal law ⇨824(1).

Defendant cannot complain of failure to charge jury on particular phase of case, in absence of requested instruction, provided instructions given correctly state law.

7. Witnesses ⇨345(1).

Witness may not be impeached by evidence disclosing former conviction of mere misdemeanor (Code Civ. Proc. § 2051).

8. Witnesses ⇨344(1).

Witness may not be impeached by evidence of particular wrongful acts (Code Civ. Proc. § 2051).

9. Witnesses ⇨345(1).

In homicide prosecution, testimony disclosing prosecuting witness had been previously convicted of misdemeanor, not related, held not admissible for impeachment purposes, or to establish motive for accusing defendant (Code Civ. Proc. § 2051).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Aurelio Montezuma was convicted of murder in the first degree, and he appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Carl Barnard, of Santa Rosa, and Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

The defendant was convicted of murder of the first degree and sentenced to life imprisonment. It is contended the court erred in failing to instruct the jury on its own motion upon the subject of manslaughter. It is also asserted the defendant was prejudiced by precluding him from proving that the prosecuting witness had been previously convicted of a misdemeanor.

The defendant and two companions had been engaged for eight years in cutting wood on the Gilder ranch in Sonoma county. Montezuma's associates were Joe Cruz, the prosecuting witness, and Julian Celaya, the deceased. They all ate their meals together in the Cruz cabin. The defendant slept in an adjoining shack. These cabins were located a short distance from the Gilder dwelling house. Some dissension arose between the defendant and Cruz regarding the cooking. The defendant had the impression that Cruz had criticized him for his failure to pay for his proportion of the provisions. Except for this incident, these wood choppers appear to have associated on friendly terms.

January 30, 1931, this trio ate dinner together in the Cruz cabin. They afterward

engaged in several friendly games of checkers, during which they drank some wine. Cruz then retired to his own bed in the same room. The defendant and the deceased continued to play checkers. About 8 o'clock Alfred Gilder, the proprietor, appeared and watched the game for a few moments. He says they seemed to be on friendly terms. There was then no evidence of dissension between them. Gilder went home. At 10 o'clock he heard some disturbance at the cabin, but made no investigation regarding the cause thereof.

The three woodchoppers were the only witnesses to the affray. The defendant maintained he was not present when Celaya was stabbed and that he knew nothing of the affair. He claims that he left the cabin for a moment to go to a toilet; that when he returned he found a glass of wine on the table where he sat; that he sipped the wine, and told Celaya that it tasted as though some one had put tobacco in it; that Celaya told him the wine was all right, and he drank it. He said that in a few moments he became dizzy and fell upon the floor unconscious; that he arose sometime afterward and went to his own cabin without saying a word; that he did not return until the following morning, and that Celaya was then gone. His sole defense consists of a denial that he stabbed the deceased. He claims that he knew nothing about the homicide. He infers that the prosecuting witness, Cruz, killed Celaya.

The evidence furnishes satisfactory proof of the defendant's guilt. A controversy existed between the defendant and Cruz regarding the cooking. About three weeks before the homicide the defendant cut off a portion of the end of a case knife and ground it down to a point like a dagger, sharpening the blade upon both sides. This knife was placed beside a clock on a shelf in the cabin. At daylight on the morning following the homicide, the defendant appeared in the Cruz cabin, and, after preparing his own breakfast, he took his game bag and went hunting. After the arrest of the defendant, human blood was found upon his shoes and upon the clothing which he wore the night of the homicide. Human blood was also found upon his hunting bag.

Cruz at first denied having any knowledge of the homicide. After he and the defendant were taken into custody by the officers, he made a statement of facts conforming substantially to the testimony which he gave at the trial. There is no conflict regarding the participation of the three woodchoppers in their dinner and the friendly games of checkers in the Cruz cabin the night of the homicide. Cruz testified that, after they had been playing checkers for about an hour, he went to bed in the same room which they were then occupying; that the defendant and

Celaya continued to play checkers for some time, during which period Gilder appeared at the door of the cabin and, after watching the game for a few moments, he went away; that the defendant arose from the table later, and began to complain about former criticism on the part of Cruz regarding the defendant's failure to pay his share of the cost of provisions; that the defendant became angry, and, addressing himself to Cruz as he lay in bed, he said: "You been talking about the cooking business * * * all the time. I said to him, 'No, Monte, I never say nothing to you about cooking, we eat together, but I never say anything to you.' * * * That is what I tell him, and he keep it up, mad, you know. He says, 'God damn you, I am going to kill you.' * * * Grab right here twice, grab and lift me up about four inches in the bed. * * * I said, 'No, Monte, leave me alone, I don't do any harm to you.'" In anger, the defendant then rushed over to the shelf, and seizing the improvised dagger which he had previously prepared in one hand, and a butcher knife in the other, he returned to the bedside, flourishing the knives over the face of the prosecuting witness and threatening to kill him. Cruz drew his arms over his face to protect it, but was cut upon his left wrist during the defendant's frenzied demonstration. The deceased, Julie Celaya, then came toward the defendant, protesting against his threatening conduct. He said: "No, no, Monte, let him sleep; leave him alone." The defendant then turned upon Celaya, and, knocking him against the foot of the bedstead, rushed upon him and stabbed him to the heart with the pointed knife. Celaya fell to the floor and expired instantly without uttering a word. The knife blade penetrated the left ventricle of the heart, and death resulted instantly. A large lump was found on the back of the head of the deceased, evidently caused by striking either the foot of the bedstead or the floor as he fell. No other provocation for the fatal attack upon the deceased by the defendant appears in evidence.

Cruz further testified that, after killing Celaya, the defendant stood for a moment looking at his form as it lay upon the floor; that he then threw the knife back of a box in the room, and, after deliberating for a moment, left the cabin, but soon returned, and, taking a blanket from the bed, he wrapped the body of the deceased in it and carried it out "just like a baby." He deposited the body with a hat over the face in a field beyond the vineyard, at a distance of about four hundred feet from the cabin. He did not return to the Cruz cabin, but went directly to his own house and retired. At daylight the following morning he returned to the Cruz cabin and searched for the knife which he had thrown behind the box. He inquired from Cruz regarding the knife, but, failing to

find it, he took his gun and game bag and went hunting.

About 11 o'clock Gilder appeared and inquired for the deceased. He obtained no information from Cruz at that time. He then proceeded to haul a load of grapes from the vineyard, and in so doing observed the body of the deceased lying in the field. Thinking Celaya was asleep, he approached the body and discovered that he was dead. He then returned to the cabin and told Cruz that he had found the dead body of Celaya down in the field, and immediately left to summon the officers.

In the meantime the defendant returned. Cruz told him that Gilder had found the dead body of Julie Celaya down in the field. The defendant replied: "I don't believe you." Cruz asked him to go with him to the field where the body lay, but the defendant said: "No, I don't want to see. I want to go right to the house and make a cross," to mark the grave.

When the officers arrived, they found the body in the field with a piece of burlap over it and his hat resting over the face. Celaya was dead. The body was quite rigid. A pool of blood left a spot under the body in the vicinity of the wound. A post mortem examination showed that the incision of the knife reached the heart, and that death ensued from that cause.

An examination of the cabin disclosed some evidence of an affray. A broken chair was found. There were blood spots on the floor where the body of the deceased first fell. Several sacks, some of the bedding and the defendant's clothing, shoes, and hunting bag contained spots which proved to have been caused by human blood. The officers found the defendant engaged in making a wooden cross.

The preparation of the sharp-pointed knife by the defendant, his denial that he knew anything about the homicide, and the presence of human blood on the clothing, shoes, and hunting bag, together with Cruz' story of the affray, furnishes satisfactory proof that Montezuma killed the deceased.

[1] There is sufficient evidence to sustain the verdict of murder of the first degree. The defendant was superior to his companions in size and strength, and he appeared to dominate over them. One may not instigate a quarrel, become the aggressor in an affray, and, without first seeking in good faith to withdraw from the conflict, kill his adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. *People v. Hoover*, 107 Cal. App. 635, 290 P. 493.

[2-4] There is no merit in the contention that the court erred in failing to adequately instruct the jury regarding the elements of

the crime of manslaughter, which lesser offense may have been properly included within the crime of murder with which the defendant was charged. No such instruction appears from the record to have been offered by the defendant. Nor was it error to fail to include among the forms of verdicts which were given to the jury by the court a form for the offense of manslaughter. It is claimed the court should have more fully instructed the jury on its own motion regarding the elements of the offense of manslaughter, for the reason that the evidence shows the homicide may have been committed by the defendant without malice while he was engaged in a sudden quarrel or in mere heat of passion.

It appears the jury was very fully and fairly instructed regarding the necessary elements of murder, including a proper definition for malice both express and implied. The court charged the jury that, to constitute the crime of murder with which the defendant was accused, "The intent to kill must be the result of a deliberate premeditation; it must be formed upon a preexisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." The jury was further told that a homicide is excusable "when committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no unfair advantage was taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner." Upon the subject of manslaughter, the court instructed the jury: "Where there has been premeditation and deliberation, as I have defined those terms to you, there can be no heat of passion within the meaning of the statute to reduce the crime to manslaughter. To reduce the killing from murder to manslaughter, you must find from the evidence that such killing was the result of a sudden, violent impulse of passion on the part of defendant, produced by sufficient provocation to excite the passion of a reasonable person, situated as the defendant was situated, and the interval of time, if any, was not sufficient for defendant's passion to cool and subside, and (for) the voice of reason (to be) restored." The foregoing instructions were correct declarations of law so far as they went. No further instructions upon the subject of manslaughter, or otherwise, appear to have been submitted to the court by the defendant. No other forms of verdict were offered by the defendant. The theory of the defendant was that he did not stab or kill the deceased. He denied that he participated in or had any knowledge of the homicide. There was no contention on the part of the defendant that he killed the deceased upon a sudden quarrel or in the heat of passion, or at all.

From the fact that the jury was fully instructed regarding the necessary elements of

the crime of murder together with a correct statement of such circumstances as would reduce the crime to manslaughter or constitute justifiable or excusable homicide, and that the jury was furnished without objection with four forms of verdicts, including that of murder of the second degree, and deliberately found the defendant guilty of the highest degree, it seems apparent the jury was not disposed to consider any crime in connection with the case except that of murder. Twice the jury returned into court during its deliberations and asked the court for information regarding the penalties provided by law for the crimes of murder in the first and second degrees. The subject of manslaughter was not mentioned by the jurors. During the trial, the defendant made no claim of a sudden quarrel or striking the deceased in heat of passion or any other circumstances which might reduce the killing to manslaughter. His sole defense rested upon his denial that he killed the deceased, or that he knew anything about the homicide. The act of the defendant of stabbing the deceased appears to have been deliberate. He was angry and threatening to kill the prosecuting witness. The deceased was protesting against his conduct toward Cruz. He resented the interference, and, turning in wrath upon the deceased, he stabbed him to the heart and killed him. His wrath was exhibited by first knocking the deceased over against the bed. This evidence will support the implied finding of the jury that the defendant killed Celaya with malice aforethought. Express malice is manifested by a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation for the killing appears. Section 188, Pen. Code. No provocation appears for the killing of the deceased in the present case. Malice would therefore be implied from the nature and circumstances of the act.

[5] Failure of the court to voluntarily charge a jury respecting the law of a lesser degree of a crime, even though it may be properly included in the offense with which the accused is charged, will not constitute reversible error, in the absence of a request for such omitted instructions. *People v. Worden*, 113 Cal. 569, 45 P. 844, 846; 8 Cal. Jur. 310, § 363; 16 C. J. 1023, § 2451; *People v. Modina*, 146 Cal. 142, 79 P. 842; *People v. Bailey*, 142 Cal. 434, 76 P. 49; *People v. Barney*, 114 Cal. 554, 47 P. 41; *People v. Franklin*, 70 Cal. 641, 11 P. 797; *People v. Ross*, 89 Cal. App. 132, 139, 264 P. 314. The *Worden* Case first above cited determines the contention of the defendant in this case regarding the failure of the court to voluntarily instruct the jury upon the subject of manslaughter, adversely to him. In that case the appellant was convicted of murder of the first degree, carrying with it the death penalty. The court there failed to instruct the jury

upon the subject of murder of the second degree or of manslaughter, except that the statutory definition of murder of the second degree was given. The jury was not instructed that it was permissible under the circumstances of that case to find the defendant guilty of any offense less than murder of the first degree. Only three forms of verdicts were furnished the jury. The forms of neither murder of the second degree nor manslaughter were among those which were given to the jury. In that case, like the case at bar, the sole defense which was relied upon by the defendant was that he was not present and did not participate in the crime, consisting of derailing a train which caused the death of the deceased for which he was charged with murder. Regarding the failure of the court in that case to furnish the jury with a form of verdict covering the crime of murder of the second degree, the court said:

"No objection was made by the defendant or his counsel in response to such charge by the court relative to such forms of verdict, defendant's counsel remaining silent"; also, that 'no instruction was, upon the trial of this cause, requested by the defendant or his counsel as to what verdicts the jury could render, or as to what constituted either the crime of murder in the first degree, murder in the second degree, or manslaughter, nor was the court requested by the defendant or his counsel to instruct the jury that it was within their province to find the defendant guilty of any lesser crime than the crime charged in the information.' Moreover, it is plain from the evidence introduced by appellant, and the instructions asked by him, that he presented his case entirely upon the theory that he did not do the appalling and 'most horrible' acts ascribed to him, and did not participate in such acts. * * * In the general charge the judge gave the statutory definition of murder in the second degree, and did not refuse any instruction asked upon the subject by appellant. Under these circumstances, it was not the duty of the judge to affirmatively suggest to the jury that they might convict appellant of a lesser offense, when not asked by appellant to do so, and when such suggestion apparently would have been against appellant's wishes; and no error was committed by not doing so."

[6] No case is cited in this jurisdiction which is in conflict with the foregoing rule of law. In each of the cases which is relied upon by the appellant, wherein it is said instructions should have been given upon the law of lesser offenses which under the evidence may have reasonably been included within the crime charged, the proposed instructions upon

the omitted subject were offered by the accused and refused by the court. No such proposed instructions were offered in the present case. A defendant may not complain of a failure to charge the jury upon a particular phase of the case regarding which subject no proposed instruction is submitted by him to the court, provided the instructions which are given to the jury correctly state the law.

[7-9] The defendant charges the court with error in sustaining an objection to the question propounded to the prosecuting witness, Cruz, as to whether he had not been previously convicted of a misdemeanor consisting of an alleged assault with a knife upon one Vandolini. It is conceded this evidence was not competent for impeachment purposes under section 2051 of the Code of Civil Procedure. But it is asserted that it is competent to discredit the witness and to show he had a motive which would indicate that he was more likely to have committed the homicide than the defendant. This evidence was first admitted over the objection of the district attorney, but it was subsequently stricken from the record, and the jury was charged to disregard it. This ruling was not erroneous.

While the record does show that this witness was once charged by an information filed in the Superior Court with an assault with a deadly weapon upon one Vandolini, it is apparent he was permitted to plead guilty to a simple assault and was committed to the county jail for a misdemeanor. While he was charged with a felony, he was convicted of a misdemeanor only. A witness may not be impeached by evidence of his former conviction of a mere misdemeanor. *People v. Carolan*, 71 Cal. 195, 12 P. 52; *People v. Lando*, 92 Cal. App. 405, 268 P. 439. A witness may not be impeached "by evidence of particular wrongful acts." Section 2051, Code Civ. Proc. The testimony of the witness Cruz could not be legally discredited by evidence of his conviction of an assault amounting to a mere misdemeanor which had no relation to the crime with which the defendant was charged. Nor does the prosecuting witness' guilt of another misdemeanor furnish evidence of a motive for accusing the defendant with the commission of this homicide. There is no relative connection between that offense and the homicide with which the defendant is accused. The objection to the proof of this prior offense was properly sustained, and the evidence of that conviction was appropriately stricken from the record.

The judgment and the order are affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

JACKSON v. CAMPBELL *

Civ. 6956.

Thomas S. Bunn, of Los Angeles, for respondent.

District Court of Appeal, Second District, Division 2, California.

Sept. 22, 1931.

Rehearing Denied Oct. 22, 1931. Hearing Granted by Supreme Court Nov. 19, 1931.

WORKS, P. J.

This is an action for the recovery of a money judgment. The cause was decided in favor of plaintiff, and defendant appeals.

Appellant is an attorney at law. Respondent employed him as her counsel in an action to be commenced for the recovery of damages for the death of her husband because of the negligence of a third party. The cause was instituted with the result that a judgment was procured in favor of respondent in the sum of \$5,000. An appeal was taken, and the judgment was affirmed.

1. Attorney and client ⇨148(3).

Contract giving attorney 35 per cent. of recovery for obtaining judgment in Superior Court and 35 per cent. in event of appeal contemplated total fee of 70 per cent. (Code Civ. Proc. § 1021; Civ. Code, § 3359).

2. Attorney and client ⇨148(1).

Under contract specifying attorney's compensation for obtaining judgment in Superior Court, attorney was not bound to defend against appeal.

3. Attorney and client ⇨143.

Where employment contract is obtained by attorney's undue influence, fraud, or imposition, or gives excessive compensation, court will protect client (Code Civ. Proc. § 1021; Civ. Code, § 3359).

4. Attorney and client ⇨147.

Contract giving attorney 70 per cent. of final recovery in negligence action held unconscionable, precluding enforcement (Code Civ. Proc. § 1021; Civ. Code, § 3359).

5. Work and labor ⇨10.

Where contract giving attorney 70 per cent. of recovery was unconscionable and void, attorney held entitled only to reasonable fee (Code Civ. Proc. § 1021; Civ. Code, § 3359).

6. Attorney and client ⇨147.

Since contract giving attorney 70 per cent. of final recovery was unconscionable and void, attorney could give no life thereto by offering to reduce fee (Code Civ. Proc. § 1021; Civ. Code, § 3359).

7. Attorney and client ⇨32.

Attorney who ceases to be protector and becomes despoiler of his clients renders himself subject to censure of any court in which delinquencies are shown.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Louise Marie Jackson, formerly Louise Marie Douglas, against Eugene C. Campbell. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Eugene C. Campbell, of Long Beach, in pro. per.

[1, 2] The agreement by which respondent employed appellant is in writing; appellant being the first party and respondent the second party thereto. We now refer only to such portions of the contract as are material to a determination of the appeal. Paragraph II of the instrument provides for the commencement of an action for damages "if said claim cannot be collected without suit," and that the second party agrees "to advance and pay all costs and expenses connected therewith; and said party of the first part shall receive as compensation for his services in bringing and prosecuting the said action to judgment in said Superior Court thirty-five per cent. (35%) of the total amount recovered."

Paragraphs III and IV of the contract read, in full, as follows:

"III. That in case the said claim for damages as aforesaid shall be compromised and settled after suit is brought, the said party of the first part shall receive as compensation for his services thirty-five per cent. (35%) of the amount received in compromise and settlement of the said claim of the said parties of the second part.

"IV. That in case said action is appealed to the Court of Appeals or the Supreme Court of the State of California, the said parties of the second part will advance and pay all costs and disbursements in connection therewith and the said party of the first part shall receive as compensation for his services therein thirty-five per cent. (35%) of the amount recovered in said action."

The complaint in the present action alleges that appellant had collected the amount of the judgment, together with accruing interest, and demands judgment for the amount collected, less 35 per cent., upon the theory that under the contract of employment appellant is entitled to no more than that as his fee. At the trial, appellant contended that the contract provides for a fee of 70 per cent., but he attempted in his answer to waive all but 50 per cent. and offered to pay respondent

ent all he had collected over that amount. The trial court adopted the theory of the complaint, holding that the contract allowed but a 35 per cent. fee and rendered judgment for respondent accordingly.

We do not see how the theory upon which the trial court rendered judgment can be upheld. The second paragraph of the contract plainly provides a fee of 35 per cent. for "services in bringing and prosecuting the said action to judgment *in said superior court*" (italics ours), and under that language it is certain that appellant was not bound to defend against an appeal from any judgment which might be rendered by the Superior Court. Under the language of the second paragraph, taken alone, the forum of appellant's activity in behalf of his client was the trial court and none other. This fact would seem to exercise a controlling influence over a construction of the fourth paragraph of the contract. The second paragraph relating to services in the trial court alone, and respondent naturally being desirous of protecting any judgment she might procure against assault on appeal, it became necessary for her to provide for services in combatting a possible appeal and for a compensation therefor. This was done by the fourth paragraph of the contract. It seems to us that the second and fourth paragraphs are as separate and separable as if one of them were contained in a contract between respondent and appellant and the other in a contract between respondent and some other lawyer. If this be not true, we fail to perceive what purpose is served by the presence of the fourth paragraph as a part of the instrument. Each of the two paragraphs, therefore, to our minds, provides for a separate fee of 35 per cent. of the "total amount recovered," as it is put in the second paragraph, and of "the amount recovered in said action," as it is put in the fourth paragraph, or in all a fee of 70 per cent.; and in to such a state of affairs we pray never again to be delivered!

It is provided by section 1021 of the Code of Civil Procedure: "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties;" but this saving language is to be found in section 3359 of the Civil Code: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." This latter section has been declared to apply to contracts for the employment of lawyers, in a case but little like the present one on the facts, but exactly like it in principle: "If the contract be considered as an agreement to pay \$1500 in any event as a compensation for plaintiff's services, the youth and inexperience

of plaintiff, the fact that he had never tried a murder case, and had had but a very limited experience in the trial of any class of cases, the circumstances surrounding the execution of the contract, and the surroundings of the parties would indicate that such a contract would be, within the spirit of section 3359, Civil Code, unconscionable and contrary to substantial justice, in which event only reasonable damages could be recovered." *Newmire v. Ford*, 22 Cal. App. 712, 136 P. 504, 505.

[3-5] The same rules have been announced in other jurisdictions, usually irrespective of statutory provision. Where it can be shown that a contract of employment has been "obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will in a proper case protect the party aggrieved." *Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 444, 28 L. Ed. 64. In another case an attorney claimed that he had a contract under which he was to receive 50 per cent. of the amount recovered in an action. In its opinion the court said: "The court is not satisfied that such a contract was made, but, if it were, it was so utterly unconscionable as to be void. *Matter of Fitzsimons* [Sup.] 77 App. Div. 345] 79 N. Y. S. 194. The action was to recover damages for injuries resulting from an ordinary street accident, a collision between a car and a truck. To constrain or persuade a client into agreeing to give half the recovery, and to pay all the disbursements besides for preparing and trying such a case, is an abuse of confidence, which, in the language of the case cited, 'it would not be in the interest of public policy or professional ethics' to approve." *Herman v. Metropolitan St. Ry. Co. (C. C.)* 121 F. 184, 185. See, also, for a general discussion of the point now under examination, *Morehouse v. Brooklyn Heights R. Co.*, 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377, and *Shirk v. Neible*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150. We are so well satisfied that the contract here in question is excessive and unconscionable, and that the courts cannot enforce it, that we have made no examination of the later digests bearing upon the question. We are also satisfied that it is the duty of the trial court to proceed further with the action and in disposing of it to render such judgment as will allow appellant to retain a reasonable fee.

[6] As the contract is void, appellant can give no life to it by offering in his answer to reduce the amount of his fee under it to 50 per cent. He is entitled to no fee whatever because of his express contract.

[7] Having thus disposed of the questions presented by the appeal, it becomes our duty to pay some attention to the conduct of ap-

pellant in taking from respondent this contract so ruinous to her rights. It appears to us that the contract could have been made by appellant only because of his possession of an atrophied conscience. For his conduct in the affair he is subject to extreme reprehension. When an attorney at law ceases to be the protector of those who come to him for relief in their distress and becomes their despoiler, he renders himself subject to the censure of any court in which his delinquencies are made to appear. It is to be hoped that appellant may so revise his views concerning the duties of an attorney at law as to free himself from the possibility, hereafter, of unfavorable comment upon his activities in the practice of his chosen profession. It is an honorable one, and we pray that appellant may not again besmirch it.

Judgment reversed, with directions to the trial court to render judgment in favor of plaintiff, upon appropriate evidence, and in an amount which will allow defendant to retain a reasonable fee for the services rendered by him in the action for damages.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

116 Cal.App. 720

MOSS v. BOWMAN.

Civ. 870.

District Court of Appeal, Fourth District, California.

Sept. 21, 1931.

Rehearing Denied Oct. 6, 1931. Hearing Denied by Supreme Court Nov. 19, 1931.

1. Estoppel ⇨75.

Finance company's long-continued custom of permitting dealer to repossess and resell automobiles supported finding that dealer was company's agent to make resale, precluding recovery against innocent buyer (Civ. Code, §§ 2307, 3543; Code Civ. Proc. § 1962, subd. 3).

Evidence showed that automobile dealer's custom was to assign conditional sales contracts to finance company; that between ten and fifteen buyers defaulted annually, and in every instance, except that involved in present action, automobiles were repossessed by dealer and placed in dealer's salesroom and resold, each new contract being assigned to finance company to take up defaulted contracts; and that it was company's invariable custom to notify dealer either to collect delinquencies or to repossess automobiles.

2. Estoppel ⇨72.

Finance company held within statutory provision that that one of two innocent persons whose negligence produced another's act must suffer therefrom (Civ. Code, § 3543).

3. Interpleader ⇨10.

Where finance company claimed bankrupt dealer unauthorizedly resold repossessed automobile, innocent buyer could require court to determine respective interests therein and amount unpaid as against company as undisclosed principal (Civ. Code, § 2307).

It appeared that, as result of judgment deciding that innocent buyer was owner of automobile in question, finance company lost its title thereto and its security for unpaid balance originally advanced on defaulted contract, and received therefor an allowed claim against dealer's bankrupt estate on which nothing had been paid at time of trial, and, since buyer admitted owing specified amount as part of purchase price, trial court should have determined issue raised by buyer's pleadings regarding payment of this amount either to finance company or to receiver, or perhaps in part to both, and, if proper consent could be obtained, it would be advisable to cause referee in bankruptcy to be joined as cross-defendant on buyer's cross-complaint, thereby permitting referee and finance company to litigate question of which one was entitled to all or part of amount unpaid.

4. Bankruptcy ⇨341.

Allowance of claim against bankrupt constitutes adjudication of issues presented.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Moe Jacobs, as executor of the estate of Max Jacobs, deceased, who did business under the fictitious name and style of the Universal Finance Company, against H. D. Bowman, who filed a cross-complaint. From a judgment for defendant, plaintiff appealed, but, on plaintiff's death pending the appeal, Oscar Moss was appointed administrator with the will annexed of the estate of Max Jacobs, and was substituted as plaintiff and appellant.

Reversed, with instructions.

Harrison G. Sloane, of San Diego, and Maurice Saeta, of Los Angeles, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

MARKS, J.

This is an action brought for the recovery of the possession of a Pierce Arrow automo-

bile. The respondent had judgment in the court below, and plaintiff has taken this appeal.

Prior to August 1, 1929, Max Jacobs was transacting the business of lending money to finance the sale and purchase of automobiles under the fictitious name of the Universal Finance Company. After the controversy here involved had arisen, and before suit was filed, he died, and Moe Jacobs was appointed and qualified as executor of his estate. During the pendency of this appeal, Moe Jacobs died, and Oscar Moss was appointed and qualified as administrator with the will annexed of the estate of Max Jacobs, deceased, and has been substituted in the place of Moe Jacobs as the plaintiff and appellant herein.

[1] The Sammis-McBrien Company, a partnership, were agents for the sale of Pierce Arrow Automobiles in the city of San Diego. The partnership maintained a show and salesroom in that city. When an automobile was sold upon credit, it was its custom to execute a conditional sales contract with the purchaser providing for deferred payments at stated intervals, and to assign these contracts to the Universal Finance Company, the partnership guaranteeing the deferred payments. Probably one hundred twenty of such contracts were so negotiated annually. Registration slips on each of the cars were issued showing the Finance Company as the legal owner of the car, and the pink slips delivered to it.

Between ten and fifteen purchasers defaulted in their payments annually, and their cars were repossessed. In every instance except in the pending case the automobiles were repossessed by the Sammis-McBrien Company, placed in their salesroom, and resold by it. Each new contract was assigned to the Universal Finance Company to take up the defaulted contract on the same car. In no instance was any repossessed car delivered to Max Jacobs or his Finance Company. Generally, the deferred payments on the contracts were made to the Sammis-McBrien Company and by it remitted to the Finance Company. In a few instances, purchasers made payments direct to the Finance Company.

In cases where purchasers became delinquent in their payments, it was the universal custom of Max Jacobs to notify the Sammis-McBrien Company to either collect the delinquencies or repossess the automobiles. Those repossessed were resold according to the custom we have already described. Whether or not this custom originated in an express contract or developed during the business relations between the parties does not appear from the record. That it was universally followed is not disputed.

On March 19, 1928, the Sammis-McBrien

Company was the owner of a Pierce Arrow sedan, which it sold to George E. Short, who executed a conditional sales contract for the unpaid balance of the purchase price, payable in monthly installments of \$167. The general terms of such contracts are too well known to the bench and bar of California to need elaboration here. The contract was assigned to the Universal Finance Company and the registration slips issued showing it as legal owner and George E. Short as registered owner of the car, and the pink slip delivered to it on or about May 9, 1929.

Under date of May 15, 1929, the Universal Finance Company wrote the Sammis-McBrien Company in part as follows:

"Up to this date we have heard nothing from you in regard to delinquent accounts which we have written you several days ago. Some of these accounts are now long past due and we must ask that you kindly make the collection on same or repossess automobiles at once as we do not wish to have the delinquent accounts like they were a month ago. * * *

"Geo. E. Short. First payment on contract in the amount of \$167.40 was due on the 8th of May. This payment is now one week past due and we ask that you get in touch with Mr. Short and collect the payment."

The Sammis-McBrien Company were evidently successful in collecting this payment from Short and remitted it to the Finance Company.

Under date of June 11, 1929, the Universal Finance Company again wrote the Sammis-McBrien Company in part as follows: "To date the delinquents on your accounts are as follows: * * * Geo. E. Short due June 8th." On an undisclosed date another letter was sent in part as follows: "The following accounts are still unpaid; * * * Geo. E. Short."

Some time between May 9, 1929, and June 10, 1929, Short became financially unable to continue his payments on his conditional sales contract, and returned the automobile to the Sammis-McBrien Company. The record describes the subsequent transactions concerning the car as follows:

"That thereafter, Sammis-McBrien Co. repossessed such automobile from Short and placed the same on its premises with other cars displayed for sale.

"That on or about June 10, 1929, defendant H. D. Bowman, acting in good faith, and without actual knowledge of any claim of ownership on the part of Universal Finance Co., agreed to purchase such automobile and executed and delivered to Sammis-McBrien Co. a memorandum, a copy of which, Exhibit A, is hereafter referred to. That said Sammis-McBrien Co. executed and delivered to said defendant a memorandum, Exhibit B, hereafter referred to. That said defendant,

as a part of the agreed price, transferred and delivered to Sammis-McBrien Co. his Chrysler automobile at the agreed valuation of \$800.00; that Sammis-McBrien Co. thereupon delivered such Pierce Arrow automobile to defendant and he has ever since had possession thereof.

"That on or about July 10, 1929, defendant paid to Sammis-McBrien Co. the sum of \$167.00 on account of such purchase price and said Sammis-McBrien Co. purported to forward the same to Universal Finance Co. by its check; * * * that such check was dishonored by the Bank on which it was drawn for lack of funds and Universal Finance Co. has never received such, or any further, installment.

"That Universal Finance Co., on or about September, 1929, made demand upon said defendant for possession of said automobile; that said defendant refused to deliver the same and asserted his right thereto under and by virtue of such purchase from Sammis-McBrien Co. and said defendant then and at all times thereafter offered and agreed to pay to Universal Finance Co. in the installments agreed upon, the balance of such purchase price aggregating \$833, but such offer was at all times refused and no further payments have been made to Universal Finance Co. or to Sammis-McBrien Co.

"That Sammis-McBrien Co. subsequent to June 10, 1929, sold such Chrysler automobile to one Leo Hennequin upon a conditional contract of sale. * * * That such contract was for a valuable consideration assigned to Universal Finance Co., and after default of said Hennequin, said Universal Finance Co. repossessed such Chrysler automobile."

Respondent filed an answer denying that appellant's predecessor was the owner of, or entitled to the possession of, the automobile. It alleged that the Sammis-McBrien Company was the agent of Max Jacobs and the Universal Finance Company in the transaction, and set forth the other foregoing facts by way of answer and as an estoppel. He also alleged that, subsequent to June 10, 1929, the Sammis-McBrien Company was adjudged a bankrupt by the United States District Court, and that on September 14, 1929, Moe Jacobs, as executor, filed with the referee in bankruptcy a claim against the bankrupt estate in the sum of \$7,754.94, which included the sum of \$1,674 unpaid on the George E. Short contract. These facts are admitted. This claim was allowed in full, but nothing paid thereon at the time of trial. The claim was filed five days after the Universal Finance Company made demand upon respondent for the possession of the automobile. In his answer defendant tendered to the plaintiff the unpaid portion of the purchase price of the automobile (\$833), and filed a cross-complaint in which he asked the court to determine the respective interests in the car and that the

only interest the plaintiff had in the automobile was to recover the unpaid portion of the purchase price, not to exceed \$833.

The trial court found against the plaintiff on all issues presented by the complaint and that the Sammis-McBrien Company was the agent of Max Jacobs and the Universal Finance Company in repossessing the automobile from Short, and in the subsequent transactions with the defendant. It also found in favor of the defendant on all the special defenses but failed to find on the issue presented by the defendant as to the balance of \$833, which he admitted owing on the purchase price of the car and which he offered to pay. A special finding was made as follows:

"That at the time of the sale of said automobile to defendant as aforesaid, neither plaintiff nor said Universal Finance Corporation knew that said automobile had been repossessed by said Sammis-McBrien Company. That defendant did not know of any agency or of the ownership of said car by the plaintiff."

The judgment followed the findings, and merely decreed that defendant was the owner and entitled to the possession of the automobile, "and that the plaintiff, Moe Jacobs, and the estate of Max Jacobs, deceased, who did business under the fictitious name and style of Universal Finance Company, nor either of them, have any right, title or interest in or lien or claim upon said automobile."

At the time the defendant executed his conditional sales contract with the Sammis-McBrien Company, he received the usual receipt certifying that the change of registration of the car would be in accordance with law and a new certificate issued to him as registered owner. Under these circumstances it has been held, with special reference to section 45 of the California Vehicle Act (St. 1925, p. 402, § 7), "that the provisions of the Motor Vehicle Act relative to registration of automobiles have no bearing upon the facts of this case appears from the cases of *Boles v. Stiles*, 188 Cal. 304, 204 P. 848; *Chucovich v. San Francisco Securities Co.*, 60 Cal. App. 700, 214 P. 263; *Kenny v. Christiansen*, 200 Cal. 419, 253 P. 715 [50 A. L. R. 1297]." *State Finance Co. v. Isaacson*, 86 Cal. App. 113, 260 P. 580, 582.

The first question for our consideration is whether or not the finding that the Sammis-McBrien Company was the agent of Max Jacobs and his Finance Company in the sale of the car to the defendant is supported by the evidence.

Section 2307 of the Civil Code provides as follows: "*Creation of Agency.* An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification."

In 1 California Jurisprudence, 695, it is said:

"In the case of either antecedent authority, or subsequent ratification, the act of conferring authority upon the agent may be either express or implied. * * * Indeed, under appropriate circumstances, the rights and liabilities of agency may be created by implication of the law, as in the case of agency by estoppel, or ostensible agency."

We have concluded that the proof of the long-continued custom followed by Max Jacobs and the Sammis-McBrien Company without deviation therefrom, of permitting the latter to repossess cars upon which the payments had become delinquent, placing them among its own cars and in its own showroom for sale, and selling them to innocent purchasers for value, with Jacobs accepting the purchase price of the new sale in every case except the instant one, must be held to constitute sufficient evidence of agency to support the finding.

This case comes squarely within the language contained in *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267, 269, as follows: "If the principal," says Lord Ellenborough in *Pickering v. Busk*, supra [15 East (Eng.) 38], 'send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.' And in the same case Judge Bayley, in a concurring opinion, states the rule as follows: 'It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given; and if a person put goods into the custody of another whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them.'"

Certainly the undisclosed principal should be held estopped to deny the agency to the damage of an innocent purchaser. *State Finance Co. v. Isaacson*, supra; *General Securities Corp. v. Reo Motor Car Co.*, 91 Cal. App. 16, 266 P. 576, 577.

[2] Section 3543 of the Civil Code provides that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." We think that the conduct of Max Jacobs in this transaction, if it did not confer actual authority upon the Sammis-McBrien Company to sell the automobile to the defendant,

was such as to bring him within the provisions of the section we have last quoted. *State Finance Co. v. Isaacson*, supra; *General Securities Corp. v. Reo Motor Car Co.*, supra. In the latter case it was said: "In *Shirey v. All Night and Day Bank*, 166 Cal. 50, 134 P. 1001, the court said: 'Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.' See *Schultz v. McLean*, 93 Cal. 329, 28 P. 1053; *Gardiner v. McDonogh*, 147 Cal. 313, 81 P. 964; *Chucovich v. San Francisco Securities Corp.*, 60 Cal. App. 700, 214 P. 263."

In the case of *Powers v. Pacific Diesel Engine Co.*, 206 Cal. 334, 274 P. 512, 514, 73 A. L. R. 1398, it was said: "* * * That where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority (Code Civ. Proc. § 1962, subd. 3). In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud."

[3] Under the facts of the instant case, the defendant could, under proper pleading, have the court determine the respective interests in the car and the amount unpaid upon the purchase price under his contracts with the agents, as against the undisclosed principal. *Hulsman v. Ireland*, 205 Cal. 345, 270 P. 948.

[4] While the trial court decided the question of the ownership of the car, it did not dispose of the question of the amount unpaid by the defendant upon his contract of purchase. The net results of the judgment rendered are as follows: The plaintiff lost title to the car, and lost his security for the unpaid balance of the money he advanced on the Short contract, and received therefor an allowed claim against the bankrupt estate of the Sammis-McBrien Company, upon which nothing had been paid at the time of trial. The amount of the probable dividends upon this claim, if any, do not appear. The estate of the bankrupt has, as one of its liabilities, an allowed claim in favor of the

plaintiff in the sum of \$1,674, the full amount unpaid on the Short contract. The defendant has the automobile and \$833, which he admits he owes to some one as part of the purchase price of the car. The trial court should have determined the issue raised by the defendant's pleadings as to the payment of this money to the plaintiff or to the receiver, or perhaps in part to both. The allowance of the claim against the bankrupt estate constitutes an adjudication of the issues presented by it, and possibly may be held to be an election of remedies by the claimant. *Martin Music Co. v. Robb* (Cal. App.) 1 P.(2d) 1000.

The case must be reversed to permit the trial court to dispose of the \$833 admittedly owed to some one by the defendant. If proper consent can be obtained therefor, it would be advisable to cause the cross-complaint to be amended and the referee of the bankrupt estate joined as cross-defendant, permitting the two cross-defendants to litigate the question of which one is entitled to all or part of the \$833 owed by the defendant. The findings already made are complete upon the questions they purport to settle, are supported by the evidence, and need not be disturbed. The trial court should take evidence and make findings upon the question of to whom the \$833, or any part thereof, should be paid, and render judgment in accordance with the present and such additional findings and the conclusions of law in accordance therewith.

Judgment reversed, with instructions to the trial court to take appropriate proceedings in accordance herewith.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 40
TIEMAN v. RED TOP CAB CO. et al.
Civ. 7611.

District Court of Appeal, First District, Division 1, California.
Sept. 23, 1931.

1. Automobiles ⇨149.

Absence of lighted headlights on automobile at night is material in determining driver's negligence.

2. Automobiles ⇨245(52).

Whether absence of lighted headlights on taxicab which struck pedestrian, causing injuries resulting in death, contributed to accident, *held* for jury.

Evidence disclosed that absence of lighted headlights on taxicab did not interfere

with observation of approach of taxicab, and that witness walking with decedent at time of accident saw taxicab 150 feet from point of collision.

3. Automobiles ⇨245(49).

Notwithstanding operator of taxicab was driving within speed limit, whether taxicab was being driven at careful and prudent speed not greater than was reasonable and proper *held* question for jury (St. 1923, p. 553, § 113 (a)).

4. Automobiles ⇨242(8).

In action for death of pedestrian struck by taxicab, defendants had burden to prove applicability of ordinance relating to pedestrians crossing streets and decedent's violation thereof.

Ordinance of city limited right of pedestrians to use roadway, and provided that no pedestrian shall cross a roadway other than by a crosswalk when within the central traffic district or business district.

5. Automobiles ⇨245(72).

Whether pedestrian struck by taxicab, resulting in death, was contributorily negligent in attempting to cross street, *held* question for jury.

6. Automobiles ⇨242(8).

It is presumed that decedent struck by taxicab used ordinary care for his safety.

7. Automobiles ⇨244(32).

In action for death, testimony of decedent's companion that he saw taxicab company's name on cab *held* sufficient proof of ownership.

8. Evidence ⇨222(10).

Admission by driver that he was driving taxicab at time of accident *held* admissible, although inadmissible against taxicab company.

9. Evidence ⇨265(18).

Trial ⇨140(1).

Though oral admissions must be viewed with caution, jury is judge of their effect and value and of credibility of witnesses (Code Civ. Proc. §§ 1847, 2061).

10. Evidence ⇨208(1).

In action for death, defendant's petition for writ of mandate filed between second and third trials *held* admissible as judicial admission.

11. Automobiles ⇨244(26).

Uniform worn by taxicab driver as described in testimony, being that customarily

worn by drivers of taxicab company, held sufficient to prove driver was in its employ.

12. Evidence ⇨75.

Where evidence tends to prove material fact, and defendant could produce contradictory evidence, if preceding evidence was not true, presumption arises that evidence, if produced, would be prejudicial (Code Civ. Proc. § 2061, subd. 6).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Mary Tieman against the Red Top Cab Company and another. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

B. P. Gibbs, Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of Los Angeles, for appellants.

Thomas C. Nelson, of San Francisco, for respondent.

GRAY, Justice pro tem.

The alleged owner and the alleged operator of a taxicab, jointly, appeal from a judgment, based upon a verdict awarding a widow damages for her husband's death, caused by injuries received in a collision with such taxicab. The only testimony as to the accident is given by decedent's then companion, produced as a witness on behalf of respondent. He testified that, between the hours of 7 and 8 on Christmas Eve, the decedent, another, and himself, after walking westerly on the north sidewalk of Folsom street, between Third and Fourth streets, in the city of San Francisco, reached a space fifteen to twenty feet wide between two automobiles parked along the north curb; that the street was well illuminated and a light drizzling rain was falling; that, as he stepped off the curb to go through the opening, he saw the taxicab, without lighted headlights, 150 feet west, coming down the center of Folsom street; that decedent and he advanced one or two steps and stopped between the parked automobiles to let the taxicab pass; that decedent was then an arm's length in front, diagonally to his right; that the taxicab swerved, and, a second or two after they stopped, struck them as they stood between the parked automobiles; and that the taxicab, without skidding, stopped at the point of collision.

[1-3] Appellants first claim that this testimony does not establish actionable negligence upon their part, because the lack of lighted headlights could not have been a proximate cause of the accident and the speed of the taxicab, was not sufficient to constitute negligence. It is apparent that the lack of light-

ed headlights did not interfere with this witness' observation of the approaching taxicab, for he testified that he saw it 150 feet west of the point of collision. Although there is no direct testimony as to whether decedent looked or saw the taxicab, it would appear that he had an opportunity, equal to that of his companion, so to do. Since the driver's point of view differed from that of such companion, it does not follow that he could have seen the pedestrians as readily as the companion observed the taxicab. As the purpose of lighted headlights is not only to warn a pedestrian of a vehicle's approach, but is also to enable its operator to see the pedestrian, their absence is material in determining such operator's negligence. *Mardorf v. Penniman*, 68 Cal. App. 696, 230 P. 12. While the absence of lighted headlights was probably inconsequential as to decedent's observation, yet it remained for the jury to say whether such absence contributed to the accident. *La Count v. Pasarich*, 205 Cal. 181, 270 P. 210; *Neilson v. Walker*, 105 Cal. App. 23, 286 P. 1091. Although this witness was unable to estimate the speed of the taxicab in miles per hour, still the jury could make such estimate from the fact that the taxicab traveled 150 feet while the witness took one or two steps from the curb and waited one or two seconds before being hit. *Arrelano v. Jorgensen*, 52 Cal. App. 622, 199 P. 855. Even if the operator was driving within the speed limit, "it was still a question of fact for the jury to determine whether under all of the circumstances present he was at that time driving his automobile, as is required by the provisions of section 113 (a)" of the California Vehicle Act, St. 1923, p. 553, "at a careful and prudent speed not greater than was reasonable and proper, having due regard for the traffic, surface, and width of the highway, and at such a speed as not to endanger the life, limb, or property of any person; for, if he was not, he was guilty of negligence, even though he was not exceeding the statutory limit. * * * *Garns v. Halpern*, 193 Cal. 193, 223 P. 545; *Cook v. Miller*, 175 Cal. 497, 166 P. 316." *Truitner v. Knight*, 83 Cal. App. 655, 660, 257 P. 447, 450.

[4, 5] The collision occurred in the vicinity of the northerly projection, across Folsom street, of Ritch street, which, in bisecting the block southerly of Folsom street terminates at the latter's southern line. In support of their affirmative defense of contributory negligence, appellants offered, and the court admitted in evidence, a section of an ordinance of the city and county of San Francisco reading as follows: "Pedestrian's Limited Right to Use of Roadway. When within the Central Traffic District or a Business District, no pedestrian shall cross a roadway other than by a crosswalk." Since the definition of its terms, contained in the ordinance, was binding upon the judge and jury (36 Cyc.

1105; 25 R. C. L. 1049), the court properly admitted, on respondent's offer, another section, which defined an intersection as "the area embraced within the prolongation of the property lines of two or more streets which join at an angle, whether or not one such street crosses the other," and a crosswalk as "that portion of the roadway included within the prolongation of curb and property lines at street intersections. * * *" It was incumbent upon appellants to prove that the ordinance was violated by decedent; and, in doing so, that it was applicable under the facts. *Rathbun v. White*, 157 Cal. 248, 107 P. 309; *Vicino v. Amador*, 71 Cal. App. 604, 236 P. 369. This they failed to do, because evidence that there were stores on both sides of Folsom street did not show that the locality of the accident was within the "central traffic district," and because, in absence of evidence as to the location of the extended curb and property lines of Ritch street, the decedent's position relative to the crosswalk is unknown. The witness' statement, obviously mistaken when compared with other portions of his testimony, that he stepped off the curb at a point 15 or 20 feet west of the continuation of the easterly line of Ritch street, across Folsom street, does not aid in locating the crosswalk, because it fails to designate such easterly line as either the curb or property line. "The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury; for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question." *Burgesser v. Bullock's*, 190 Cal. 673, 677, 214 P. 649, 651.

[6] Equally without merit is appellants' further claim that the evidence establishes decedent's contributory negligence, because it shows that he left a place of safety on the sidewalk and stepped into the street between the parked automobiles and in front of the taxicab without attempting to assure himself that no vehicles were approaching. The evidence does not support the statement that decedent stepped in front of the taxicab, but, on the other hand, clearly shows that he was standing in a position of apparent safety between the parked automobiles, and that he had no reason to fear that the taxicab would suddenly swerve into him. There is no direct testimony as to whether decedent looked before leaving the sidewalk, although his stopping would support an inference that he knew the taxicab was approaching. In absence of contrary evidence, it must be presumed that he used ordinary care for his own safety, and that, in so doing, he looked. *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027.

[7-9] The complaint alleged, and appellants' joint answer denied, that at the time of the accident Red Top Cab Company was the owner of the taxicab and that Leland Warrington, as its employee, was operating it. Appellants contend that the evidence is insufficient to support the jury's finding that the company was the owner and Warrington, as its employee, was operating such taxicab. The following evidence, offered by the respondent, is the only evidence upon these issues. The companion's testimony that, immediately after the accident, he saw the company's name painted upon the taxicab, was sufficient proof of ownership. *Guderitz v. Boadway Bros.*, 39 Cal. App. 48, 177 P. 859; *Blashfield, Cyc. of Automobile Law*, vol. 2, p. 1636. Warrington's admission that he was driving the taxicab at the time of the accident, made to a process server about a month thereafter, was admissible to prove this fact as far as he was concerned, although such admission was not binding upon his coappellant. *Lampton v. Davis Standard Bread Co.*, 48 Cal. App. 116, 191 P. 710; *Shaver v. United Parcel Service*, 90 Cal. App. 764, 266 P. 606. Although evidence of oral admissions is to be viewed with caution, the jury is the judge of its effect and value (Code Civ. Proc. § 2061), and the credibility of the witness (Code Civ. Proc. § 1847).

[10-12] Appellants' petition for writ of mandate, filed in this court between the second and third trials of this action, was properly admitted in evidence as a judicial admission, although it was verified by their attorney (*Coward v. Clanton*, 79 Cal. 23, 21 P. 359), and although respondent was not a party therein (22 C. J. 336). The petition alleged that, at the time of the accident, Leland Warrington was employed by the Red Top Cab Company as a taxicab driver. The uniform worn by the taxicab driver, as described in the companion's testimony, was that customarily worn by the company's drivers, and was therefore sufficient to prove that he was in the company's employ and acting as such. *Western Union Telegraph Co. v. Hale* [C. C. A.] 277 F. 422; *Phillips v. Western Union Telegraph Co.*, 194 Mo. App. 458, 184 S. W. 958; *Western Union Telegraph Co. v. Brown* (Tex. Civ. App.) 297 S. W. 267. Appellants' failure to offer any evidence on these issues, although obviously the best advised, requires that the above evidence "be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict." Code Civ. Proc. § 2061, subd. 6. "It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact,

and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." *Bone v. Hayes*, 154 Cal. 759, 765, 99 P. 172, 175; *Alloggi v. Southern Pacific Co.*, 37 Cal. App. 72, 173 P. 1117; *Perry v. Paladini, Inc.*, 89 Cal. App. 275, 264 P. 580.

Since appellants' motions to strike out testimony, for a nonsuit and for a directed verdict, were based upon the same matters heretofore fully discussed, separate consideration of alleged errors in denying such motions need not be given, for to do so would merely lead to repetition. Finding no merit in appellants' claims of error, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 71

CLEVELAND et al. v. PETRUSICH et al.
Civ. 4308.

District Court of Appeal, Third District,
California.

Sept. 24, 1931.

1. Automobiles ⇨244(6).

Motorist's own testimony, showing sudden change of course without warning, established her negligence in running down pedestrian at street intersection.

2. Automobiles ⇨169.

Motorist not giving signal for right turn at intersection until after she began turning did not comply with statute (St. 1923, p. 553, § 130, as amended by St. 1925, p. 412, § 15a).

3. Automobiles ⇨160(1).

Dangerous condition created at intersection by motorist in turning on crosswalk occupied by pedestrians imposed on her added duty commensurate with added peril so created.

Such added duty required application of law respecting reciprocal rights of motorists and pedestrians in light of increased dangerous situation thereby created.

4. Automobiles ⇨160(1).

Though motorist and pedestrian are both charged with same degree of care, amount of care exacted of motorist is far greater.

The driver of a motor vehicle, a dangerous instrumentality capable of inflicting fatal injuries, is charged with a greater amount of care than the pedestrian in

order that he may be bound to the same standard of ordinary care.

5. Automobiles ⇨160(1, 3).

Motorist making turn at intersection on crosswalk occupied by pedestrians should give audible signal, and, if necessary, stop car (St. 1923, p. 545, § 95, as amended by St. 1929, p. 531, § 37).

6. Appeal and error ⇨1170(7).

Eliciting testimony that motorist involved in accident had stated that she was insured *held* not reversible error (Const. art. 6, § 4½).

Though course of counsel in interrogating witness which elicited the testimony complained of should have been much more guarded, and though circumstances of statement that defendant motorist was protected by insurance was not necessarily or inextricably connected with any of facts sought to be elicited, there was no reversible error in eliciting such testimony, because there was no assignment of error raising issue respecting excessiveness of verdict, and jury could not reasonably have arrived at any other verdict under evidence, and trial court ordered answer stricken out, and admonished jury to disregard it.

7. Appeal and error ⇨1170(6).

Error in disclosing that defendant is insured does not alone justify reversal, where jury could not reasonably have arrived at any other verdict, and verdict was not excessive (Const. art. 6, § 4½).

8. Automobiles ⇨244(50).

Evidence warranted finding that pedestrian and her companion properly looked and listened before crossing street at intersection.

9. Appeal and error ⇨1170(9).

Any error in instruction that there was no positive duty on pedestrian to stop, look, and listen before crossing street *held* not prejudicial to motorist (Const. art. 6, § 4½).

Motorist was not prejudiced, since evidence showed that pedestrian struck by automobile at intersection and her companion properly looked before attempting to cross street.

10. Appeal and error ⇨928(4).

Where record failed to show on whose behalf or request instruction complained of was given, appellate court will not determine whether it is technically correct.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by Winifred Cleveland and husband against Katy Petrusich and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Jeremiah J. Sullivan, of Los Angeles, for appellants.

Goldman & Lieberman, of Los Angeles, for respondents.

PLUMMER, J.

On or about the hour of 10 o'clock p. m., on the 30th day of August, 1927, an automobile, driven by the defendant, collided with, ran over, and seriously injured the plaintiff Winifred Cleveland. In this action the plaintiffs had judgment against the defendant for damages on account of the injuries sustained. From this judgment the defendant appeals.

The record shows that on the evening of the day mentioned the plaintiff, in company with a friend, was walking southerly on the east crosswalk of Main street in the city of Los Angeles, across Sixth street; that the defendant was driving an automobile northerly on Main street, and, upon reaching the intersection of Main street with Sixth street, made a right-angle turn onto Sixth street for the purpose of driving easterly thereon, and, upon making said turn, ran down and injured the plaintiff Winifred Cleveland. No contention is made that the damages awarded by the jury are excessive. Such a contention would, in view of the injuries inflicted upon said plaintiff, be wholly without merit, as the record shows that said plaintiff was not only severely, but also, in all probability, permanently injured. These facts are necessary to be borne in mind in order to arrive at a just conclusion in the consideration of some of the questions tendered for our solution.

[1, 2] Upon this appeal the appellant contends that the record shows contributory negligence on the part of the plaintiff Winifred Cleveland, as a matter of law; that plaintiff's counsel was guilty of prejudicial conduct in the propounding of certain questions during the course of the trial; and, finally, that the court erred in its instructions to the jury. The testimony of the plaintiff, and also of the friend with whom she was walking, is to the effect that, just before they entered upon the crosswalk on the east side of Main street, leading over Sixth street, they looked and saw no automobile, and proceeded across the street, and did not perceive the approach of the automobile driven by the defendant until it was actually upon them. The contention of the appellant is that, if the plaintiff Winifred Cleveland had looked, she would have seen the approach of the automobile driven by the defendant. A number of cases are cited by the appellant relating to the duty of pedestrians when about to cross a street to look in the direction from which danger may be apprehended. The cases cited correctly state

the law as to the circumstances presented in each case cited by appellant, but their applicability to the circumstances here presented is a different matter. We are here dealing with the case where an automobile driver changes his course under conditions of which the plaintiff or the person injured may be wholly unaware. In other words, the record in this case shows that, had defendant Winifred Cleveland and her friend looked toward automobiles approaching on the east side of Main street driving northerly, neither Winifred Cleveland nor her friend could have ascertained or derived any information leading them to conclude that the driver of such automobile would turn easterly upon the intersection of Sixth street and run them down. That the defendant was guilty of negligence is clearly established by her own testimony, as the following excerpt therefrom will show:

"I was going north on Main street, and when I got to Sixth street, I turned to the right; when I got to Sixth street I stopped; the bell been ring before I did go, when I come to Sixth and Main; I mean the signal that directs traffic on Sixth and Main, rang to stop; all the traffic going north stopped; I stopped; I stopped until the second bell did ring for me to go; I started; another car was ahead of me; I was about 10 feet back on Main street from Sixth; then when I turn I put out my hand, of my going to turn; I put out my hand as soon as I started my car; then I saw those two women coming from—before I started—two women coming and more people behind them, and they stopped when they saw my hand out; I had my hand up for a right-angle turn, and the women didn't look down, didn't look where they were going; they were looking down; I saw the two women before I started; the two women were walking with their heads down; they were walking straight ahead; then I struck them; I turned when I put out my hand, and then I looked to the other side of the street; I had to look on my wheel which way I turn, and I looked at my wheel not to hit anybody in front of me, and when I looked I still had my hand out, I held out my hand to turn, and when I kept turning, Mrs. Cleveland already hollered and the other woman hollered, and I cannot—and I tried to turn to the curb not to hurt her, and she didn't look at me, bumped right off my bumper.

"Q. Now, after you first saw these two ladies with their heads down, what did you do? Just looked to your wheel and kept right on going, is that right? A. I looked; there been a one the other side of the street where they started; they looked down and I thought they saw me, and the other people stopped their going to stop, too, and I coming just to turn, and I kept my hands up and I tried—I seen them up too near to me; I just tried to switch to the curb to miss them, you know, not to hit them, and it was impossible to swing so quick.

"Q. You say you first saw them just before you started, when the second bell told you to go ahead? A. I saw them before that.

"Q. You saw them before that? A. Yes; just leaving their side of Sixth street; they stepped off the north curb line of Sixth street."

This testimony shows that the defendant saw the plaintiff Winifred Cleveland and her friend on the crosswalk over Sixth street, where they had a legal right to be, and that the defendant made no attempt whatever to stop her car to avoid hitting them; no signal was given, no horn was sounded that could reasonably be calculated to apprise the plaintiff Winifred Cleveland and her friend of the impending danger. Her own testimony shows that the signal which she gave by raising her hand and the situation of the car at the turn were such that the jury had a right to conclude that the hand signal was invisible to the plaintiff. Assuming that the defendant did put up her hand, as stated by her, there is no pretense that she complied with section 130 of the California Vehicle Act (St. 1925, p. 412, § 15a). She began turning, and then gave the arm signal. This is not complying with the provisions of said section. *Snyder v. Reeg*, 86 Cal. App. 231, 260 P. 600.

The testimony of the defendant is further to the effect that she was just starting her car and driving very slowly. If this testimony is true, an application of the brakes would have prevented the accident. In connection with the testimony of the defendant as to the signals being given, we may here call attention to the testimony of the traffic officer who was on duty on the evening of the 30th of August, 1927, to the effect that the operation of the signals was discontinued at 9 o'clock p. m. by him, and the box locked where the controls are located. We may also call attention to the testimony of the disinterested witness John B. Burger, who testified as follows: "I am in the employ of the Southern California Telephone Company as a traffic officer. I witnessed the accident at the intersection of Main and Sixth streets on August 30, 1927; it occurred at about 10 p. m. I was just returning from a meeting of the Southern California Display Manager's Association; I was driving east on Sixth street; I was about the middle of the intersection of Main and Sixth street, just about the center of the street. Mrs. Cleveland was about 10 feet from the south line of Sixth street when she was hit. The signals were not operating at that time; I judge the automobile driven by the defendant was traveling between 10 and 15 miles per hour. I didn't hear any note of warning sounded by the defendant before the collision. There was nobody ahead of me between my car and the defendant's car. At the time of the impact someone screamed and the car lurched forward suddenly a distance of about 10 or 12 feet into the middle of the street,

with this woman underneath the car. I had stopped; I had slowed down to allow the two ladies to cross the street; I believe there was a man just shortly behind them; I am not just positive of that, but I think there was a man just shortly behind them at that time, and the defendant's car came around the corner and made the turn; that is how I happened to notice them; there had been one or two pedestrians shortly in front of Mrs. Cleveland; I saw the defendant's car just as it started to make the turn; I observed Mrs. Cleveland and her friend just walking naturally across the street; I noticed nothing about their conduct except that they were directly in front of me. I had been driving down Sixth street at about 15 miles per hour. The traffic signals absolutely were not working." From this testimony and the testimony of the officer having charge of the signal controls, the jury was amply warranted in concluding that the testimony of the defendant that the control signals were operating was based upon assumption and not upon facts. Other witnesses testified that the defendant's car was traveling at a rate of between 15 and 20 miles an hour.

[3-5] While the injury involved in this case was inflicted upon the plaintiff Winifred Cleveland prior to the adoption by the Legislature of section 131½ of the California Vehicle Act, which reads: "The driver of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at the end of a block," etc., the ignorance of motorists as to the rights of pedestrians or their carelessness or indifference as to such rights led to the enactment. The circumstances of this case show that the principle involved in the section just quoted is applicable, as Mrs. Cleveland and her friend were, as stated herein, where they had a legal right to be, and where, under the circumstances, they had the right of way. The defendant turned from the street upon which she was traveling to cross the intersection already occupied not only by Mrs. Cleveland and her friend but by other people, and, as the testimony of the witness Burger shows, he had stopped to allow them to cross the street in perfect safety, as they were there prior to the time when automobile drivers would be entitled to use or pass over the crosswalk. This is not a case of a pedestrian suddenly stepping in front of a moving automobile, and all the cases cited by appellant where such circumstances appear are wholly inapplicable. The dangerous condition created by the defendant in turning upon a crosswalk already occupied by pedestrians imposed upon her an added duty commensurate with the added perils so created, and the law with regard to reciprocal rights of motorists and pedestrians must be applied, in the light of the increased dangerous situation caused by the defendant changing the course

of her automobile. We agree with the law as set forth in 3 California Jurisprudence, 871, relative to such rights, where it is said: "Persons alighting upon or walking across public streets where vehicles are constantly traveling to and fro must use ordinary care to see that they do not run into or are not run over by vehicles; and in turn it is the duty of the drivers of vehicles to exercise ordinary care to prevent any injury being caused to such foot-passengers. It has been stated as the settled rule that the requirements as to the conduct of both the pedestrian and the driver of a vehicle are reciprocal and equal, and that neither has any right of way superior to the other. But while both parties are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot-passenger. The degree of care exacted of both users of the highway is the same; the amount of care must of necessity vary in order that the degree may not. The driver of a motor vehicle—a dangerous instrumentality capable of inflicting fatal injuries—is charged with a greater amount of care than the pedestrian, in order that he may be bound to the same standard of ordinary care."

Laying aside what we have said as to the right of the pedestrian being superior to that of a motorist by reason of being first to occupy the intersection, and not basing anything we are saying herein upon the amended section of the Vehicle Act which now gives the pedestrian the preferred right, the rule as stated in California Jurisprudence which we have just quoted shows that, in order for the defendant in this case to have exercised the care and caution which she should have used, it was necessary for her to sound the siren on the car and give a notice of the turn that she was about to make intercepting the pedestrian traffic, and also, when she saw Mrs. Cleveland and her friend occupying the crosswalk, to immediately apply the brakes, shut off the gas, and stop her car. There is no pretense in the record that she attempted any of these necessary acts to show a reasonable effort to avoid running down Mrs. Cleveland and her friend. We think that the rule of reason requires that, when a motorist, at 10 o'clock at night, changes the course of his automobile and attempts to pass over a crosswalk occupied by pedestrians, the siren of the car should be sounded or some audible signal given of the fact that the course of travel is about to be changed. Section 95 of the California Vehicle Act (St. 1929, p. 531, § 37) requires all automobiles to be equipped with a siren capable of giving a signal that can be heard for a distance of at least 200 feet. In this particular we think what this court said in the case of *Devecchio v. Ricketts*, 66 Cal. App. 334, 226 P. 11, 13, applicable: "A person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of

vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained." And further, as said in that case: "The rule of reasonable precaution which the law enjoins upon a driver of an automobile upon a public highway includes the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle; that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach; and, finally, that the vehicle is under such control as that it may be stopped promptly." We think the same rule as to giving some audible notice by the sounding of the siren applies here, just as the rule was stated by the Supreme Court, speaking through Mr. Justice Preston, in the case of *Berguin v. Pacific Electric Ry. Co.*, 203 Cal. 116, 263 P. 220, 224, when dealing with the failure of a motorman to give audible warning of the approach of a street car when following an automobile, to wit: "This being true, his duty to look ahead, and not behind, would have demanded of the motorman the ringing of the bell, or the use of some other method of attracting attention of said plaintiff, before coming into collision with him."

The record in this case shows that, after the collision had occurred, the automobile was stopped by a man, who was riding with the defendant, applying the emergency brake. This witness testified that he did not see the women until the instant of the impact; that he was looking in some other direction. From what we have said we think it clear that the rule set forth in the case of *Lord v. Stacy*, 68 Cal. App. 517, 229 P. 874, 876, is not controlling here, the circumstances of that case showing that the plaintiff stepped into the street immediately in front of an automobile, and did not look in the direction from which danger might have been apprehended, or that if she had looked, she would have seen. The court then said: "That it is the duty of a person about to cross a city street, immediately before placing himself in a position of danger, to look in the direction from which danger is anticipated it has been repeatedly held"—citing a number of cases which we find on page 522 of the volume just cited (68 Cal. App. 522, 229 P. 874, 876). A pedestrian crossing Sixth street, walking southerly, could not anticipate that a motor vehicle being driven northerly on a different street, to wit, Main street, would turn in upon Sixth street without giving some audible signal at that time of night to warn pedestrians of the impending peril. The cases cited by the ap-

pellant relate to a straight-away course of an automobile and not to instances where the automobile makes a right-hand turn without audible warning.

[8, 7] The conduct alleged as prejudicial refers to the following testimony given by the witness C. J. Cleveland:

"Q. By Mr. Goldman: Did you ever have any conversation with the defendant, Mrs. Petrusich, with regard to this accident? A. I did.

"Q. What and when and where and who were present? A. Well, Mrs. Petrusich, and there might have been one of her little girls there.

"Q. Speak up, please. A. I saw Mrs. Petrusich.

"Q. Yes. A. Perhaps one of the little girls was around.

"Q. Where was this conversation had? A. At her home.

"Q. About when? A. It was shortly after the accident occurred. That is, a few days after, inside of a week.

"Q. What did she say and what did you say? A. I asked Mrs. Petrusich if she felt that she wanted to help me in any way; she said that she was protected by the insurance company.

"Q. By Mr. Goldman: What else? A. And that I—

"Mr. Perkins; (interposing) Now, just a minute, if the court please—

"The Court: Just a minute now.

"Mr. Perkins: Now, if the court please—

"The court (interposing): I thought you were going to introduce certain admissions and so on. Strike the answer out. The jury is instructed to disregard the answer to the question."

While we think the course of respondent's counsel in interrogating this witness, which elicited the answer complained of, should have been much more guarded, and that the circumstances of the statement that the defendant was protected by insurance are not necessarily or inextricably connected with any of the facts sought to be elicited, yet, in view of the testimony which we have been reviewing in this case, we feel that the holding of this court in the case of *Rowe v. Rennick*, 297 P. 603, 607, is controlling. We there said, after a rather careful analysis of a long list of cases dealing with the issues here presented: "A number of other cases cited by counsel for respondent might be reviewed showing that, where the fact of insurance is disclosed in an answer, coupled with an acknowledgment of liability, prejudicial error cannot be assigned, but the authorities which we have heretofore cited we think sufficient to establish the following rules: First, that where the answer disclosing the insurance is

inextricably coupled with an acknowledgment of liability, the answer is admissible; second, that, where it appears from the testimony in the record that no verdict could have been rendered for the defendant, the admission of testimony relative to insurance is not alone sufficient to authorize a reversal of the judgment. It must further appear that the judgment returned was the result of passion or prejudice. This involves the third assignment of error, to wit, that the verdict is excessive."

There is no assignment of error in the instant case raising issue as to the excessiveness of the verdict. Nor is this a case where the testimony is evenly balanced. This court, in the case of *Squires v. Riffe*, 287 P. 360, in an opinion prepared by Mr. Justice Finch, and adopted by the Supreme Court upon hearing therein had, 295 P. 517, held that such error is not sufficient to justify a reversal, unless the testimony is evenly balanced. The counterstatement is necessarily true that, where the testimony is not evenly balanced, and where the facts show that the jury could not reasonably have arrived at any other verdict, the error in disclosing the fact that the defendant is insured is not, in and of itself, sufficient to justify a reversal, and especially is this true when there is no contention that the verdict is excessive, and, as we have said, the record in this case shows that such contention could not be reasonably made with any hope of success. Under such circumstances we think that section 4½ of article 6 of the state Constitution applies.

[8-10] It is next insisted that prejudicial error was committed by the court in reading to the jury the following portion of an instruction: "You are instructed that it is not the law that a pedestrian must refrain from crossing a public street intersection in the business section of the city of Los Angeles until such street is free from traffic and obstructions, and that there is no positive duty upon the part of a pedestrian about to cross a street, to stop, look and listen; that the question of negligence is a question to be determined by the jury, under the rule of ordinary care, that devolves upon pedestrians crossing the street, in the light of all the attending circumstances and evidence in the case." There is sufficient testimony in the record to warrant the jury in coming to the conclusion that Mrs. Cleveland and her companion did stop and look in the direction from which danger might be apprehended. The respondent also cites some authorities supporting this instruction. However, as the record falls absolutely to show upon whose behalf or request this portion of the instruction was given to the jury, the appellant is not in a position to complain, and we are not called upon to enter into an analysis of the cases to ascertain whether the instruction is

or is not technically correct. In view of the testimony showing that the two pedestrians involved did look, the giving of an instruction could work no prejudicial error. However, the law is pretty well settled that, when the giving of an instruction is assigned as error, the record must show at whose request the instruction was given, or that it was given by the court of its own motion. The law as to what the record must show is thus stated in 2 California Jurisprudence, 870: "If the record does not show at whose request the instructions are given, it will be presumed that they were requested by the appellant who claims them to be erroneous, and likewise, where there is a failure to give an instruction, and the record does not show a request therefor, it will be presumed that no request was made." See, also, 24 Cal. Jur. 871; Shannon v. Calmus, 70 Cal. App. 652, 234 P. 107, 108, where it is said: "The record does not show at whose request the instructions were given, and the presumption, therefore, is that they were given at appellant's request"—citing Gray v. Eschen, 125 Cal. 1, 57 P. 664; Sutter-Butte Co. v. American R. & A. Co., 182 Cal. 549, 189 P. 277.

Under these circumstances, we do not feel called upon to express any opinion as to the correctness or incorrectness of the challenged portion of the instructions given to the jury. We may state, however, that the whole charge given by the court to the jury has been considered, and we find it exceptionally clear and direct as to all the issues involved.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

116 Cal.App. 622

GAJANICH v. GREGORY.

Civ. 7558.

District Court of Appeal, First District, Division 1, California.

Sept. 16, 1931.

Rehearing Denied Oct. 16, 1931. Hearing Denied by Supreme Court Nov. 12, 1931.

1. Witnesses ⇨397.

Dismissed pleading was not competent as evidence of fact alleged therein, but was admissible solely to impeach pleader's testimony.

2. Trial ⇨140(1).

Weight of dismissed pleading, introduced for impeachment purposes, was for jury.

3. Pleading ⇨291(2).

Plaintiff's failure to deny genuineness and due execution of release does not preclude at-

tack thereon for fraud or mistake, notwithstanding replication does not plead fraud or mistake (Code Civ. Proc. §§ 448, 462).

4. Jury ⇨13(18).

Issues raised by attack for fraud on release set up as bar to plaintiff's action were triable by jury in court of law.

5. Trial ⇨48.

Admissibility of evidence competent for one purpose is not affected by incompetency for another purpose, but correction of abuse of testimony lies in explanation to jury.

6. Trial ⇨255(4).

Instruction limiting evidence to only purpose for which it was competent was not required, absent request.

7. Trial ⇨48.

In action for automobile injuries, evidence of fraud in obtaining plaintiff's purported release, although showing that defendant was insured and settlement was attempted, held competent.

8. New trial ⇨77(2).

Trial court has discretion to grant new trial for excessive damages appearing to have been given under influence of passion or prejudice.

9. New trial ⇨76(1).

Trial court, concluding that verdict is too large, may provide for its reduction or grant new trial.

10. Damages ⇨132(7).

\$6,000 verdict, reduced from \$12,500, held not excessive for injuries, including comminuted fractures of right fibula and left clavicle, many bruises and severe nervous shock.

Injured party was confined to the hospital for over a month, was on crutches for two months after leaving, and at the time of the trial seven months later was still under medical treatment, and, on examination on the day before trial, it was shown that he suffered from a 20 to 25 per cent. limitation of motion of the knee joint. In using the leg in walking, injured party's entire lower limb became swollen, necessitating the use of a cane, and he had a 40 to 50 per cent. permanent disability of the shoulder; and, according to medical testimony, would be unable to work for at least six to nine months after the date of the trial.

11. Trial ⇨139(1), 142.

Weight to be given witnesses' testimony and inferences to be drawn from circumstantial evidence were for jury.

12. Contracts ⇨93(1).

Generally, person executing contract is charged with knowledge of all its provisions where he had means of such knowledge, of which he negligently deprived himself.

13. Contracts ⇨94(4).

Where, as result of fiduciary relation, person is fraudulently induced to execute contract in reasonable belief that he is signing something else, instrument is void ab initio.

14. Release ⇨24(2).

Where rescission of release is necessary to plaintiff's recovery, plaintiff need only restore anything of value he has received (Civ. Code, § 1691).

15. Release ⇨24(2).

Payment to one not plaintiff's agent was not payment to plaintiff, requiring restoration to secure rescission of purported release for which payment was given (Civ. Code, § 1691).

16. Estoppel ⇨55.

Party asserting estoppel by conduct must have relied on representations or admissions of adverse party.

17. Estoppel ⇨116.

Party, relying on negligence as basis of estoppel, must show that such negligence was proximate cause of deceit.

18. Release ⇨22.

Plaintiff, suing for automobile accident injuries, held not estopped to avoid release, pleaded in bar, under facts.

Facts were that the power of attorney under which the purported agent of plaintiff, who arranged the release, acted, was forged, and the check delivered in payment of the release was delivered before the release was signed, and not in reliance on any representation that it had been signed, and that no acts or omissions of plaintiff made it possible for his purported attorney to procure payment of the check given for the release.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by George Gajanich against John R. Gregory. Judgment for plaintiff, and defendant appeals.

Affirmed.

Daniel W. Burbank, C. F. Laumeister, Robert E. Fitzgerald, all of San Francisco (Pembroke Gochner, of San Francisco, of counsel), for appellant.

Jesse H. Miller, of San Francisco, for respondent.

PER CURIAM.

An appeal by defendant John R. Gregory from a judgment for plaintiff in an action for damages for personal injuries sustained by plaintiff when struck by defendant's automobile.

Defendant denied the alleged negligence, and as a separate defense averred that plaintiff, prior to the filing of the action, for a valuable consideration, released and discharged defendant from all claims for damages or causes of action arising out of the accident described in the complaint.

The questions of negligence and of the validity of the alleged release were submitted to a jury, which returned a verdict in favor of plaintiff for \$12,500. Following a motion for a new trial, the plaintiff remitted the sum of \$6,500 from the judgment, which was thereupon reduced to \$6,000, with costs of suit.

Defendant concedes that the evidence on the question of negligence was conflicting and sufficient to sustain the verdict in that respect, but contends as grounds for his appeal that the release was binding, and precluded a trial of the issues as to negligence, and that the court erroneously submitted the question of the validity of the release to the jury; further, that the court erred in certain of its instructions, and that plaintiff, by signing the release, was guilty of negligence, and is estopped to question its effect.

The evidence shows the plaintiff to be a Slavonian, who could neither read nor write the English language. He could, however, write his name. He was injured on March 8, 1929, at about 5 o'clock p. m., near the corner of Eighteenth and Third streets in San Francisco after alighting from a street car. Following the accident, he was taken to the San Francisco Hospital, where he remained until April 18, 1929. On Saturday, March 9, 1929, the defendant reported the accident to his insurance carrier; namely, California Casualty Indemnity Exchange, a corporation, which maintained its office in San Francisco. On the afternoon of March 9 plaintiff was visited by one H. L. Johnson, who appears to have been an employee of one W. Daniel Hay, who testified that he was engaged in the business of adjusting claims, and employed persons to solicit claims from injured persons. Hay further testified that he obtained the names of such persons from newspapers and hospital records. According to the plaintiff, Johnson represented himself to be an attorney, and stated in effect that he would act as such without cost and "collect insurance" for the plaintiff. Johnson appeared at the hospital again on Monday, March 11, 1929, when he presented to plaintiff a document for his

signature. Plaintiff's testimony as to Johnson's statement regarding its character was as follows: "Mr. Johnson, he says he wants sign go show somebody he is my lawyer." He further testified that he could not read, nor was the document read to him; that nothing was said about settling his claim; that he did not know it to be a release; and that he signed believing it to be as represented by Johnson. He further claims that the only writing he signed is that relied upon by the defendant as a release. This document is in part a printed form, and reads as follows:

"Release of All Claims.

"Know all men by these presents that George Gianich in consideration of Five Hundred dollars (\$500.00), receipt of which is hereby acknowledged, I hereby release and discharge U. S. Steel Products Co. and/or any other person or persons, of and from all claims, damages, demands and/or causes of action which I may have or may ever have by reason of an accident sustained on or about the 8 day of March, 1929, substantially as follows: Injuries and damages sustained in accident occurring near intersection of 18th street and 3rd street, San Francisco, involving automobile driven by John R. Gregory.

"I agree that I have read or had read to me this entire document, and I rely wholly upon my own judgment without influence by anyone or their representatives in making this settlement, and fully understand and agree that it fully settles and discharges all claims and damages, and constitutes the entire agreement of the parties herein named without admission of any liability or any other promise or consideration than herein stated.

"X Geo Gianich.

"Witnesses: W. Daniel Hay

"H. L. Johnson.

"State of California, City and County of San Francisco—ss.

"On this 11th day of March in the year one thousand nine hundred and twenty-nine before me, Mattie G. Stirling, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Geo. Gianich, known to me to be the same person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

"In witness whereof I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

"[seal] Mattie G. Stirling,

"Notary Public in and for the City and County of San Francisco, State of California."

It was further testified that a few minutes after the paper was signed W. Daniel Hay came to plaintiff's bedside and was introduced

by Johnson as "superintendent for the insurance company." Hay then stated in substance that plaintiff was negligent at the time of the accident, and that he would pay him \$250, which amount plaintiff declined to accept. Another patient at the hospital and his wife overheard a part of this conversation, and testified that Hay stated to plaintiff, "You will get \$250 and no more," and that the latter said in reply, "I no take." Hay on the same day took the paper to a notary public, and, by representing that he saw plaintiff sign the same, induced the notary to attach thereto her certificate, shown above, that plaintiff personally appeared before her and acknowledged its execution. That this was untrue was admitted by the notary at the trial. The evidence also shows sufficiently that Johnson was not a licensed attorney.

Before Hay saw the plaintiff, he met one Richard L. Oliver, a claim adjuster in the employ of the California Casualty Indemnity Exchange. At this time Hay showed Oliver what purported to be a power of attorney constituting Hay plaintiff's attorney in fact, with authority to adjust all claims arising out of the accident, and which provided that Hay should receive 50 per cent. of all sums recovered. This paper, which bore the date March 9, 1929, purported to have been executed by plaintiff by his mark and witnessed by H. L. Johnson. A settlement for \$500 was then agreed upon by Hay and Oliver, and the latter filled out the release in question, which was a form used by the indemnity company. Oliver testified that at Hay's request he at the same time caused a check for \$500 to be drawn by the company payable to plaintiff and Hay, and delivered the same to the latter. This, he explained, was to permit Hay to procure the release and plaintiff's indorsement of the check at the time time, and thus obviate the necessity for two trips to the hospital. The check was dated March 11, 1929, but the release bears no date. It was testified by both Oliver and Hay that the release was prepared on March 11, 1929, and by the latter that plaintiff executed it on that date. The release was received by the company through the mail on the following day. The check, which was paid March 13, 1929, was indorsed by Hay, and also bears an indorsement which defendant claimed was made by plaintiff. The latter testified, however, that the indorsement was not made by him, and that the check was not presented to nor seen by him previous to the trial. It was also testified in effect by a handwriting expert that the indorsement was a forgery. According to Hay, the release was signed and the check indorsed in his presence by plaintiff, and at the same time he showed plaintiff the purported power of attorney, and the latter admitted its execution. Plaintiff denied that anything was signed while Hay was present, or that he admitted the execution of the pow-

er of attorney. He insists that the only paper signed by him was the one signed at Johnson's request before Hay appeared on the scene, and that he signed nothing by his mark. That he was physically able to sign his name on March 9, 1929, the date of the purported power of attorney to which it is claimed he affixed his mark, was shown by the fact that on that date he signed a request to be admitted to the hospital.

No part of the proceeds of the check was received or accepted by plaintiff, but on or about March 23, 1929, \$250 of the amount was deposited to his credit in a San Francisco bank by Hay. It appears that the deposit book was brought to the hospital by Johnson, and, without plaintiff's consent, placed in an open drawer at his bedside. Later the book was returned to Hay.

Johnson, whose name was affixed to the purported power of attorney, was not called as a witness at the trial. It was stated by plaintiff's counsel in open court that Johnson had been sitting in the courtroom during the trial, whereupon defendant's counsel disclaimed any acquaintance with him. Other than this, no explanation of the failure to call Johnson to the stand was offered.

[1, 2] In plaintiff's verified complaint as filed appeared a cause of action for rescission of the release, and it was there alleged that plaintiff, induced by the false representation that Johnson was an attorney at law and would act for him, executed a power of attorney on March 9, 1929. This cause of action was dismissed. The pleading was not admissible in evidence as evidence of the fact so stated. *Morris v. Lachman*, 68 Cal. 109, 8 P. 799; *Stern v. Loewenthal*, 77 Cal. 340, 19 P. 579; *Ralphs v. Hensler*, 114 Cal. 196, 45 P. 1062; *Miles v. Woodward*, 115 Cal. 308, 46 P. 1076; *Williams v. Seiglitz*, 136 Cal. 767, 200 P. 635. It was, however, properly offered by defendant and properly admitted for the purpose of impeaching plaintiff's testimony that no power of attorney was executed (*Williams v. Seiglitz*, supra; *Estate of O'Connor*, 118 Cal. 69, 50 P. 4; *Schuh v. Herron Co.*, 177 Cal. 13, 169 P. 682; *Cornwell v. Mulcahy*, 62 Cal. App. 659, 217 P. 568); and was competent only for that purpose (*Worley v. Spreckels Bros., etc., Co.*, 163 Cal. 60, 124 P. 697; *Keyes v. Geary St., etc., R. R. Co.*, 152 Cal. 437, 93 P. 88; *Albert v. McKay & Co.*, 174 Cal. 451, 163 P. 666; *Estate of Relph*, 192 Cal. 451, 221 P. 361), the weight to be given it being a question for the jury (*Weissbaum v. Eibeshutz* [Cal. Sup.] 294 P. 396).

It was further testified that an offer was made to repay the Indemnity Company the \$500 upon the surrender of the so-called release, but its agent refused, stating that they had the release and "intended to keep it," and "stand upon it." The record discloses, however, no evidence of plaintiff's ability to

pay the amount had the offer been accepted. In addition, a notice was served on both the company and the defendant that plaintiff rescinded the release upon the grounds of fraud, mistake, and want of consideration therefor. The defendant set forth the purported release in his answer. No affidavit of denial, as required by section 448 of the Code of Civil Procedure, was served or filed by plaintiff, and defendant at the opening of the trial moved for judgment on the pleadings, and objected to the admission of any evidence thereunder. The motion was denied, and the objection overruled.

[3] The above section provides that, when the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk within ten days after receiving a copy of the answer an affidavit denying the same, and serve a copy thereof on the defendant. It has been held that, by the use of the term "genuineness" is meant that the document pleaded is the identical instrument which it purports to be, and that it appears in the exact form in which it passed between the parties; and that the admission of its due execution means only that it was regularly signed and delivered in the form in which it appears. *Moore v. Copp*, 119 Cal. 429, 51 P. 630; *McKenzie v. Los Angeles Life Ins. Co.*, 97 Cal. App. 659, 275 P. 1003. Nor do these admissions preclude a party from challenging the effect of the instrument on the grounds of fraud or mistake; and under section 462 of the Code of Civil Procedure such defenses need not be pleaded by way of replication. *McKenzie v. Los Angeles Life Ins. Co.*, supra; *Moore v. Copp*, supra; *Sterling v. Smith*, 97 Cal. 343, 32 P. 320; *Baird v. Pacific Elec. Ry. Co.*, 39 Cal. App. 512, 179 P. 449; *Furlong v. White*, 51 Cal. App. 265, 196 P. 903.

[4] Defendant further contends that these issues were equitable, and that consequently plaintiff had no right to have the same tried by a jury; also that, a verdict being merely advisory in such cases, it was the duty of the court to make findings thereon.

It appears to be the rule, even in those jurisdictions where separate systems of law and equity prevail, that in cases where the execution of a release is obtained through fraud, or where through some trick or deception a person signs a paper other than that which he intended to sign, the avoidance of the release is within the jurisdiction of a court of law because the validity of the instrument is in question; and it has been generally held in jurisdictions where legal and equitable rights are administered in a single court that a release set up as a bar may be attacked for fraud, whether in the execution, or consisting of misrepresentations which in-

duced the giving of the release, and that no decree of rescission or cancellation is necessary. 23 R. C. L. Releases, § 40, pp. 410, 411; Girard v. St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556; Dixon v. Brooklyn, etc., Co., 100 N. Y. 170, 3 N. E. 65, 20 L. R. A. (N. S.) 915, note; Hartley v. Chicago, etc., Ry. Co., 214 Ill. 78, 73 N. E. 398. That the same rule prevails in this jurisdiction is shown by numerous decisions, namely, Smith v. Occidental S. S. Co., 99 Cal. 462, 34 P. 84; Meyer v. Haas, 126 Cal. 560, 58 P. 1042, 1043; Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66; Edmunds v. Southern Pacific Co., 18 Cal. App. 532, 123 P. 811; Wilson v. San Francisco-Oakland Terminal Railways, 48 Cal. App. 343, 191 P. 975.

[5-7] It is further urged that the admission of evidence of fraud in obtaining the purported release, and in that connection of evidence that defendant was insured and that a settlement was attempted, prevented defendant from having a fair trial on the issues of negligence and damage.

That the evidence was competent on the issue of fraud cannot be disputed. As was said in State v. Farmer, 84 Me. 440, 24 A. 985, 986: "That evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it." As held in Adkins v. Brett, 184 Cal. 252, 193 P. 251, the defendant is entitled in such cases to an instruction that the jury shall consider the evidence only for the purpose for which it is received. But it was not the duty of the court to instruct the jury in the absence of a request from the defendant (Liebrandt v. Sorg, 133 Cal. 571, 65 P. 1098; Courvlosier v. Burger, 61 Cal. App. 470, 215 P. 93), and, so far as shown, no request for such an instruction was made.

[8-10] It is further claimed that the verdict was so excessive as to indicate that it was the result of passion or prejudice. As stated, the trial court was of the opinion that the finding of the jury as to the extent of the damage, namely, \$12,500, was not supported by the evidence, and directed that the verdict be set aside and a new trial granted on the ground that the same was excessive, unless plaintiff remit the sum of \$6,500. This having been done, the motion for a new trial was denied and a judgment entered for \$6,000.

Plaintiff sustained a comminuted fracture of the right fibula, a similar injury to the left clavicle, many bruises, and severe nervous shock. He was confined to the hospital for over a month, was on crutches for two months after leaving, and at the time of the trial,

seven months later, was still under medical treatment. He was examined again by a physician on the day before the trial, at which time it was shown that he suffered from a 20 to 25 per cent. limitation of motion of the knee joint. In using the leg in walking the entire lower limb became swollen, necessitating the use of a cane. It was also shown that he had a 40 to 50 per cent. permanent disability of the shoulder; and in the opinion of a physician it will be at least from six to nine months after the date of the trial before he would be able to work. He incurred a liability of \$250 for physicians' services, and suffered a loss of wages to the date of the trial of \$700.

The trial court has discretion to grant a new trial for excessive damages appearing to have been given under the influence of passion or prejudice; and it is his duty, if from the evidence he concludes that the verdict is too large, either to provide for its reduction or grant a new trial. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073. This course the court followed; and from all the evidence we are satisfied that the amount to which the judgment was reduced was fairly supported, and that the motion for a new trial was thereupon properly denied.

[11-15] Defendant contends that Hay and Johnson were plaintiff's agents, and that the release was binding on him; further, that he was negligent in signing the same, and that in any case his failure to make restitution precludes an avoidance of the release.

The alleged agency depended upon whether plaintiff executed a power of attorney to Hay; it not being claimed that Johnson entered into the negotiations with the insurance company or that he had authority to settle the claim. The weight to be given the testimony of the witnesses and the inferences to be drawn from the circumstantial evidence were questions for the jury. We are satisfied that the evidence was amply sufficient to support findings that what were claimed to be plaintiff's signatures subscribed to the power of attorney and indorsed upon the check were forgeries. It is the general rule that a person who executes a contract is charged with knowledge of all its provisions where he had the means of such knowledge and of which he negligently deprived himself (Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067; Burt v. Los Angeles Olive, etc., Ass'n, 175 Cal. 668, 166 P. 993); and it has been held that the fact that he is illiterate does not change the rule (Hawkins v. Hawkins, 50 Cal. 558). But, where a fiduciary relation exists, and as a result a person is fraudulently induced to execute a contract in the reasonable belief that he is signing something else, a different rule applies, and the instrument is void ab initio. 6 Cal. Jur. Contracts, § 50, p. 86. The latter rule has been applied in numerous instances where, due to illiteracy or a weak

mental condition, persons who were unable to comprehend the effect of their acts were induced to execute releases and other contracts. *Smith v. Occidental S. S. Co.*, supra; *Moore v. Copp*, supra; *Meyer v. Haas*, supra; *Calmon v. Sarraile*, 142 Cal. 638, 76 P. 486. And it has been held that the doctrine of rescission and restoration has no application in such cases, for the reason that the plaintiff "is not attempting to avoid a contract which he has made, but is showing that he did not make the contract which he apparently made." *Meyer v. Haas*, supra; *Garcia v. Cal. Truck Co.*, 183 Cal. 767, 770, 192 P. 708. Where a rescission is necessary as a condition to recovery, the plaintiff is only required to restore anything of value he has received (Civ. Code, § 1691); and in the present case the evidence sufficiently shows that Hay was not plaintiff's agent, and consequently payment to him was not payment to the plaintiff. Furthermore, the indorsement of plaintiff's name upon the check being a forgery, there was no acceptance of the check by him, and, according to the testimony, he refused at all times to receive any part of the amount paid to Hay. Moreover, according to Oliver, the check was not delivered to Hay in reliance upon the previous execution of a release by plaintiff or upon any such representation, but before any release was signed; and it is clear from the evidence that the company relied solely upon the forged power of attorney as evidence of Hay's authority to compromise the claim.

[16-18] It is an essential element of estoppel by conduct that the party asserting it should have relied upon the representations or admissions of the adverse party; and, if he relies upon negligence as the basis of the estoppel, he must show that such negligence was the proximate cause of the deceit. 10 Cal. Jur. Estoppel, § 20, p. 636; *Mercantile Trust Co. v. Sunset, etc., Co.*, 176 Cal. 461, 168 P. 1037; *Barstow v. Savage Mining Co.*, 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705; *Stoner v. Security Trust Co.*, 47 Cal. App. 216, 190 P. 500. If the power of attorney was forged, it cannot be contended that plaintiff's negligence made the forgery possible; and, if the check was delivered before the release was signed, or not in reliance upon any representation that the same had been signed, an essential element of the alleged estoppel is wanting. Nor does the evidence show that any act or omission by the plaintiff made it possible for Hay to procure the payment of the check.

The court instructed as to the legal effect of the execution of a release by plaintiff in the belief that he was signing something different; also as to acts which would constitute forgery of the power of attorney and of the indorsement of a check, and the effect of forgery. Defendant makes numerous objec-

tions to their sufficiency, but we are satisfied that, taken with the other instructions, they fairly state the law, and that no prejudicial error can be predicated thereon.

The evidence fairly supports the conclusions of the jury, and, after an examination of the entire record, we find no error which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

MCCORMICK v. GREAT WESTERN POWER CO. OF CALIFORNIA.*

TILLIE v. SAME.

Civ. 7523.

District Court of Appeal, First District, Division 1, California.

Sept. 24, 1931.

Rehearing Denied Oct. 24, 1931. Hearing Granted by Supreme Court Nov. 23, 1931.

1. Trial ⇨165.

On motion for nonsuit, conflicts in evidence must be resolved in plaintiff's favor.

2. Electricity ⇨16(2).

Where it may be reasonably anticipated that persons will come in contact with wire, power company must either insulate wire or place it in comparatively harmless position.

3. Electricity ⇨14(1).

Power company, to prevent injuries from wires, should use "ordinary and reasonable care," meaning care which reasonably careful prudent person would exercise under circumstances.

"Ordinary and reasonable care" means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury; and, where death may be caused by an agency lawfully in use, "ordinary care" requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.

[Ed. Note.—For other definitions of "Ordinary Care" and "Reasonable Care," see Words and Phrases.]

4. Negligence ⇨136(9).

Where reasonable men might fairly differ on question whether defendant, with ordinary care, could have anticipated injury, issue is for jury.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 8 P.2d 145.

5. Appeal and error ⇨996.

Verdict for plaintiff on fact question, on which reasonable men might fairly differ, as to whether defendant exercised ordinary care, will not be disturbed.

6. Negligence ⇨125.

To prove that one maintaining dangerous instrumentality might reasonably anticipate injury, previous similar accidents are admissible, unless too remote.

For the purpose of proving that one who maintains a dangerous instrumentality might reasonably anticipate that persons engaged in lawful occupations, in places where they have a legal right to be, are likely to be injured thereby, evidence of previous accidents similar in character to the one in question, and not too remote therefrom in place or point of time, is admissible.

7. Electricity ⇨19(4).

To prove that power company might reasonably have anticipated injury to structural iron workers, similar accidents one year previously, occurring on building diagonally across street, *held* admissible.

8. Electricity ⇨19(4).

That workman on same building was similarly injured after power line had injured structural iron workers, suing power company, *held* inadmissible.

Evidence of similar accident subsequent to injury to iron workers was inadmissible in their actions against power company, since such evidence did not tend to prove that, by reason of subsequent accident, company might reasonably have anticipated injury to iron workers.

Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Separate actions by James J. McCormick and by Robert Tillie against the Great Western Power Company of California were consolidated for trial. A motion for a nonsuit was granted, and plaintiffs appeal.

Reversed.

Reisner & Deming, of San Francisco, for appellants.

Keyes & Erskine, W. H. Spaulding, and Guy C. Earl, all of San Francisco, for respondent.

KNIGHT, J.

While working on a building in the course of construction in the city of Oakland, plaintiffs were severely burned by electricity when a steel bar they were handling came in con-

tact with defendant's power line, strung on poles standing along the side of the street on which the building was being erected; and they brought separate actions for damages against the power company, alleging that their injuries were proximately caused by the negligent manner in which the wires were maintained. The actions were consolidated for trial, and came on for hearing before the court sitting with a jury. At the conclusion of plaintiffs' case, the court granted a motion for nonsuit, and thereupon judgments of dismissal were entered, from which plaintiffs have appealed. The points urged as grounds for reversal are that the court erroneously excluded material evidence which plaintiffs sought to introduce in support of one of the essential issues to be determined by the jury; and that even without said evidence the case presented by plaintiffs was legally sufficient to support the inference that defendant was negligent, and that therefore the court erred in granting the motion for a nonsuit.

The building on which the accident occurred was a five-story structure, reinforced with steel, located on the corner of Thirtieth and Summit streets. The construction thereof had reached the fifth floor level, and the outside wall nearest Summit street, along which the company maintained its power wires, was completed to a height of 24 to 30 inches above the floor level. The poles carrying the wires were set in the sidewalk adjacent to the building; the tops thereof being on a level with the fifth floor, or thereabouts. Cross-arms were fastened near the tops of the poles, along which were strung a number of wires. Suspended from the top cross-arm on each pole were three wires belonging to defendant, each wire carrying 11,000 volts of electricity. One wire was fastened to the cross-arm on the side of the pole nearest the building, and the other two were attached to said cross-arm on the side of the pole nearest the street. Another power wire carrying 4,000 volts was fastened to a cross-arm lower on the pole, but it belonged to another company; and still lower down on the poles were other wires of low voltage, belonging also to the other company. Defendant's wires were insulated, but admittedly the insulation afforded no protection, because it was of a type insufficient to prevent the escape of the electrical current. According to the testimony given by the division superintendent of the power company, who was called as a witness by plaintiffs subject to the provisions of section 2055 of the Code of Civil Procedure, upon learning that the building was to be constructed, and about two months prior to the accident, the company caused its wire nearest the building to be moved 27 inches farther over on the cross-arm toward the pole, so that at the time of

the accident it was 10 feet 4 inches distant from the wall of the building. Continuing, he stated that shortly after the wire was moved he wrote a letter to the general contractor of the building reading as follows: "We understand you are in charge of construction of a building on the Southwest corner of 30th and Summit Streets, Oakland. Exterior structures, scaffolding, etc., are being placed on or adjacent to this new building, that will possibly interfere with our electric circuits which pass in front of this property. In the interest of safety to all concerned, we beg to warn you of the danger, both to life and property, attendant upon contact with our electric wires through the careless handling of ropes, scaffolding and other structural material. We have also many consumers in the immediate vicinity depending upon us for electric service, and, in addition to the risk involved, any contact with our wires may seriously result in interruption of service to these consumers. May we ask that all contractors, subcontractors, and employees be warned of these dangers and especially cautioned against the attendant risk, and that extreme care be exercised to prevent any contact with our wires or equipment. [Signed] F. C. Viscia, Supt. Oakland Division."

[1] Plaintiffs were iron workers employed by a subcontractor, and went to work on the job for the first time on the morning of the accident. The evidence shows without dispute that they had not been forewarned of the presence of the high-voltage wires, and they testified that they did not know of their presence before they were injured. Earlier in the day they were engaged on the Thirtieth street side of the building, and just before they were injured the foreman put them to work on the fifth floor to install a steel reinforcing bar an inch thick and 35 or 38 feet long in a floor beam. In order to do so it was necessary for them to project one end of the bar over the wall above Summit street, and, when it came within 8 or 10 inches of defendant's high-voltage wire nearest the building, the electricity arced therefrom to the bar, which brought the wire and the bar together instantly, and the wire was burned in two; one of the loose ends of the wire then swung across the other two high-voltage wires, severing them also. At the time the bar made contact with the power wire, one of the men was standing 10 feet distant from the wall and the other 5½ feet therefrom, and both were standing on a steel deck leading to and from the construction elevator, built outside of the building between the wall and said power wires. The result was that the full voltage from said wires entered the bodies of plaintiffs, rendering them unconscious and severely burning the flesh on their hands and feet, so that they are permanently injured. Both men testified that the wires

were not visible from the fifth floor without going to the edge of the building and looking over. Defendant, in its brief, endeavors to demonstrate by certain mathematical calculations that the wires could be seen from a point some distance back from the wall; but such calculations merely raise a conflict, and in passing on a motion for a nonsuit all conflicts must be resolved in favor of the plaintiff.

[2-5] The legal duties imposed upon a power company to protect persons from coming in contact with this invisible but deadly current are set forth in *Anderson v. Southern California Edison Co.*, 77 Cal. App. 328, 246 P. 559, 562, as follows: "From the very nature of its business, an electric company using highly charged wires owes a legal duty toward every person who, in the exercise of a lawful occupation in a place where he has a legal right to be and is liable to come in contact with the wires, to see that such wires are properly placed with reference to the safety of such persons. It is only in accord with reason and common sense that persons controlling so dangerous and subtle an agency as electricity should use a high degree of care. Either the wires must be insulated or at least placed beyond the danger line of contact with human beings. While the law does not require the wires to be insulated everywhere, where there is reason to apprehend that persons may come in contact with them in the pursuit of their calling or where they may be reasonably expected to go, they should in some manner be protected." Stated in other words, where it reasonably may be anticipated that persons will come in contact with the deadly wire, "the obligation of the electric company is alternative in its nature. Either the wire must be insulated, or it must be so located as to be, comparatively speaking, harmless." *Curtis on the Law of Electricity*, § 511. Such is the doctrine everywhere. 9 R. C. L. 1210; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Howell v. San Joaquin Light & Power Corp.*, 87 Cal. App. 44, 261 P. 1107; *Anstead v. Pacific Gas & Elec. Co.*, 203 Cal. 634, 265 P. 487; *Burrows v. Livingston-Niagara Power Co.*, 217 App. Div. 206, 216 N. Y. S. 516; *Id.*, 244 N. Y. 548, 155 N. E. 892; *Rome Ry. & Light Co. v. Jones*, 37 Ga. App. 244, 139 S. E. 579; *Snyder v. Leavenworth Light, etc., Co.*, 98 Kan. 157, 157 P. 442; *Hickman v. Union Electric Light & Power Co. (Mo. Sup.)* 226 S. W. 570; *Card v. Wenatchee Valley Gas & Electric Co.*, 77 Wash. 564, 137 P. 1047. "The standard to be attained is that of ordinary and reasonable care, and this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. Where death may be caused

by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it." *Fairbairn v. American River Electric Co.*, 170 Cal. 115, 148 P. 788, 789, and *Id.*, 179 Cal. 157, 175 P. 637.

"If," therefore, says the court in *Minter v. San Diego Consol. Gas, etc., Co.*, 180 Cal. 723, 182 P. 749, 750, "guided by those considerations which ordinarily regulate the conduct of human affairs, an ordinarily prudent person would have had reasonable ground to suspect that the wires so placed would cause injury, the plaintiff can be said to have proved a breach of duty." And where the evidence is such that reasonable men might fairly differ as to the answer to the above question, the issue is one of fact for the jury to determine, and, if it finds in favor of the plaintiff, its verdict will not be disturbed. *Minter v. San Diego Consol. Gas, etc., Co.*, *supra*. A practical illustration of the application of the foregoing rule is to be found in the case of *Fairbairn v. American River Electric Co.*, *supra*, wherein on the first appeal (170 Cal. 115, 148 P. 788) the judgment in favor of plaintiff was reversed upon the ground that there was no evidence to show that the power company could have anticipated or foreseen that at a future date persons in that locality would likely transport along the road over which the company's power wires were strung the character of farming implements plaintiff was moving along the road at the time the implement came in contact with the wires; whereas on the second appeal (179 Cal. 157, 175 P. 637) the judgment in favor of plaintiff was affirmed because on retrial plaintiff supplied such proof by showing that the character of implements he was then transporting over the highway was in general use in those regions, and that consequently the power company had reasonable ground to apprehend the occurrence of such accidents if the wires were allowed to remain in their then present condition.

[6, 7] Furthermore, it is held in this state that, for the purpose of proving that one who maintains a dangerous instrumentality might reasonably anticipate that persons engaged in lawful occupations, in places where they have a legal right to be, are likely to be injured thereby, evidence of previous accidents similar in character to the one in question, and not too remote therefrom in place or point of time, is admissible. *Long v. John Breuner Co.*, 36 Cal. App. 630, 172 P. 1132, 1136; *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083, 1087; *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 P. 972. In the *Long Case*, in holding that evidence of similar accidents was admissible, the court said: "We think the evidence was admissible upon the general proposition that testimony of previous accidents similar to the one in

question not only tends to show the dangerous character of the place, but, where the previous accidents have occurred under substantially the same general circumstances of the subsequent accident, tends to disclose the cause of the latter, and, furthermore, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place." And in the *Gorman Case* the following language was used: "Appellant next contends that the court erred in permitting respondent to introduce evidence that other accidents had occurred at this bridge; that is, that at least four automobiles had fallen off of this bridge into the canal prior to the time the boy was drowned. We think the evidence was properly admitted as tending to show the dangerous character of the bridge and the cause of the boy's death, and furthermore, it tends to bring home to appellant knowledge of the dangerous condition of said bridge."

In the present case, as evidence tending to establish that the defendant company had reasonable ground to anticipate that the workmen employed in the construction of this particular building would be in constant danger of electrocution or severe injury because of the presence of said wires in the location and condition in which they were being maintained, plaintiffs sought to prove, in addition to the existing circumstances under which the wires were maintained, that several other men had been burned by defendant's high-voltage wires, under similar circumstances, in the immediate neighborhood, about a year prior to the present accident; but the evidence was excluded. In this regard the record discloses that the company's superintendent, who had held that position during all of the times herein mentioned, was asked by counsel for plaintiff if he was not aware that in the immediate vicinity and prior to the present accident other workmen had been injured by defendant's power lines strung in front of buildings on which they were employed, under circumstances similar to those existing in this case; but on objection by defendant the court refused to allow the witness to answer. And before plaintiffs closed their case they offered specifically to prove that about a year prior to the present accident three workmen employed in the construction of a seven-story building diagonally across the street intersection from the building in question, and known as the Peralta Hospital building, were severely burned in the same manner as plaintiffs, when a steel bar they were handling likewise came in contact with defendant's power wires suspended from poles set in the sidewalk adjacent to that building, under circumstances similar to those existing here; also that shortly after the latter accident and prior to the present one another workman employed on the Peral-

ta Hospital building was injured in the same manner when an iron bar which he projected out of the building came in contact with one of said power wires; and that the circumstances of these earlier accidents were well known to defendant when the superintendent wrote the letter above quoted to the general contractor. But the court rejected the evidence.

In view of the law as declared and applied in the cases above cited, it is our opinion that the evidence was admissible for the purpose for which it was offered; and that it was prejudicial error to exclude the same, for the reason that, if admitted, the evidence as a whole would then have been amply sufficient to sustain the inference, if the jury had so found, that the power company had reasonable ground to anticipate that workmen on said building were in danger of being injured by the presence of said wires in the location and condition in which they were being maintained, and that consequently it was negligent in failing to take the necessary steps to insulate the same or to place them beyond the point of danger. *Howell v. San Joaquin Light & Power Co.*, supra; *Anstead v. Pacific Gas & Elec. Co.*, supra; *Giraudi v. Electric Imp. Co.*, supra; *Heyer v. Jersey Central Power & Light Co.*, 106 N. J. Law, 211, 147 A. 452; *Burrows v. Livingston-Niagara Power Co.*, supra; *Rome Ry. & Light Co. v. Jones*, supra; *Choka v. St. Joseph Ry.*, etc., Co., 303 Mo. 132, 260 S. W. 67; *Stevens v. United Gas & Elec. Co.*, 73 N. H. 159, 60 A. 848, 70 L. R. A. 119.

Among the reasons assigned by the trial court in support of its adverse ruling was that there was no "necessity for such proof," adding, "The evidence affirmatively shows * * * that defendant knew of the dangerous situation of the wires, and had sent its warning to the people who were about to put up the building." But, if that be true, under the doctrine of the decisions above cited the defendants were not entitled to a nonsuit; and, even conceding that the evidence sought to be introduced was, as the court intimated, cumulative in its nature, it was not, for that reason, rendered inadmissible.

Defendant endeavors to escape the effect of the rule of the *Long* and *Gorman* Cases, supra, upon the ground that there the previous accidents occurred at the identical places where plaintiffs therein were later injured; whereas here the previous accidents which plaintiffs sought to prove occurred in another building diagonally across the street from the one in which plaintiffs were injured. But the distinction mentioned does not, in our opinion, take the case out of the operation of the rule there applied, providing the circumstances attending the accident were in other respects the same, and there is no contention

made on this appeal that they were different. As said in *Long v. John Breuner Co.*, supra, in answer to the contention made by the defendant therein, that before previous accidents may be shown it must appear that such accidents occurred under circumstances "precisely similar" to those characterizing the later or subsequent one, "We think * * * that the rule is that the previous accidents need only be similar in their general character to the one in question to render proof of them admissible." And, as stated, here there is nothing in the record to challenge the accuracy or good faith of counsel's statement to the effect that they expected to prove that the circumstances attending the previous accidents were substantially the same as those of the present case. Defendant further contends that the early case of *Martinez v. Planel*, 36 Cal. 578, declares a rule contrary to the one adhered to in the *Long* and *Gorman* Cases, supra; but, if that be true, the later cases have evidently departed from that rule; and, of course, the doctrine of the later decisions must prevail. Among the other cases cited and relied upon by defendant is *Sweatman v. Los Angeles Gas & Electric Corp.*, 101 Cal. App. 318, 281 P. 677, 680; but it will be seen from an examination thereof that it states no rule in conflict with the views herein expressed. On the contrary, it will be observed therefrom that it recognizes the rule here invoked that a plaintiff in an action such as this may show, within the limitations stated, previous accidents in establishing the element that the power company had reasonable ground to apprehend that persons were likely to be injured by coming in contact with its wires. In that case, however, there was no such evidence introduced, and it was upon that ground that the court absolved the company from liability, saying, "There is no allegation that any similar injury has ever resulted therefrom, and therefore no such injury was reasonably to be anticipated."

[8] Plaintiffs sought also to show that, subsequent to the time plaintiffs were injured, another workman employed on this same building was injured by said wires; but we think the testimony relating thereto was properly excluded, because obviously the happening of the subsequent accident could not have tended to prove that by reason thereof the company might reasonably have anticipated the injury to plaintiffs.

It is well to state in conclusion that we are not here concerned with the issue of contributory negligence, no claim having been made on this appeal that plaintiffs were shown to be guilty of contributory negligence as a matter of law, and, in granting the motion for nonsuit the trial court having expressly stated that the evidence was legally sufficient to warrant a denial of the motion on that ground.

For the reasons above stated, we are unable to sustain the trial court's rulings excluding said evidence and granting a nonsuit, and therefore the judgments of dismissal are reversed.

We concur: TYLER, P. J.; PARKER, Justice pro tem.

119 Cal.App.(Supp.) 778

PEOPLE v. HECHT.

No. Cr. A. 696.

Appellate Department, Superior Court, Los Angeles County, California.

Sept. 26, 1931.

1. Lotteries ☞3.

Elements of "lottery" are disposition of property on contingency determined by chance, to person having paid consideration for chance of winning prize.

[Ed. Note.—For other definitions of "Lottery," see Words and Phrases.]

2. Lotteries ☞3.

Scheme, whereby one purchasing suit was to get chance of securing suit before he paid full amount, constituted "lottery" (Pen. Code, § 319).

The contract providing for purchase of suit for \$60 payable in weekly installments of \$2 on its face appeared to be straight agreement for purchase, but it appeared that the plan of doing business was to select some purchaser to receive suit and waive all further payments for purpose of boosting business and to induce other persons to enter into similar contracts.

Appeal from Municipal Court of Long Beach; Charles D. Wallace, Judge.

A. J. Hecht was convicted of the crime of contriving, preparing, setting up, and proposing a lottery, and he appeals.

Affirmed.

Le Roy Reames, of Los Angeles, for appellant.

John K. Hull, City Pros., and Martin DeVries, Chief Deputy City Pros., both of Long Beach, for the People.

McLUCAS, P. J.

The defendant was convicted of the crime of contriving, preparing, setting up, and proposing a lottery, and appeals from the judgment. According to the undisputed facts, the

defendant was the owner of the Wilshire Clothes Shoppe, in Long Beach, and sent out salesmen soliciting memberships in suit clubs, who stated to the persons solicited that they were forming a suit club and wanted sixty members, each member to pay \$2 per week; that as a member was selected for a suit, he received his suit and that ended his payments. Members having the widest acquaintance were first selected in order to boost the sale of memberships. Upon selection of persons having such wide acquaintance, inquiry was made by the solicitor whether the person solicited for membership would help boost the club if he were selected to receive a suit within four or five weeks. The names of the members were to be selected by the solicitor and not by chance. Each week the members were to be notified as to the name of the person selected to receive a suit for that week.

The solicitor delivered to each customer a small contract book in which the date of the first payment and the amount were entered. There was space for 30 payments. The contract was later verified by a different solicitor. Subsequent payments were entered as made. The contract reads as follows:

"Customer's Purchase Contract"

"The Wilshire Clothes Shoppe hereby agrees to sell, and the holder of this contract agrees to buy, one tailored-to-measure suit or coat for the sum of Sixty (\$60.00) Dollars, upon the payment of Two (\$2.00) Dollars or more, each week, to its authorized collector, or at its place of business.

"In the event the purchaser shall discontinue payments, this contract shall become null and void, but the Company agrees that it will at any time during the life of this contract, make and deliver to purchaser one of its tailored garments upon payment to the Company of the difference between the amount paid by the said purchaser and Sixty (\$60.00) Dollars.

"Verbal agreements between agents and purchasers of this contract contrary to the printed terms contained herein will not be recognized by the Company.

"Payment on another contract cannot be added to amount paid on this contract.

"If you prefer to have your suit or overcoat, before the expiration of this contract, you can obtain same from us at any time by paying up the unpaid balance of this contract.

"The making of the second payment and receipt of this contract shall constitute full acceptance of its terms.

"[Signed] The Wilshire Clothes Shoppe."

The contract was not required to be signed by the purchaser.

On the first page of the contract book appeared the following advertisement:

"Each week we will give one or more of our high-grade tailored garments, valued at

\$60.00, to the person or persons whom we consider can be of greatest assistance to us in securing new customers, and such person will be free from making any payments therefor.

"The tailored garments which are given free to persons in payment for services rendered in obtaining or assisting us in obtaining new customers are awarded strictly upon a basis of merit and no prize, chance or lottery methods of any kind will directly or indirectly be used."

Witnesses for the people testified as follows concerning their dealings with the solicitor:

Ralph Dewey:

"A. He came in and wanted me to go in this Suit Club and explained it to me.

"Q. What did he say? A. He said that if I would go into it they would be glad to use me as a booster, seeing I was in business in town, they thought I could be of some benefit in getting their club started."

The witness joined the suit club, paid \$2, and received a contract book with an entry of payment of \$2. Later another payment of \$2 was made to a different salesman, who verified the contract. The witness had not received his suit and his total payments were \$4. On cross-examination the witness testified:

"Q. Mr. Boch Binder came in and says, 'We have a method here, a club by which we sell suits on time?' A. Yes.

"Q. You paid him Two Dollars and Two Dollars every week until you paid Sixty Dollars? A. No, sir, he did not say anything about Sixty Dollars. He said it was a suit club. You paid Two Dollars down. * * *

"Q. Then he said if you would be a booster and get other people to buy clothes, why you would get a suit, they would give you a suit? A. Yes.

"Q. In return for your boosting? A. Yes."

On redirect examination the witness testified:

"Q. Mr. Dewey, how much were you to pay, do you know, into this suit club? A. Well, there was no stipulated amount mentioned at all.

"Q. Do you know how much you were to pay? A. I was to pay until within a few weeks, they said, using me as a booster and they would push me ahead and fix me a suit a little sooner."

W. H. Taylor testified:

"Q. Who were present at the time he called besides yourself and Mr. Boch Binder? A. Just the two of us.

"Q. What was the conversation? Just tell the court any conversation, what you said and what he said. A. He asked me if I would join this 'Suit Club,' Two Dollars a week, and pay in until they selected me a good

suit. I paid in two weeks and they selected me to get a suit.

"Q. You paid in two weeks. Did you get your suit? A. I got measured.

"Q. And you were not to pay any more money? A. No, sir, no more.

"Q. At the time you had the conversation, was there anything said as to how much you were to pay? A. No.

"Q. Was there anything said at that conversation? A. Nothing else said. * * *

"The Court: When you had this conversation about being selected to have this suit, how did they say you were selected? A. They said that I would be a good fellow to boost their business.

"Q. They said they just picked you out? A. They didn't promise me anything. They just picked me out. I was not promised anything.

"The Court: What are you going to get for your Two Dollars? A. A suit now as I understand it.

"The Court: You are getting your suit for Four Dollars? A. For Four Dollars, yes, sir."

On cross-examination the witness testified:

"Q. They told you if you would help boost the sale of these suits they would give you a suit for nothing? A. They would select me early.

"Q. In other words, you had to go out and pep up their business to help them out, interest your friends? A. It was not put that way.

"Q. Was that the general idea? A. That was the way I took it."

The witness testified that he received a contract book, the first and last parts of which were read to him. A few days later another solicitor came and verified the contract, after the witness had explained his understanding of the contract. On cross-examination the witness testified that nothing was said about helping out the business to get the suit until the second solicitor came and told him that he had selected him to receive a suit. The witness further testified:

"The Court: Do I understand you to testify he said you were going to get a suit and it would be an extra good suit? A. Yes, I took it over to Billy Wright's—

"The Court: And all the fellows coming in would see you wearing that good suit and would ask you where you got the suit and you told them? A. Yes, I would say these fellows.

"The Court: Who are those fellows? A. The Wilshire Clothes Shop."

Clarence Jensen testified:

"Q. What was said? A. Why, he asked me if I would be interested in joining a suit club that he was forming here in Long Beach. He was a business man here and had his place of business in the Pacific Southwest Bank

Bldg., and he told me he was forming a suit club and he wanted sixty members and each member to pay Two Dollars a week, and as each one was selected for the suit, each received their suit and that ended their payments from then on.

"Q. Was anything else said? A. I asked him one thing in particular, if all the names were put in a box or hat and a name drawn out and that one was selected or a name was selected by himself; and he said it was selected by himself.

"Q. Did he tell you how he made the selections? A. Yes; he said he selected it from the fellow having the largest acquaintance in town that could help him boost the club. The man asked me if I would help boost the club if I got a suit in four or five weeks and I told him sure, which any man would and I told him I would join his club and paid him Two Dollars and got the book and he went out."

The witness paid \$4 and ceased making payments. He further testified:

"Q. Do you know who came after that? A. No I don't know; but the second man who came around the first time said he was to verify that I would get the suit in four or five weeks. They didn't set any certain date but it would be four or five weeks and he was going to verify it was all O. K. and he is the same man that came back the third time, or I should say came for the third payment. That was the second time he was there.

"Q. Did you have any other conversation beside what you have told with Mr. Boch Binder? A. Yes, there was one thing Mr. Boch Binder said; that each week as the person's name was selected or he selected to give the suit to, all that joined the club would be notified when the man came around to collect the money for that week. He would tell who the man was and the phone number and everything so we could verify it."

The contract book was delivered to the witness, but was not read to or by him. It was stipulated that defendant Hecht was the owner and Boch Binder the salesman for the Wilshire Clothes Shoppe.

The contract on its face is a straight agreement for the purchase and sale of a tailor-made suit for the sum of \$60, payable \$2 per week, the contract to become null and void upon the discontinuance of payments, but the seller agreed during the life of the contract to deliver a tailored garment upon payment of the difference between the amount paid and \$60. However, it appears from the advertisement in the contract book and from the statements of the solicitors that the plan of doing business was to select some person to receive a suit of clothes and waive all further payments. This was done to boost the business and induce other persons to enter into the contract. It is evident there was a studied scheme to evade the provisions of the lottery

law by inserting in the contract book that the tailored garments were given free in payment for services rendered in obtaining new customers, and were awarded strictly upon a basis of merit and that "no prize, chance, or lottery methods of any kind will directly or indirectly be used."

"Lottery" is defined in section 319 of the Penal Code, which reads: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

[1] It thus appears that the elements of a lottery are: (1) The disposition of property (2) upon a contingency determined by chance (3) to a person who has paid a valuable consideration for the chance of winning the prize; that is to say, one who has hazarded something of value upon the chance. In order to decide whether the scheme adopted in this case was a lottery, it must be determined whether the foregoing elements are present. It must be remembered that the contract itself was only a part of the scheme, and that the transaction as a whole must be examined in order to determine whether the scheme is a lottery. Here we have present all the elements of a lottery, unless it can be said there was no chance. There has been a disposition of property and there has been a payment of a valuable consideration, but without chance there can be no lottery. "So-called clubs wherein the members pay periodical dues and conduct periodical drawings for a specified article of merchandise are lotteries, even though the unsuccessful members are entitled to receive the article eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, and although the winners are not determined by lot but are selected by the seller." 38 C. J., p. 299, and cases cited.

In *People v. Wassmus*, 214 Mich 42, 182 N. W. 66, 67, the defendant sold tailor-made suits for \$48, payable \$1 a week under a simple contract similar to the contract in the instant case. According to advertising matter accompanying the contract, each week a suit was discounted or given to one of the customers selected by the management in order to induce the customer selected to use his influence in securing new accounts and allow the use of his name as having received one of the garments. The court said: "It is said that the essentials of a lottery are: First, consideration; second, prize; third, chance. 17

R. C. L. 1222. There need be no question under this scheme about the element of consideration or prize, but it is contended that there is no element of chance in the transaction; that one buys a suit for \$48 and gets it, and, beside, he may get his suit discounted before he makes 48 payments. Herein lies the element of chance. By purchasing a suit for \$48 one gets the chance of acquiring it before he pays for it, or before he pays the \$48. This chance is the seductive thing about the scheme, and it is this which attracts the investor. But it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this fact does not purge the transaction of all element of chance. To the purchaser it is uncertain, as to him it is chance."

In *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340, 341, L. R. A. 1915F, 1018, Ann. Cas. 1917D, 137, a scheme by which articles were contracted for at a uniform price to be paid in installments with the possibility of receiving the article before the installments were all paid, and having the contract canceled for advertising purposes, and of losing all right to this privilege by default in payments, was held to be a lottery. The contract required the customer to make weekly payments of 25 cents until the sum of \$17.50 was paid or until his name was selected by the company as an advertising medium. The contract stated, "No method of any kind dependent upon or connected with chance in any form whatsoever, enters into this contract." The court said:

"The same contention was made there [*State v. Clarke*, 33 N. H. 329, 66 Am. Dec. 723], as in this case, that the choice of persons to receive the furniture was not by lot or chance, but by the judgment of the company which proposed to sell; but the court rejected it, and thus showed its fallacy: 'With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word lottery, and clearly within the mischief against which the statute is aimed.' *Randle v. State*, 42 Tex. 580. * * *

"So far as we can see from the evidence, the managers of the 'Mutual Supply Company' exercised no more than an arbitrary choice of its customers as recipients of its gifts; but, however that may be in fact, the vice of the whole scheme lies farther back than that, and is found in the 'chance' which the customer takes when he pays his money under the

terms of the contract and the temptation held out to arouse the gambling spirit, which is just as evil and debasing as if there were any other kind of chance taken, and, besides, if he fails once or twice, or more times to win the prize, and discontinues paying, he loses all that he has paid. So that if tempted by this cunning device, which so insidiously appeals to this gambling instinct, his money is risked in the hope of drawing a piece of furniture of much larger value, the person so investing it may lose or win, and in either event may retire, forfeiting what he had paid in the one case, and retaining what he has drawn in the other as the profit of his venture."

[2] So in the present case by purchasing a suit for \$60, under the conditions of the contract, the purchaser gets the chance of securing the suit before he pays for it. As to the purchaser it is uncertain; it is chance that luck and good fortune will give a large return for a small outlay. We therefore conclude that all the essential elements of a lottery are present in the instant case.

The judgment is ordered affirmed.

I concur: YANKWICH, Judge pro tem.

214 Cal. 10

LOUD v. LUSE et al.

L. A. 11295.

Supreme Court of California.

Sept. 28, 1931.

As Amended Oct. 16, 1931.

1. Cancellation of instruments Ⓒ35(3).

In suit to cancel deed, subgrantees, taking with notice of fraud and without paying value, *held* proper parties.

2. Appeal and error Ⓒ907(3).

Evidence is presumed to support finding where appeal is on judgment roll alone.

3. Action Ⓒ57(1).

Complaints in separate actions for cancellation of deed *held* to set forth single cause

of action, where substantially identical except as to relief prayed.

The complaint in one action was entitled a complaint to quiet title and for cancellation, and merely sought recovery of land conveyed, while the complaint in the other action, entitled a complaint for rescission and cancellation, sought recovery of land and return of amount paid under contract to exchange lands.

4. Deeds ⚡76.

Conveyance obtained by fraud passes title to grantee subject to right of avoidance by grantor.

5. Pleading ⚡8(11).

Allegation of erroneous legal conclusion that plaintiff was owner of property conveyed by deed sought to be canceled for fraud held not to vitiate complaint or findings.

6. Trial ⚡395(5).

Finding of ultimate fact or legal conclusion is invalidated, where based on findings of probative facts requiring different conclusion.

7. Contracts ⚡266(1).

Right to rescind is conditional on party's restoring everything of value which he has received.

8. Cancellation of Instruments ⚡55.

Judgment in cancellation action, making plaintiff's right to relief absolute but defendant's right to relief conditional, should be modified to make both parties' right to relief dependent on restoration of consideration.

9. Cancellation of Instruments ⚡58.

In suit to cancel deed and note given on exchange of properties, judgment directing cancellation should allow plaintiff recovery of amount of note, in event of defendant's failure to surrender it.

In Bank.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Suit by Emma B. Loud against A. F. Luse and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Rupert B. Turnbull and James R. Jaffray, both of Los Angeles, for appellants.

Haight, Mathes & Sheppard, and W. C. Mathes, all of Los Angeles, for respondent.

SEAWELL, J.

[1] Defendants appeal on the judgment roll from a judgment decreeing the cancellation

of a deed by which plaintiff conveyed real property in the city of Glendale, county of Los Angeles, to defendant A. F. Luse in reliance on the fraudulent promise of said defendant to cause to be conveyed to her in exchange therefor valuable oil lands in the state of Texas. The judgment also directed defendant Luse to restore to plaintiff the sum of \$2,500 paid by her to consummate the transaction, and to deliver up for cancellation a promissory note executed by plaintiff in favor of defendant in the sum of \$500, or pay the amount thereof in the event he should fail to surrender the note in thirty days. The other defendants are grantees of defendant Luse, found by the court to have taken with notice of the fraud affecting Luse's title and without paying value, and as such were proper parties to the action. *Raynor v. Mintzer*, 67 Cal. 159, 7 P. 431.

[2] Since the appeal is on the judgment roll alone, it must be presumed that the evidence supports the findings of fact. The facts of the fraudulent transaction are amply set forth in the findings.

[3] Defendants' contention that the judgment must be reversed for inconsistency in the findings on a material issue cannot be upheld. Plaintiff instituted two separate actions, which were consolidated for trial. Except as to the relief prayed for, the complaints are substantially identical. Both set forth in detail a cause of action for rescission and cancellation based on fraudulent representations which induced plaintiff to part with valuable property without receiving value therefor. The amended complaint in the first action is entitled complaint to quiet title and for cancellation, and seeks recovery of the land conveyed to defendant. In the other action, entitled complaint for rescission and cancellation, plaintiff prays for recovery of said land and also for a return of the \$2,500 paid to defendant and for surrender of the note in his favor. Plaintiff could obtain all relief to which she was entitled in one action. The complaints set forth a single cause of action. Although denominated an action to quiet title, the object of the action first filed was to secure a rescission and cancellation of plaintiff's deed which transferred title to defendant Luse.

[4-6] The allegation in the complaints that plaintiff then was, and since June 1, 1920 (which was prior to the transaction set forth) had been, the owner of the property conveyed to Luse, is a legal conclusion at variance with the rule that a conveyance obtained by fraud is not void, but passes title to the grantee subject to a right of avoidance by the grantor. Said allegation does not vitiate the complaint, which is complete without it. The same conclusion is carried into the findings, which, however, also find probative facts suf-

ficient beyond question to support a judgment for rescission. A finding of ultimate fact or a legal conclusion clearly based on findings of probative facts requiring a different conclusion is invalidated by the probative facts found. *Hammond Lumber Co. v. Barth Investment Corp.*, 202 Cal. 601, 262 P. 29; *Henry v. Phillips*, 163 Cal. 135, 124 P. 837, Ann. Cas. 1914A, 39, cited by appellants, is not to be construed as holding that a deed procured by fraud and resulting in failure of consideration does not transfer title and is void absolutely, but rather that it is void in the sense that it will be annulled whenever fraud is shown in a proper action.

[7, 8] Defendants' objection to the form of the judgment is well taken. The right to rescind is conditional upon the party who rescinds restoring everything of value which he has received in the transaction. *Henry v. Phillips*, supra; *Campbell v. Kennedy*, 177 Cal. 430, 170 P. 1107; 4 Cal. Jur. 764, 797. Plaintiff makes no claim to retain anything received by her. In her complaint she alleged that to her knowledge she had received nothing of value. In her notice of rescission she offered to restore everything received by her. The only finding on the point is that defendant A. F. Luse executed and caused to be filed for record five separate instruments "purporting" to transfer to plaintiff either lands in Texas and New Mexico or rights under oil and gas and mineral leases. Although the use of the word "purporting" lends substance to the claim that said finding is, in effect, a finding that plaintiff received nothing, the direction in the judgment that under certain circumstances plaintiff reconvey and reassign to defendant Luse all interest received by her under said instruments compels the conclusion that such reconveyances are of value to defendant Luse, and should be a condition of rescission.

The judgment requires plaintiff to execute said reconveyances only upon condition that Luse, within thirty days, restore the sum of \$2,500 and the promissory note for \$500, or pay the amount thereof, and deliver up for cancellation all writings ordered to be canceled. The provisions of the judgment in plaintiff's favor are absolute, not conditional. The result is that, unless defendant Luse fully satisfies the judgment within thirty days, plaintiff recovers the land conveyed to defendant, with the right to the process of the court to enforce the judgment for \$2,500 and for the return of the note, without being required to restore to Luse whatever rights she may have acquired under the deeds to her.

The judgment may be modified by this court to cure the defect. In so far as the conclusions of law filed in the court below are inconsistent with the judgment as herein-after modified, they are set aside. The judg-

ment for plaintiff for the amount of the note in the event that defendant Luse shall fail to surrender it to her is necessary to protect her adequately in case the note has passed into the hands of a bona fide purchaser to whom she is liable.

The judgment is hereby modified as follows: All portions following the preliminary recitals are stricken out, and the following is inserted in place thereof:

It is hereby ordered, adjudged, and decreed as follows:

Upon plaintiff depositing with the clerk of the Superior Court of Los Angeles county, within thirty days after the going down of the remittitur herein, an instrument or instruments conveying and transferring to defendant A. F. Luse, free and clear of any lien or incumbrance made by plaintiff, all right, title, and interest received by her under the five instruments of transfer described in finding VI, then:

(1) Judgment shall be entered cancelling and annulling the deed to property in the city of Glendale, county of Los Angeles, executed by plaintiff in favor of defendant Luse; canceling and annulling the deeds executed by defendant Luse and Mary E. Luse, his wife, to defendants T. J. Martin and Alice M. Boyden, each covering a portion of said property; and adjudging that plaintiff is the owner and entitled to the possession of said property, and that none of defendants has any right, title or interest therein. Said property is described as follows: Lots 1, 2, 4, and 5 of tract No. 986, as per map recorded in Book 16, page 149, of Maps, Records of Los Angeles county.

(2) Defendant A. F. Luse shall be allowed thirty days after the deposit by plaintiff of the instruments of reconveyance referred to above with the clerk of the court to pay to said clerk, for plaintiff, the sum of \$2,500, with interest thereon from September 30, 1927. If said defendant shall fail to make payment within the time allowed, then judgment shall be entered that plaintiff recover of said defendant said sum of \$2,500, with interest from September 30, 1927.

(3) Judgment shall be entered canceling and annulling the promissory note for \$500 made by plaintiff, dated September 1, 1927, and payable one year after date to the order of defendant A. F. Luse, and directing said defendant to surrender said note to the clerk to be by him canceled and delivered to plaintiff. Said judgment shall provide that, if defendant Luse shall fail to surrender said note to the clerk within thirty days from the deposit by plaintiff with said clerk of an instrument or instruments of reconveyance, as set forth above, then plaintiff shall have and recover of him the sum of \$500, with interest from September 1, 1927, to date of payment.

Upon defendant A. F. Luse performing all

terms of paragraphs 1, 2, and 3, the clerk of said court shall deliver to him the deed or deeds of reconveyance executed by plaintiff and deposited with said clerk.

As thus modified, the judgment is affirmed. For the reason that this appeal involves no question of any substantial merit other than the matter as to the form of the judgment, and the further fact that the record indicates that respondent has never made any claim to retain anything received by her, and that appellant Luse could have secured a reconveyance upon request of respondent without resorting to an appeal, which served only to delay respondent's securing the fruits of her judgment, appellants should not be allowed costs upon this modification upon appeal. It is therefore ordered that respondent recover costs on appeal.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

214 Cal. 15

HURD et al. v. ALBERT et al.
L. A. 11209.

Supreme Court of California.
Sept. 28, 1931.

1. Injunction ⇨127.

Court, in injunction suit, could consider increased vehicular traffic along contiguous streets, in determining whether restricted property had ceased to be suitable for residential purposes.

2. Injunction ⇨128.

Refusal to enjoin erection of gasoline filling station in violation of restrictive residential covenants *held* justified under evidence which showed marked change in use of property in vicinity.

The trial court found that the streets bounding the restricted area had become three of the most congested streets for vehicular traffic in the city of Los Angeles, and that since 1905 the character of the uses to which the adjacent property had been put had completely changed from that residential section to that of business, apartment house, and flat building section, and that the lots in question had no market value for residential purposes, and that if defendants were restrained from using their property for the purpose sought, they would be irreparably damaged.

3. Injunction ⇨62(3).

Equity will not enforce restrictive covenants by injunction where enforcement, by reason of neighborhood change, would be inequitable.

4. Judgment ⇨585(5).

Former judgment enforcing restrictive covenant under conditions existing five years previous *held* not res judicata, where subsequent suit involved issue of change in condition of neighborhood.

5. Judgment ⇨585(5).

Doctrine of res judicata does not prevent re-examination of question between parties, where facts have materially changed.

6. Judgment ⇨585(5).

Court, on trial of second action, may consider facts, both prior and subsequent to first action.

7. Injunction ⇨62(3).

That property was leased with intention of breaking restrictive covenants, if possible, did not require granting of injunction against lessee's violation of covenants.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Suit by James D. Hurd and others against George C. Albert and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Shaw & McDaniel, Victor E. Shaw, Joseph L. Lewinson, and F. Walton Brown, all of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent Crawford.

Louis Greenbaum, of Los Angeles, for respondent Albert.

PER CURIAM.

This action was instituted by plaintiffs as property owners in Shatto Place tract, in the city of Los Angeles, to enjoin defendants from constructing and maintaining a gasoline, oil, and service station on lots 13, 14, and 15, block 2, in said tract, in violation of certain restrictive residential covenants found in each deed by which lots in the tract were conveyed. Shatto Place tract, in which plaintiffs' and defendants' properties are located, was subdivided in the year 1905 for residential purposes, restrictive covenants, unlimited as to time, being inserted in all deeds by which parts of the tract were conveyed. So far as necessary to a decision of the questions involved on this appeal, these covenants provide that the property can be used

only for single family residences, of at least two stories in height, to cost not less than \$7,500, and to be erected within certain designated set-back lines. The deeds likewise provide that if there be any violation of the restrictive covenants by the grantee, or his successors in interest, such grantee's interest shall be forfeited to the grantor, her heirs, successors, and assigns. It is specifically provided that the restrictive covenants are covenants running with the land for the benefit of the grantor, and for the benefit of the other lots in the tract.

The tract is bounded on the south by Wilshire boulevard, on the west by Vermont avenue, on the north by Fourth street, and on the east by the westerly line of the lots abutting the west side of Westmoreland avenue, except as to the northerly portion of said tract, which is bounded on the east by Westmoreland avenue. The area thus inclosed comprises a rectangular shaped area about three blocks long and less than two blocks wide. Sixty rather large city lots are included in the tract.

The three lots of defendants are located on the southeast corner of Sixth street and Vermont avenue, and face what is now and for some time past has been unrestricted territory on the west side of Vermont avenue. These lots were acquired by defendants Albert in 1922. On May 1, 1923, these defendants granted to defendant Crawford, who was admittedly acting for others, a 99-year lease on the premises. There is no dispute that all the defendants had notice and knowledge of the restrictions, and there can be no doubt that they acquired their respective interests with the intention, if possible, to break the restrictive covenants.

The complaint alleges the ownership by plaintiffs of certain lots in the tract; alleges in detail the restrictions; alleges that defendants are engaged in the construction of a gasoline, oil, and service station on lots 13, 14, and 15, in violation of the restrictions, to the damage of plaintiffs. An injunction and money damages are prayed for. The answer admits the existence and validity of the restrictions, and admits that the erection and maintenance of a gasoline station on the property is in violation of the restrictions. The principal defense set up in the answer is that the character of the territory, both inside and outside the tract, and surrounding defendants' lots, has so changed that the property of defendants has become essentially business property. It is likewise contended that the erection and maintenance of the gasoline, oil, and service station will not injure plaintiffs' property for residential purposes. Based on these two major premises, it is alleged that the covenants and restrictions have become ineffective, by virtue of these changed conditions, and that the enforcement of the

same, under the facts of this case, would be inequitable, unjust, and oppressive. The trial court, after hearing all the evidence, and after making a personal inspection of the locality involved, denied injunctive or monetary relief to plaintiffs. From the judgment entered accordingly, plaintiffs prosecute this appeal.

The trial court, among other things, found that, due to changes in the neighborhood, the three lots of defendants "are no longer suitable or desirable for residential purposes; and that defendants' said lots have no market value for residential purposes, but are essentially business property; and that if defendants are restrained from using their said property for the only purpose for which it is now suitable and available, they will be irreparably damaged and deprived of any use whatsoever of said property; and that by reason of said changed conditions in the neighborhood occurring since the said restrictions were imposed, it would be inequitable to enforce them against the said uses to which defendants are devoting their said property." The court likewise found that the use of the three lots in question "for said purposes [maintaining a gasoline, oil and service station] will not damage the property in said tract owned by the plaintiffs or any of them, or depreciate or destroy the use of the same for residential purposes, or render the lots or homes of plaintiffs or any of them undesirable or unfit for residential use, or cause any damage to the plaintiffs or any of them."

Before discussing the findings of the lower court in reference to the changes that have occurred, both inside and outside the tract, since the area was subdivided in 1905, it is necessary to point out that a distinction must be made as to changes that occurred before 1923 and those that have occurred subsequent to that date. That date becomes important because the question of the effect of the changed conditions on part of the very property involved on this appeal was tried and determined adversely to defendants in that year. The property involved on this appeal was purchased by defendants during the pendency of and with knowledge of this former litigation. The former litigation resulted in two appeals. The first is to be found in *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159, and the second appeal is to be found in *Strong v. Hancock*, 201 Cal. 530, 258 P. 60. The trial resulting in this second appeal took place in 1923. In that action the trial court, on substantially conflicting evidence, found that it is not true that "the change in uses to which the land surrounding and adjacent to Shatto place has been put has been complete; nor is it true that any of said changes in uses of property have taken place within the said Shatto place; nor is it true that any of said changes of use of property

have made the property within Shatto place or any of the lots contained therein wholly unadapted or undesirable for residential purposes. And in this connection the court finds that the changes in use of property outside of but adjacent to and in the vicinity of Shatto place, herein found to have taken place, are the same sort and character of changes of use which the court found to have taken place in and by its written findings of fact filed herein upon the first trial of this cause, and that the difference in the said change of use and in the conditions affecting the property in the vicinity of the said Shatto place is one of degree, but not of kind." Strong v. Hancock, supra, at page 544 of 201 Cal., 258 P. 60, 66.

In other words, the trial court, in that action, found that as conditions existed in 1923, they were not of such a nature as to warrant releasing the property involved on this appeal from the effect of the covenants. On appeal in the former action, this court held that the finding last above quoted was based on substantially conflicting evidence and, therefore, could not be disturbed on appeal.

After this unsuccessful attempt to break the restrictions, defendants started construction of the gasoline, oil, and service station, resulting in this action, which was tried in 1928, and the findings, of course, are based on the conditions as they existed at that time. The findings in reference to the changed conditions are quite detailed. There is no necessity for discussing the changes outside the tract that occurred between 1905 and 1923. Those changes are discussed at some length in the case of Strong v. Hancock, supra, to which reference is made for a complete description of the same. Before discussing the changes that have occurred outside the restricted area since 1923, some reference must be made to the findings, in the instant case, concerning changes inside the tract.

As stated earlier in this opinion, the restricted area is bounded on the south by Wilshire boulevard and on the west by Vermont avenue. Sixth street runs in an easterly and westerly direction through the tract, running parallel to Wilshire boulevard and being located one block north therefrom. The trial court found that these three streets "have become and are three of the most congested streets for vehicular traffic in the City of Los Angeles, and are used not only for pleasure, but for freight and business purposes; along and in said Sixth Street there is located a double track street railway carrying east and west bound traffic, and along said Vermont Avenue is located a double track street railway carrying north and south bound traffic. Said lines of street railway cross each other at the intersection of Vermont Avenue and Sixth Street and street cars, traveling in all four directions, pass said intersection at frequent intervals throughout the day and un-

til a late hour at night; at said intersection of Vermont Avenue and Sixth Street, at each of the four corners thereof, an automobile traffic signal equipped with semaphores and bells has been erected and said bells ring at intervals of 20 to 25 seconds throughout the day until about 10:30 o'clock at night; at said intersection newsboys call out their wares from early evening until after midnight. Wilshire Boulevard, running parallel with said Sixth Street and one block south thereof, is an extensively used boulevard for east and west bound vehicular traffic and throughout the day and until a late hour at night the intersection of said Wilshire Boulevard with Vermont Avenue is greatly congested with traffic; traffic signal semaphores and bells are installed at said intersection, said bells ringing at frequent intervals throughout the day and during certain hours at night."

[1] In addition to these changes, defendants had likewise pleaded in their answer that certain other changes, such as the use of certain residences for business purposes, had occurred inside the tract. In reference to each of these alleged changes, the trial court found that they constituted immaterial and unsubstantial violations of the covenants. According to the findings of the trial court, the only important changes that have occurred inside the tract since 1905 have to do with the increased vehicular traffic and congestion on Wilshire boulevard, Vermont avenue, and Sixth street. In the case of Strong v. Hancock, supra, this court specifically held that the operation of street railways inside the tract, and the increased use of the streets inside and bounding the tract for other vehicular traffic, did not, as they existed in 1923, constitute such a change in conditions as to release the property involved on this appeal from the effect of the restrictive covenants. In so holding, however, this court pointed out that in that case the trial court had found that such increased use had not destroyed the restricted residential uses of the property here involved. In the case at bar, the trial court, considering the situation as it existed in 1928, held that such increased vehicular traffic and congestion, when considered with the changes that had occurred outside the tract, had rendered the defendants' property unsuitable for residential purposes. We think the increased vehicular traffic and congestion along the three streets mentioned were properly considered by the trial court, in connection with the other changes that had taken place, in determining whether defendants' property was suitable for residential purposes. We do not mean to hold that such increased traffic and congestion alone are sufficient to warrant releasing affected property from the restricted covenants, but we think that such changes can properly be

considered by the trial court, together with other changes, in determining whether or not the covenants should be enforced.

[2] As to the changes that have occurred outside the restricted area, the trial court found that in 1905, when Shatto Place tract was first subdivided, the territory inside the tract, and the territory surrounding the tract, "was used primarily and exclusively for private residences"; that there "were no hotels, apartment houses, stores or business houses in the immediate vicinity"; that since "1905 the character of the uses to which the land surrounding and immediately adjacent to said Shatto Place Tract has been put has completely changed from that of a residential section to that of a business, apartment house and flat-building section." The court fully itemizes the various changes, showing that almost the entire surrounding territory is now being devoted to the above purposes, and pointing out that many of these changes have taken place since 1923. It would serve no useful purpose to enumerate in this opinion the changes that have occurred outside the tract since 1923. Sufficient it is to say that we are of the opinion that they are of such a nature and of such a degree as to warrant and sustain a judgment different from that rendered in 1923.

[3] We are of the opinion, after reading the record, that the above findings are all supported by substantial evidence, and cannot be disturbed on appeal. Such findings are ample to sustain a judgment denying injunctive relief. Whatever may be the weight of authority in other jurisdictions, the rule in this jurisdiction is well settled that the equity courts will not enforce restrictive covenants by injunction in a case where, by reason of a change in the character of the surrounding neighborhood, not resulting from a breach of the covenants, it would be oppressive and inequitable to give the restriction effect, as where the enforcement of the covenant would have no other result than to harass or injure the defendant, without benefiting the plaintiff. The leading case in this jurisdiction on the point is *Downs v. Kroeger*, 200 Cal. 743, 254 P. 1101, where the majority of this court held that changes outside the tract, coupled with substantial evidence that to enforce the covenant would cause irreparable injury to defendant, without materially benefiting the plaintiff, were sufficient to sustain a judgment denying injunctive relief. In that case this court, at page 747, of 200 Cal., 254 P. 1101, 1102, stated:

"The authorities unquestionably support the conclusion of the trial court in holding that, where there has been a change in the uses to which the property in the neighborhood is being put, so that such property is no longer residence property, it would be un-

just, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes other than their breach.

"It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that, owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made. (Citing cases.)' *Jackson v. Stevenson*, 156 Mass. 496, 502, 31 N. E. 691, 693, 32 Am. St. Rep. 476.

"It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. *Peters v. Delapaine*, 49 N. Y. 362; *Margraf v. Muir*, 57 N. Y. 155; *Mathews v. Terwilliger*, 3 Barb. (N. Y.) 51; *Radcliffe v. Warrington*, 12 Ves. [Eng.] 331. If for any reason, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered "that the terms and restrictions" of the covenant are no longer applicable to the existing state of things. 1 *Story's Eq. Jur.* (10th Ed.) § 750. And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff.' *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 317, 41 Am. Rep. 365, 367.

"Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restrictions were of substantial value to the dominant estate, a court of equity might enforce it even if the

result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive.' McClure v. Leaycraft, 183 N. Y. 36, 44, 75 N. E. 961, 963, 5 Ann. Cas. 45."

From an examination of the Downs Case it appears that the changes that had taken place in the territory surrounding the tract were not as complete as the changes that have taken place in the territory immediately adjacent to Shatto Place tract. In the Downs Case the only changes relied upon were those that had taken place outside the tract. In the instant case, as we have already seen, in addition to the changes outside the tract, material changes have taken place inside the tract. If the rule of the Downs Case is still the law of this state, there can be no doubt that the judgment appealed from in this case must be affirmed.

Appellants strenuously contend, however, that the Downs Case has been overruled by the case of Strong v. Hancock, supra. We do not think that this is so. In the Hancock Case (involving, as already pointed out, part of the property involved on this appeal) the trial court on substantially conflicting evidence found that, although the changed conditions as they existed in 1923 had made the property sought to be released from the covenants more valuable for business than for residential purposes, such changed conditions did not affect the desirability of the property for residential purposes. In the instant case, the court found, as already pointed out, that the defendants' lots are no longer "suitable or desirable for residential purposes"; that said lots have "no market value for residential purposes but are essentially business property"; that to enforce the restrictions against defendants would cause irreparable damage without materially benefiting the plaintiffs. In other words, both cases recognize that, under certain circumstances, restrictive covenants will not be enforced, but in the Hancock Case it was found, on conflicting evidence, that those circumstances were not present, while in the Downs Case, on conflicting evidence, it was found that such circumstances were present. Whatever verbal inconsistency may exist between the two cases was clearly set at rest by the decision of this court in the case of Hess v. Country Club Park, 2 P.(2d) 782, filed August 31, 1931. In that case it was specifically pointed out that the only changes that had occurred were outside the tract. On findings substantially the same as those in Downs v. Kroeger, supra, this court affirmed the judgment of the trial court, refusing to enforce the restrictions, citing and relying upon the Downs Case. It is our opinion that all three

cases are consistent and stand for the principle that findings of the trial court, based upon substantially conflicting evidence, are binding in this court on appeal.

[4-6] It is likewise contended by appellants that the judgment in Strong v. Hancock, supra, acts as an estoppel in this action, for the reason that the two cases involve the same property and the same parties, or those privy to them. No such estoppel exists. That case merely decided that, as conditions existed in 1923, a release from the covenant was not warranted. The present judgment is based upon the conditions as they existed in 1928, when this action was tried. The issues raised in the instant case are materially different from those litigated in 1923. As shown by the findings here under consideration, a great many material changes in the conditions affecting the property have occurred since that date. The doctrine of res judicata was never intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants. Matter of Snowball, 156 Cal. 240, 104 P. 444; Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; 34 Cor. Jur. 905, § 1313. These cases are also authority for the point that when the second action is tried it is permissible for the court to consider, not only the facts that have occurred since the prior suit, but it may and should consider all the facts that exist, both prior and subsequent to the first action, so as to determine properly what effect all of the facts, as they exist at the time of the second trial, have on the rights of the parties. This rule is a reasonable one, particularly as applied to such cases as the one here under consideration. A change in the character of any neighborhood from residential to business in nature cannot be said to be the result of any one business invasion. Each separate business structure, when considered together with those already erected, has its effect on the restricted area. The effect of each business structure located near the tract continues until finally the cumulative effect of all the business invasions on the restricted area is such that to enforce the restrictions would be inequitable and oppressive as to one party, and would not materially benefit the other. Obviously, during the period of transformation, there are times when the changes as they then exist are not of such a character or degree as to warrant the court in releasing an owner from the covenant. However, this does not mean that, because a court has occasion to consider the effect of such changes during some early stage of the transformation, such court cannot later consider the effect of the early changes, when coupled with later changes

that have taken place. The 1923 judgment merely established that at that time the changes were not of such a character or of such a degree as to warrant denying the injunction. It did not establish that the changes up until 1923 had not affected the property at all. We are of the opinion that the trial court properly considered all the changes that had taken place in the surrounding territory from 1905 to 1928.

[7] Appellants emphasize the fact that the Alberts acquired the lots here in question during the pendency of the former action instituted by Strong. It is also pointed out that the lessee Crawford leased the property for others who intended, if possible, to break the covenants. These parties acted on advice of counsel to the effect that the covenants were no longer enforceable. Appellants contend that a deliberate violator of a restriction is entitled to no consideration at the hands of a court of equity and, therefore, the injunction should be granted, as against these particular defendants. We cannot follow the logic of this reasoning. If defendants have little equity on their side, plaintiffs have even less, for they are attempting to use the equity courts to enforce what the trial court has found to be a mere barren right. The reasoning of the New York Court of Appeals in the case of *Forstmann v. Joray Holding Company*, 244 N. Y. 22, 154 N. E. 652, seems applicable here. In that case, at page 655 of 154 N. E., it was said: "The owner of the lot at the time he conveyed to defendant Finch had certain rights under the decided cases. That he did not have the courage or the rashness or the desire to assert such rights does not affect the situation. Defendant Finch bought all his rights, including the right to avoid the restrictive covenant if its force was spent. If defendant Finch was fast to build, plaintiffs were slow to invoke the process of the court to preserve the status quo. If defendants would disregard the restrictive agreement, plaintiffs are seeking the aid of the courts to enforce a barren right. Considering the equities—all the facts and circumstances which help to show what is just and right between the parties—we find that, although defendants proceeded with full knowledge of the facts, and with notice of plaintiffs' claim, they had good reason to doubt whether, by reason of the change in the condition of the neighborhood and the short remaining life of the restrictive covenant, equity would enforce such rights as the plaintiffs claimed. They were not defiantly disregarding plaintiffs' rights, but were asserting their own conflicting rights."

It should be noted, as was done in *Downs v. Kroeger*, *supra*, that the conclusion here reached affects only the particular properties of plaintiffs and defendants, and it does not

by any means follow that the integrity and validity of the restrictions obtaining as to the other property in this subdivision are in any way affected. The facts and circumstances of each case must be considered as the need therefor arises.

The judgment appealed from is affirmed.

213 Cal. 690

HADDAD v. McDOWELL et al.

L. A. 12938.

Supreme Court of California.

Sept. 26, 1931.

1. Appeal and error ⇨854(3).

If demurrer to complaint is well taken as to any of grounds stated therein, order sustaining demurrer must be affirmed.

2. Pleading ⇨52(2).

Complaint alleging, but not separately stating, two publications of alleged defamatory matter, *held* demurrable as not separately stating two causes of action.

3. Appeal and error ⇨236(2).

Sustaining demurrer to complaint without leave to amend *held* not reversible error, in absence of application by plaintiff for permission to amend.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Alexander Haddad against Afue McDowell and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Superseding opinion of District Court of Appeal in 296 P. 635.

Henry M. Lee, of Los Angeles, for appellant.

A. G. Ritter and Afue McDowell, all of Los Angeles, for respondents.

CURTIS, J.

[1] This is an appeal from a judgment after the sustaining of a demurrer to plaintiff's amended complaint without leave to amend. No application or request was made by the plaintiff to further amend his pleading. The complaint charged that the defendants had published two libelous articles, regarding the plaintiff, one in a notice requiring the plaintiff to surrender within three days certain premises then held by him under lease from de-

fendant corporation, and the other in a complaint filed for the purpose of recovering possession of said premises. The grounds of demurrer were: (1) Uncertainty; (2) misjoinder of parties defendant; (3) joinder of several causes of action and failure to separately state them; and (4) failure to state facts sufficient to constitute a cause of action. The order of the court sustaining the demurrer is general in its terms, and does not indicate the grounds upon which the court acted in rendering it or the reason therefor. If the demurrer is well taken as to any of the grounds stated therein, then the order of the court sustaining the demurrer must be affirmed by the reviewing court. *Wilson v. Carter*, 117 Cal. 53, 48 P. 983; *Sechrist v. Rialto Irrigation District*, 129 Cal. 640, 62 P. 261; *Burke v. Maguire*, 154 Cal. 456, 461, 98 P. 21; *Billesbach v. Larkey*, 161 Cal. 649, 651, 120 P. 31; *Colburn v. Burlingame*, 190 Cal. 697, 699, 214 P. 226, 227, 27 A. L. R. 1374. In the last-named case this court declared the rule in the following terms: "There is nothing in the order of the court sustaining the demurrer which indicates that this was the ground of the court's action, and, of course, if sustainable upon any ground, it will not here be disturbed."

[2] An examination of the amended complaint in this action shows conclusively that it purports to set out two distinct causes of action and that they are not separately stated. As observed above, the action was one for damages caused by the publication of two articles, one of which publications was set out in the three-day notice to surrender the premises and the other was in a complaint filed some days after said notice was published. Each of these publications was complete in itself, and was separate and distinct from the other, and, while both grew out of the same general transaction, neither was in any way connected with the other. One was served upon the plaintiff and his subtenants, and the other was filed in the office of the clerk of the Superior Court of the county of Los Angeles, and thereafter copies were served upon the defendants in the action in which the said complaint was filed. General damages amounting to \$50,000 were asked by the plaintiff for the injurious effect of these combined publications to the plaintiff and to his business. The ground of demurrer, therefore, that two causes of action were set forth in said complaint and not separately stated was well taken, and the order of the trial court sustaining the demurrer on that ground was proper.

[3] The fact that it was sustained without leave to amend does not constitute reversible error, in the absence of a request or application by the plaintiff for such permission. No contention is made by the plaintiff that he ever asked, or made any attempt, to amend his amended complaint after the court sus-

tained the demurrer thereto. This question has frequently been before this court, and in each and every instance the action of the trial court in sustaining a demurrer under such circumstances has been sustained. "While it is undoubtedly error for a court arbitrarily to refuse permission to a pleader to amend a complaint after sustaining a demurrer on the special ground of uncertainty or the like, it is not necessary, in making the order sustaining the demurrer, to say anything about leave to amend. * * * Error will not be presumed where the record fails to show that leave to amend was asked and refused. * * * A plaintiff who has declined to amend his complaint, after a demurrer sustained, which is both general and special, must stand upon his pleading as against both grounds of demurrer." *Aalwyn v. Cobe*, 168 Cal. 165, 172, 142 P. 79, 83; *Martinovich v. Wooley*, 128 Cal. 144, 60 P. 760. "The demurrer was sustained without leave to plaintiff to amend his complaint. It does not appear that plaintiff asked leave to amend his complaint, and we cannot reverse the judgment on the ground that leave was not granted when none was asked." *Barker v. Freeman*, 85 Cal. 533, 535, 24 P. 926, 927. See, also, *Campbell v. Freeman*, 99 Cal. 546, 549, 34 P. 113; *Durrell v. Dooner*, 119 Cal. 411, 413, 51 P. 628. "Appellant is not entitled to a reversal on the ground that he was deprived of an opportunity to amend, in the absence of a showing that he asked permission to amend, that he desired to amend, or that he could have amended. * * *" *Philbrook v. Randall*, 195 Cal. 95, 106, 231 P. 739, 743. To the same effect are the following cases: *Bailey Trading Co. v. Levy*, 72 Cal. App. 339, 349, 237 P. 408; *Hansen v. Carr*, 73 Cal. App. 511, 518, 238 P. 1048.

Appellant relies upon *Schaaake v. Eagle, etc., Can Co.*, 135 Cal. 472, 480, 63 P. 1025, 1027, 67 P. 759, as stating the rule as follows: "If a complaint states a cause of action, the face of the record would 'show an abuse of discretion' in sustaining a demurrer upon any ground without leave to amend." No authority is cited by the court in support of this rule. Furthermore, the language above quoted is to be found in the department opinion in that case. In that opinion the court held that, while the complaint was good as to the general demurrers, the special demurrers were well taken and should have been sustained. It accordingly reversed the judgment "with directions to overrule the several demurrers for want of facts, and sustain" the special demurrers with leave to plaintiff to amend his complaint. A hearing in bank, however, was ordered by the court, and, after further consideration, the court held that the special demurrers should also have been overruled. It accordingly reversed the judgment, with leave to defendants to answer to the merits. But this final order and judg-

ment was made only after the court had ruled that neither the general nor the special demurrers were well taken. The language, therefore, found in the department opinion and above quoted was only dictum, and cannot be regarded of any authoritative force. The case of *Schaaake v. Eagle, etc., Can Co.* upon the point discussed has never been cited or referred to with approval by this court. In a few instances some of the courts of this state have erroneously construed the opinion in that case as holding that, if a complaint states a cause of action, the face of the record would show an abuse of discretion in sustaining a demurrer upon any ground without leave to amend. These courts fell into the error of accepting the language of the department opinion without the modification thereof made by the court in bank. There is nothing in that case as finally determined out of line with the decisions of this court cited above.

The record shows that the court sustained the demurrer to plaintiff's amended complaint without leave to amend on the 29th day of October, 1928, and judgment was entered therein on November 5th following. The plaintiff had ample time between these two dates to ask leave of the court to further amend his complaint. As he failed to do so, according to the decisions of this court he cannot thereafter complain of an abuse of discretion by the court in not granting him leave to amend when none was asked.

Judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

214 Cal. 40

McDONALD v. CANTLEY et al.

L. A. 11029.

Supreme Court of California.

Sept. 29, 1931.

1. Automobiles ⇨244(36).

Evidence required finding that negligence of driver of automobile, who collided with truck in attempting to pass, was proximate cause of injuries to workman at side of road.

2. Automobiles ⇨242(2).

Res ipsa loquitur doctrine held inapplicable to fix liability of truck driver striking workman near road where injury was due to another automobile having crowded against truck.

3. Trial ⇨260(8).

Where approved instruction defining proximate cause was given, party cannot complain that another was not given.

4. Trial ⇨28(3).

Refusal to permit jury to inspect automobile more than year and one-half after accident held not error.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Charles A. McDonald against Richard Cantley and Joseph Tanzola, partners, doing business under the name of Cantley & Tanzola, and others. From a judgment denying plaintiff recovery as against some of the defendants, plaintiff appeals.

Affirmed.

Bertrand J. Wellman, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondents.

SEAWELL, J.

Plaintiff appeals from a judgment entered in a personal injury action in the above-entitled causes upon a jury's verdict rendered in favor of Richard Cantley and Joseph Tanzola, partners doing a trucking business under the partnership name of Cantley & Tanzola, and E. L. Cook, the latter being employed as a driver for said trucking company. D. F. Staley was an original defendant in the action, but, having defaulted, a judgment was entered against him in the sum of \$7,400, after the trial of the action from which this appeal is taken.

The injuries were inflicted upon plaintiff on the afternoon of May 21, 1927, while he was engaged in making borings upon the northerly slope of Cahuenga Pass, at a point where the Dark Canyon road leads to the right from said highway, for the purpose of testing the soil with the view of constructing a sewer therein. At the time of the accident the traffic on said Cahuenga Pass was very congested, there being two or more lanes of automobiles traveling southerly and one lane traveling northerly. Plaintiff had drilled a hole with a hand drill, by turning a handle affixed to the drill, some six feet into the earth, which left the balance of the drill about eighteen inches above the earth. He was upon his knees operating the drill at a point some six or seven feet easterly of the east edge of the pavement. His truck was parked from six to ten feet northerly from where he was working, and it was either wholly off the pavement or possibly the two left wheels may have been upon the pavement

a few inches from the outer edge. While in this position he was struck by the truck driven by E. L. Cook, who was then in the employ of said copartnership. Mr. Cook, a young man twenty-one years of age, was traveling northerly on said highway downgrade, within one foot of its easterly edge, driving an American La France six-wheel dump cart weighing seven tons. His rate of speed, as testified to by a number of witnesses, was between 10 and 12 miles per hour. Immediately behind him was A. Weise, who was on his way to the Hollywood Country Club. Stanley Terwhilliger, driving a truck, was immediately behind Mr. Weise. The highway was practically covered by automobiles. D. F. Staley, who was driving a Dodge coupé weighing about 2,800 pounds, was first noticed passing Terwhilliger, and next in attempting to pass Mr. Weise and the Cook truck. As Staley undertook to leave his lane of travel to pass Weise and Cook, he observed a truck coming southerly toward him, and in his effort to avoid being hit by it he turned his car to the right, traveling at the rate of 30 or 35 miles per hour, barely grazing the truck on his left, and in attempting to clear it he steered into the truck driven by Cook to his right. He gave no alarm whatever of his approach. The right fender of Staley's car, just before it reached the point opposite to where plaintiff was at work, struck the hub cap of the truck driven by Cook. The impact swerved the truck to the right, and caused Cook to lose control of the steering wheel, and, before he could get the truck under control, it had passed over the body of plaintiff, and was resting against an embankment of the road. Whether the wheels of the truck cleared the body of plaintiff, or whether his injuries were inflicted by the handle of the boring apparatus being driven against him with great force, is neither certain nor material. By the impact he suffered a fracture of both bones of the left leg below the knee and the fibula of the right leg was broken near the ankle, and many bruises and injuries were inflicted. He was taken from beneath the truck by Mr. Cook, and the truck soon thereafter took fire, caused by the flow of gasoline escaping from the breaking of the gas line upon the muffler. The conduct of Staley was wanton and reckless. Weise, who had halted his car in the face of an anticipated crash, thus described the conduct of Staley:

"I was going north, and I saw this truck ahead of me, and a Dodge coupe passed me, evidently to get in between me and this truck and another truck coming south. Just as this truck got opposite the truck ahead of me, this fellow in the Dodge coupe decided to go between us, which he did, and he struck the left—the car coming south on the left, which threw him over to the right and struck the truck that this young fellow

was driving, and the impact apparently threw this young fellow off. * * *

"He went through there and he hit this young fellow's left wheel and threw it over. * * *

"Yes, I saw him hit this, and he kept right on going. * * *

"There was enough space for him to get through, because he got through * * * I don't see how he ever got through myself."

Mr. Terwhilliger testified: "I was going along following the truck and Mr. Weise was in between us. And this Dodge came out around me and he attracted my attention because, as one will that drives a truck, he feels a thing sometimes. He came around me and I didn't see any place for him to go only at Mr. Weise and he seemed to go in and out and out again. After he passed Mr. Weise he seemed to dig in there and hesitate a minute and went out around this truck and passed him, and as he started there [were] two lines of traffic coming the other way coming south; there was two lines. There was room enough to get through—not quite enough, because he struck the left front wheel of this fellow's truck, of Cook's truck. The truck swerved at almost right angles off the road, then at the same time went off again at an angle—not at right angles, but more to straighten up again and go off that way. The Dodge just kept going."

Cook, the driver of the truck which was struck, observed the plaintiff at the side of the road some 25 or 30 feet before his truck was struck by the Dodge car. The truck had not been used but eight or nine months, and was in good condition. The impact was heard by Weise and Terwhilliger, and, as sworn to by Mr. Cook, wrenched the steering wheel out of his hand and he applied the brakes and attempted to turn the truck to the left so as to avoid running into plaintiff. When the truck was brought to a stop it was facing northeasterly. It had been traveling in a northerly course. Staley did not stop, but kept going at a high rate of speed. He was pursued by Weise a distance of two and a half miles. Weise blew his horn and made other efforts to stop him, and only succeeded by finally cutting in front of him. Staley admitted he heard and felt the impact. On this point Weise testified: "I asked why he didn't stop and go back. He said he was not hurt. I said, 'I know that.' I said, 'You had better go back, because there has been somebody hurt, and two trucks are apparently in trouble.'" Staley refused to go back and left the next morning for the state of New York. He was there five months, returned to California and was in Sacramento four months, and then came back to Los Angeles, where he remained two months before he learned any one had

been hurt in the accident, according to his testimony given at the trial. He was conscious of possible trouble, as he left a note at his son-in-law's house on the evening the trouble occurred informing him "that they said there was an accident back there and that a fellow stopped and told me that they had my number. * * *" He claimed at the trial that he had purchased reservations for the following day, and left in accordance with his plans. He further testified that he was not stopped by Weise, but stopped voluntarily as he observed after traveling some quarter of a mile that his right forward fender was "drooped," and he got out and pulled it into place. The evidence showed a dent on the truck's hub cap, some paint was knocked off and the paint of the Dodge car had adhered to the cap. An indentation of some twelve or fourteen inches in length was admitted by a member of Staley's family to have been visible upon the right front fender on the day following the accident. In explaining his meandering course through said automobiles, the defendant said the truck going southerly changed its course and headed directly for him, and his hitting the Cook truck was in an effort to avoid said oncoming truck.

[1] The testimony of the several disinterested witnesses and the physical facts are conclusive as to reckless driving on the part of Staley, and that it was the direct and proximate cause of the injuries inflicted upon plaintiff.

[2] Plaintiff invokes the aid of the doctrine of *res ipsa loquitur* and complains of the court's refusal to give an instruction applying that doctrine to the facts of the instant case. We know of no case presenting facts similar to those disclosed by the record of the instant case in which the rule was applied. The complaint in the instant case describes the manner in which the injuries were inflicted. But waiving this obstacle, there can be no doubt but that Staley had control of the instrumentality that caused the injury and is wholly responsible for it. This was overwhelmingly established by distinguished testimony. Appellant has cited a number of cases in which the rule was applied to common carriers of passengers, and to cases in which, without any explanation whatsoever as to cause, an automobile left the highway and inflicted injury. This is not such a case. But if it be conceded that the rule of evidence, known as *res ipsa loquitur*, could under any circumstances have a place in this class of cases, it was completely overcome by direct evidence in the instant case which is practically one way, and the jury so decided.

[3] The approved instruction defining proximate cause was given, and appellant

cannot be heard to complain because another was not given.

[4] Neither was it error for the court in its discretion to refuse to cause the jury to inspect the Dodge car after more than a year had passed since the accident. Its condition was testified to by Staley, its owner, and by such witnesses as the plaintiff chose to produce.

The instructions were full and fair and responsive to the issues, and the rulings of the court were not in any particular prejudicial to appellant. There is no theory upon which the judgment can be reversed.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

213 Cal. 677

HUTTER et al. v. HOMMEL.

L. A. 11269.

Supreme Court of California.

Sept. 25, 1931.

1. Physicians and surgeons ⇨18(8).

Evidence supported judgment against physician for failure to use ordinary care and skill in treatment of cyst near patient's eye.

2. Evidence ⇨546.

Qualification of witness to testify as expert is matter within sound discretion of trial court.

3. Appeal and error ⇨971(2).

Trial court's ruling on qualification of witness to testify as expert will not be disturbed on appeal unless manifest abuse of its discretion is shown.

4. Evidence ⇨546.

Test of qualification of witness to testify as expert is whether he discloses sufficient knowledge of subject to entitle his opinion to go to jury.

5. Evidence ⇨538.

Homeopathic physician specializing in eye and ear work over 25 years *held* qualified to testify as expert to care and skill required of allopathic physician in treatment of cyst near patient's eye.

6. Trial ⇨260(1).

Refusing instructions, substance of which is contained in instructions given, is not error.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Louise Hutter and Frank D. Hutter against Wesley J. Hommel. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

James, Pace, Smith & Younkin and Troy Pace, all of Los Angeles, for respondents.

PRESTON, J.

The judgment is affirmed.

Action to recover damages for alleged malpractice on the part of defendant in so carelessly and negligently rendering surgical and medical treatment to plaintiff Louise Hutter as to cause her pain, impairment of facial appearance, and impairment of vision of the left eye. Said allegations of negligence were denied by defendant and he affirmatively pleaded contributory negligence on the part of said plaintiff. The case went to trial and upon conflicting evidence the jury returned a verdict awarding said plaintiff damages in the sum of \$10,000 and plaintiff, Frank D. Hutter, her husband, as damages for the loss of her comfort and society, the sum of \$465. Judgment was entered accordingly. Defendant appealed.

[1] The questions presented on the appeal do not merit extended discussion. Abundant evidence appears in the record in support of the verdict and judgment, shown in part by the following brief statement: Appellant was a duly licensed physician and surgeon of Los Angeles, experienced in the special treatment of eye, ear, nose, and throat diseases. Respondent Louise Hutter was a professional singer in vaudeville and club work, earning \$15 or \$20 a night at the clubs or in shows, or a straight weekly salary of \$75 to \$125. On the afternoon of November 3, 1926, accompanied by her husband, she went by appointment to appellant's office for the purpose of having him remove a small cyst located just above her left eyebrow. Despite her nervous condition he required her to wait some fifteen minutes before giving her attention. She testified that he then counseled her not to be nervous and take up too much of his time, as he was in a hurry; that he had her lie on the operating table in her street clothes and wore his street clothes and not a surgical gown; that he protected her merely by placing a towel around her neck; that he then shaved off her eyebrow and injected a hypodermic needle around the cyst three or four times but failed to cover or protect in any manner the eye below the cyst, merely swabbing the shaven place with cotton or gauze wet with some solution.

She further testified that after commencing the operation appellant was called to the tele-

phone on at least two occasions and returned to the work without cleansing or sterilizing his hands; that he had no assistance for the operation other than that he called on her husband to hold with an instrument a portion of the exposed cyst after the cutting started; that her husband's hands were neither cleansed or sterilized; that during the operation the cyst was broken and the pus or matter therein ran over the skin and upon respondent's eyelid and eyeball, but appellant made no effort to remove the fluid which penetrated the eye other than to wipe the surface of the lid with cotton; that at the conclusion of the operation, which consumed approximately an hour and a half, appellant took several stitches in the eyebrow, bandaged it, and directed said respondent to communicate with him the next day; that she passed a painful night, both eyes becoming badly swollen; that she telephoned appellant the next day and he advised her that such was the natural result of the operation and to use hot towels; that during the next twenty-four hours, said respondent endured great pain and suffering and the second day returned to appellant's office.

She further testified that appellant thereupon directed that she be sent to a hospital and that flaxseed poultices be regularly applied; that at the hospital appellant saw her once every day for about twelve days; that after three or four days there, the upper lid of the eye from the brow where the cyst had been removed, commenced to slough and decay; that about eight days after the operation appellant amputated a portion of the affected eyelid by taking a pair of scissors from his pocket and, apparently without sterilization thereof, cutting off a portion of the eyebrow; that appellant failed to draw or fasten the eyelids together, with the result that the eyeball was exposed for a period of approximately two months and an ulcer or ulcers formed thereon, which appellant treated by puncturing the ulcer with a small needle treated with nitrate of silver.

Appellant continued to treat said respondent until December 31, 1931, when he referred her to an eye specialist and also a doctor specializing in plastic surgery, from whom at the time of trial she was still receiving treatment. Operations and skin grafts had been performed in an endeavor to rectify the facial impairment and to improve the condition of her eye, but the unfortunate and permanent effects of her experience show all too plainly from photographs appearing in the record. Said respondent, in addition to loss of vision, has been left with a facial disfigurement which prevents her return to stage work. As above stated, there can be no doubt of the sufficiency of the evidence to support the conclusion reached in the court below. Appellant's negligence in failing to use ordinary care and skill to protect said respondent from infection

as a result of the operation is clearly apparent from the evidence adduced in her favor.

Appellant's first contention is that the court erred in overruling his objection to a hypothetical question propounded by respondents which, he claims, contains unfounded assumptions and facts in direct conflict with undisputed evidence. The hypothetical question is several pages in length; appellant's objections extend to but three short sentences or excerpts from it. Examining the record, we find ample, competent evidence tending to sustain every hypothesis contained in the alleged objectionable language. We have also studied the question in its entirety and find that the trial court committed no error in overruling the objection. There would seem to be no justification for a lengthy discussion of this point. As said in the case of *Treadwell v. Nickel*, 194 Cal. 243, 267, 228 P. 25, 35: "Considerable latitude must be allowed in the choice of facts as the basis upon which to frame a hypothetical question. Every hypothesis contained in the question should have some evidence to sustain it. But while this is true, it is also the rule that it is not necessary, in framing the question, to include a statement of all the evidence in the case. The question may be framed upon any theory of the questioning party which can be deduced from the evidence, and the statement may assume any facts, within the limits of the evidence, upon which the opinion of the expert is desired. It may omit any facts not deemed by the questioner material to the inquiry. 10 Cal. Jur. p. 966, § 223. It is the privilege of a party in such cases to assume, within the limits of the evidence, any statement of the facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed, subject to the limitation that the question shall not be unfair or misleading. *Thompson on Trials*, §§ 606-610; *People v. Hill*, 116 Cal. 562, 567, 48 P. 711. Measured by these considerations, the question here was not objectionable."

[2-4] Appellant next contends that the court erred in admitting into evidence, without proper foundation, the testimony of Dr. Kerr, a homeopathic physician and surgeon, as the criterion of the degree of care and skill required of appellant, who was educated in the methods of the allopathic school of medicine. The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown. *Darling v. Pac. Elec. Ry.*, 197 Cal. 702, 714, 715, 242 P. 703, and many cases there cited. The test is whether a witness discloses sufficient knowledge of the subject to entitle his opinion to go to the jury. No abuse of discretion on the part of the trial court is shown here. Dr. Kerr testified that he had specialized in eye and ear work for over twenty-five years and had been licensed

to practice in this state since 1904. He further stated: "I am familiar with the general treatment under allopathic and any other school of surgical cases. The school cuts no figure in a surgical case." He further stated that he had had operations where a cyst in or about the eyeball was dissected out and was familiar with the care and treatment required in connection with such a removal.

[5] We might add that we are cited to no rule obtaining in this jurisdiction and know of none which would preclude a physician trained in one medical school from testifying in a proper case as to the treatment rendered by a physician or surgeon trained in a different school. Such a rule might be promulgated where charges of negligence in a malpractice case are directed toward some special course of treatment to be tested by the general doctrine of a particular school, but it is not applicable to a case of this character where the alleged malpractice is based upon general charges of negligence relating largely to matters of almost common observation within the experience of every physician and surgeon. All schools of medical training require their adherents to exercise care in the handling of surgical work to insure cleanliness, proper sterilization of instruments, treatment of wounds after operation, and the taking of precautionary measures to prevent infection, allay the fear of patients, and hasten their healing. This expert witness was in our opinion fully qualified to testify as to the propriety of every act of negligence alleged to have been committed by appellant, and if his testimony and that of respondents and their other witnesses, together with certain evidence elicited from appellant's own expert witnesses on cross-examination, was believed by the jury, no further proof was needed to warrant them in concluding that appellant was guilty of extreme carelessness and neglect, thoroughly justifying the verdict rendered.

[6] The above discussion is a complete answer to the further claim of appellant that the court erred in failing to give certain requested instructions to the effect that the treatment of a physician and surgeon of one school is to be tested by the general doctrines of his own school and not by the doctrines and practices of other schools. Furthermore, examining the charge of the court as a whole, we find that the substance of the refused instructions was contained in other instructions given. It is clear that appellant suffered no prejudice in this respect.

Lastly, appellant contends that the evidence was insufficient in law to justify submission to the jury of the question of whether or not he failed to bring to the case that degree of ordinary care and skill usually possessed and exercised by physicians and surgeons in good standing practicing in this lo-

cality under similar circumstances, such proof being a vital element of a malpractice case. This contention is also answered by the above discussion, and we shall not review the evidence further. As above stated, we have examined the record at length and have found evidence, abundant and competent, supporting the action of the court below in every respect; hence we have unhesitatingly ordered an affirmance of the judgment.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

Affirmed as to defendant named and another, and reversed as to the other defendants.

V. E. Wilson and F. M. Tyrrell, both of Los Angeles, for appellants.

Leonard J. Meyberg, of Los Angeles, for respondents.

SHENK, J.

This is an appeal from a judgment for the plaintiff in an action to recover damages suffered by the plaintiff on account of an alleged fraudulent sale to her by the defendants of corporate stock of the defendant corporation.

It is not disputed that the stock certificates delivered to the plaintiff in exchange for \$5,000 cash found to have been paid by her were issued by the corporation and delivered to the plaintiff by the defendant Elmer Dwigins, acting as president of said corporation, prior to the issuance of a permit therefor by the corporation commissioner, as required by section 12 of the Corporate Securities Act, and that such a transaction is void under the terms of said section. Stats. 1917, pp. 673, 679. The purchase price of the stock was paid by the plaintiff about September 13, 1924. This action was brought on September 7, 1927, against the Harbor Realty & Development Corporation, which issued the stock, and against Elmer Dwigins, and other defendants individually, and Dwigins Company, a copartnership. The basis of the action was the alleged fraud of the defendants in inducing the plaintiff to enter into the illegal sale of the stock certificates, and the plaintiff sought as damages the sum of \$5,000 paid as the purchase price thereof.

As grounds of appeal the defendants contend that the findings bearing upon the issues of fraud are not supported by the record and that the court erred in rejecting the defendants' offer of testimony the purpose of which was to show, under the doctrine of the case of *Domenigoni v. Imperial Live Stock, etc., Co.*, 189 Cal. 467, 209 P. 36, that the plaintiff was in *pari delicto* with the defendants and not entitled to recover. The testimony offered and rejected by the trial court was to the effect that the plaintiff was one of the incorporators and directors of the defendant corporation and attended the meeting of the incorporators and the first meeting of the directors.

[1-3] None of the testimony in the record nor any of the evidence offered by the defendants has the effect to take this case out of the general rule stated in *Tatterson v. Kehrlein*, 88 Cal. App. 34, 263 P. 285; *Honn v. Hamer*, 81 Cal. App. 276, 253 P. 336, and *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784, and more recently recognized and declared in *Pollak v. Staunton*, 120

214 Cal. 46

WALKER v. HARBOR REALTY & DEVELOPMENT CORPORATION et al.

L. A. 11293.

Supreme Court of California.

Sept. 29, 1931.

1. Contracts ⇨134, 136.

Doctrine of estoppel by conduct and ratification have no application to contract void because violating law or public policy.

2. Licenses ⇨39.

One buying stock in corporation prior to issuance of permit for sale is not in *pari delicto* with seller (St. 1917, p. 679, § 12).

3. Licenses ⇨39.

In buyer's action against sellers of stock for fraud with respect to sale made before issuance of permit, evidence that plaintiff was one of incorporators and directors *held* incompetent (St. 1917, p. 679, § 12).

4. Licenses ⇨39.

Evidence sustained finding that purchase of stock was induced by fraudulent representations that corporation at time of delivery of certificates had obtained permit (St. 1917, p. 679, § 12).

5. Fraud ⇨59(1).

Damage follows as matter of course where one is induced without consideration to pay money on false representation.

In Bank.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Winifred E. Walker against the Harbor Realty & Development Corporation and others. Judgment for plaintiff, and defendants appeal.

Cal. 656, 293 P. 26, and First National Bank of Calexico v. Thompson (Cal. Sup.) 298 P. 808, that the doctrines of estoppel by conduct and ratification have no application to a contract which is void, as in the present case, because it violates an express mandate of the law or the dictates of public policy; and the statute being for the protection of the buyer of corporate securities and the penalties prescribed for a violation thereof being all laid upon the seller, the buyer is not in pari delicto with the seller. No facts have been presented or offered which could bring this case within the exceptions noted in such cases as Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Domenigoni v. Imperial Live Stock Co., 189 Cal. 467, 209 P. 36; and Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, where rights of others than the parties to the void sale or contract were involved and the buyer had by his own conduct made himself answerable to the claims of such third parties. See Tatterson v. Kehrlein, supra, 88 Cal. App. page 51, 263 P. 285. The present action involves the rights only of the parties themselves. We conclude that the court did not err in rejecting the proffered testimony.

[4, 5] The evidence on the issue of fraudulent representation was sharply in conflict. This conflict the trial court resolved in favor of the plaintiff, and we cannot say, as a matter of law, that the finding that the plaintiff was induced to part with the sum paid by her through the fraudulent representations of the corporation and of the defendant, Elmer Dwiggins, its president, namely, that the plaintiff would receive therefor valid shares of stock when and only when the corporation had succeeded in obtaining a permit to issue the same, is not supported by sufficient evidence. Elmer Dwiggins testified that he knew the corporation had not obtained the permit when he signed as president and delivered the stock certificates to the plaintiff. The record warrants the conclusion that the plaintiff did not have knowledge of the facts and that she was not fully apprised of her right to relief until September, 1927, and it is not to be supposed that she would willingly have accepted invalid certificates for the sum paid by her. Without any consideration moving to her, the plaintiff was induced to and did pay her money on what in law was a false representation upon which she relied; and her damage follows as a matter of course. Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 115, 255 P. 225. There is, however, no evidence in the record to connect the defendants other than the Harbor Realty & Development Corporation and Elmer Dwiggins with the false and fraudulent representation made to the plaintiff.

Other contentions made by the defendants

have been considered but are not of sufficient merit to require discussion.

The judgment is reversed as to the defendants Laurence W. Dwiggins, Raymond Dwiggins, and Dwiggins Company, a copartnership. As to the defendants Harbor Realty & Development Corporation and Elmer Dwiggins, the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

214 Cal. 1

NESSBITT v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

S. F. 14271.

Supreme Court of California.

Sept. 26, 1931.

Rehearing Denied Oct. 26, 1931.

1. Mandamus ⇨ 46.

Mandamus is not proper remedy to test right to jury trial.

2. Mandamus ⇨ 4(1).

Right to jury trial is question within jurisdiction of superior court, and, if error is committed in determining that question, party has sufficient remedy by appeal.

3. Mandamus ⇨ 46.

Stockholder suing directors of corporation held not entitled to mandamus to compel granting of jury trial, irrespective of whether court erred in classifying action as one in equity.

In Bank.

Application by J. C. Nessbitt for writ of mandamus to be directed to the Superior Court in and for Alameda County; Frank M. Ogden, Judge.

General demurrer to writ sustained, and alternative writ discharged.

F. W. Sawyer and L. Seidenberg, both of San Francisco, for petitioner.

Earl Warren, Dist. Atty., James H. Oakley, Deputy Dist. Atty., Fitzgerald, Abbott & Beardsley, John L. McVey, and W. E. Rode, all of Oakland, for respondent.

SEAWELL, J.

Petitioner invokes the aid of the writ of mandamus to compel the judge presiding in the department of the superior court of the county of Alameda in which a proceeding is pending wherein petitioner and approximately one hundred other shareholders of the

capital stock issued by the Automatic Electrical Machine Company, Inc., a foreign corporation, are joined as plaintiffs and Victory A. Derrick, C. Z. Sutton, E. Anderson, P. K. Sydes, A. T. Dowse, E. Ebeling, and W. C. Hollingsworth, stockholders and members of the board of directors of said corporation, are named as defendants, to comply with the demand of petitioner for a trial by jury of said proceeding, which demand was denied by the judge of said court on the ground that the proceeding was one of equitable cognizance and petitioner was not entitled to a jury trial as a matter of right.

From the allegations of the amended complaint in said proceeding, which is set out in full in the petition herein, it appears that between March 1, 1927, and April 27, 1927, the Automatic Electrical Machine Company, Inc., was a foreign corporation organized under the laws of the state of Delaware, and authorized to do business in the state of California, with an authorized capital of 500,000 shares of the par value of \$1 each; that the aggregate shares owned by said plaintiffs was 45,000, for which the par value of \$1 was paid into the funds and assets of said corporation; that with said sum of \$45,000 paid into the treasury of said corporation as aforesaid, and with additional sums of money belonging to said corporation, it purchased real property, buildings, plant, stock, machinery, equipment, patents, and patent rights, all of the reasonable market value of \$300,000. The purchase price, it is alleged, was paid with the money of the stockholders of said corporation, and was owned and possessed by said corporation for the use and benefit of its stockholders. It is then alleged that said named directors, upon and after the acquisition of said assets and property by said corporation, conspired to acquire for themselves all of the assets and property of said corporation, thereby materially reducing, if not entirely destroying, the market value of said shares of stock owned by said petitioners, with the ultimate purpose of bringing about the dissolution of said corporation. The plan of the conspiracy, as outlined by the amended complaint, was that said directors of said corporation caused and made it to appear in the records of said corporation that it was indebted to one George H. Derrick, the husband of said Victory A. Derrick, and several other apparent creditors named specifically in the amended complaint, in the aggregate sum of \$107,526.97, together with interest amounting to \$3,769.94.

Promissory notes of said corporation evidencing said indebtedness were signed by either Victory A. Derrick or her husband, who seems latterly to have succeeded her as president of the board of directors, and by the secretary of said corporation, and delivered to said apparent creditors. Following the allegations of the complaint, all of said

promissory notes, except the one in the sum of \$49,136.70, in which Victory A. Derrick is the payee, were assigned to her. In each instance except one, the allegation in this respect is "said defendant officers and directors obtained an assignment of said note to the defendant, Victory A. Derrick. The exception has to do with an open book account with the Insto Products Company, in which case the allegation is that "said officers and directors obtained an assignment of said *alleged* indebtedness to the defendant, Victory A. Derrick." (Italics ours.)

As another step in the plan, "in furtherance of and for the sole purpose of carrying out said conspiracy, said defendant officers and directors of said Automatic Electrical Machine Company caused said defendant Victory A. Derrick to, and she did, commence said action against said Automatic Electrical Machine Company on all of said notes and accounts alleged herein by filing in the superior court of the state of California, in and for the county of Alameda, as plaintiff therein named against said Automatic Electrical Machine Company, and the above named plaintiffs as stockholders thereof, wherein said plaintiff therein and defendant herein, said Victory A. Derrick, demanded judgment in the aggregate sum of \$107,526.97, together with interest and costs against said Automatic Electrical Machine Company and these plaintiffs as stockholders thereof."

Observing the sequence of the allegations of the amended complaint, it is next alleged in furtherance of said conspiracy, and for the sole purpose of executing it, said officers and directors of said corporation, on July 24, 1927, caused said corporation to appear and file in said action a general denial, special denial having been waived by the respective attorneys of said parties to the action; that said defendant officers and directors caused the attorneys for the respective parties in said action to file a stipulation setting the action for trial on or about September 7, 1928, and the judgment on that day was signed by the judge of said court in favor of said Victory A. Derrick, in the sum of \$107,526.97, principal, and \$3,769.94, interest, and \$13 as costs, and on said day judgment was entered of record, which judgment was dated August 20, 1928. (No point is made by petitioners as to the date August 20, 1928, and it is likely that it was a clerical error, as no significance is given to it as a specific fraudulent act.) Continuing, it is alleged that said officers and directors caused a special meeting of the board of directors of said Automatic Electrical Machine Company to be called for October 3, 1928, at which meeting said directors made it to appear in and upon the record books of said meeting that defendant C. Z. Sutton had offered to assume, pay, or discharge all of the outstanding indebtedness against said corporation, including said judgment, in considera-

tion of the sale and assignment of all the business, assets, and property of said corporation as a whole to said Sutton, and said officers and directors at said meeting voted to accept said offer; that said directors had called a special meeting of the stockholders of said corporation to convene on the same day, October 3, 1928, to consider said proposal. At said meeting it was represented by said officers to said stockholders that there was an existing, unpaid, and outstanding indebtedness of more than \$120,000 against said corporation, including said judgment, all of which entailed a stockholder's liability; that said board of directors then and there informed said stockholders that said board had accepted the proposal of C. Z. Sutton and unless said stockholders should by vote accept said offer and release all claims to the assets and property of said corporation, they would be personally liable for said corporation indebtedness; that a vote was taken at said meeting, and it was made to appear upon the records of said meeting by the defendant officers that said offer of said C. Z. Sutton was accepted by a two-thirds vote of all stock of said Automatic Electrical Machine Company; that thereupon, and in accordance with the action of said board of directors and stockholders, all of the business, assets, and property of said corporation as a whole, of the alleged reasonable value of \$300,000, were conveyed and transferred to defendant C. Z. Sutton, thereby depriving said corporation and all of its stockholders of anything of value, and said stock owned by plaintiff became valueless and continues to remain of no market value whatsoever; that in an attempt to make it impossible for said stockholders to realize any value on said stock or to obtain or recover said business assets or property, said defendant officers and directors of said corporation incorporated said business, assets, and property into another corporation known and named the Insto Recordograph Company (a defendant in said action), and said directors at all times since and now are conducting said business, assets, and property under said last corporate name to the exclusion of plaintiff stockholders; that in furtherance of said conspiracy said defendant officers and directors caused a special meeting of the stockholders of said Automatic Electrical Machine Company to be held April 27, 1929, whereat it was made to appear upon the meeting records that by a majority vote of said stockholders it should be dissolved as a corporation, and thereafter said officers and directors took such steps as eventuated in the dissolution of said corporation.

Petitioner alleges on information and belief that all of the foregoing acts were done and committed by said directors in furtherance of a conspiracy in violation of the trust reposed in said directors; that the "representations and statements made by said defendant

officers and directors herein, and the records and books and entries therein, including the indebtedness of said Automatic Electrical Machine Company, were simulated, false and untrue, and entirely fictitious"; that said special meetings of said directors and stockholders were not legally called or held, and said vote was not legally taken or recorded; that at said stockholders' meeting said officers and directors voted and counted proxies that did not exist with the intent and purpose of defrauding and damaging plaintiffs and all other stockholders likewise interested, to their damage in the sum of \$45,000.

It is also alleged that at the time said directors caused said corporation to be dissolved, to wit, April 27, 1929, the laws of Delaware provided and have at all times since provided that said corporation shall continue for a period of three years after said dissolution for the purpose of liquidating its business and affairs, and during said period said officers and directors were the managing and liquidating officers, and by reason of their fraudulent acts they were and are disqualified to bring this action on behalf of said corporation and there is no person or officer of said corporation upon whom any demand to commence the action or proceeding upon said claim on behalf of said corporation or plaintiffs could be made; that by reason of the fraudulent purpose and designs of said officers and directors, it would be useless to make a demand upon them for any relief in the premises.

We have set out the substance of said amended complaint, adopting much of the phraseology of the pleader, as illustrative of the equitable features of the action. That it savors upon casual inspection strongly of an equitable proceeding in its very genesis, as well as in its ramifying branches, is a circumstance which cannot be lightly ignored.

The amended complaint filed in the superior court, which petitioner relies upon as furnishing the basis of the writ of mandamus, omits to allege either the place of residence of the defendants or plaintiffs, or any of them, or the jurisdiction in which the alleged fraudulent acts were committed, or the state or the place in which the directors of said Delaware corporation or the stockholders thereof held said meetings in which the acts complained of were committed.

The only reference to jurisdiction in any respect is contained in the allegations that the action brought by Victory A. Derrick to recover a judgment against the corporation and the action brought against the defendant directors were filed in the superior court of the county of Alameda. A demurrer, both general and special, directed to the sufficiency of the amended complaint, was overruled, and we are not disposed to go into the merits of the trial court's rulings on questions of law upon demurrer in this proceeding. To do so

would be to advance the pending action ahead of others which are given precedence over actions of this class by statute. It may be finally held, and what is here said is merely by way of illustration, that the amended complaint fails to state a cause of action, and inasmuch as it constitutes the foundation of the demand for a trial by jury, it would follow that if no case is stated there would be, in the final analysis, nothing which a jury could have decided. But if that be so, it would amount only to a judicial error. Every case holds such a potentiality. No question of jurisdiction is thereby presented, nor do the facts present such a case as confers upon petitioners the right "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station," as provided by section 1085, Code of Civil Procedure. Said error differs not at all in its consequences from any other reversible error which may arise in the trial of any cause. It is the duty and desire of all courts to decide rightly, but it is not the office of the extraordinary writ to direct a decision or ruling in cases wherein reasonable minds may differ as to a proper conclusion or judgment. Certainly it cannot be contended in reason that petitioner's claim of the right of trial by jury is so free from doubt that it ipso facto takes from the trial court all discretion in the premises.

[1,2] This court and the District Court of Appeal have squarely held in numerous civil and criminal actions and proceedings not amounting to a felony that mandate is not the proper remedy to test the right to a jury trial. That is a question of law which the superior court has jurisdiction to hear and determine, and if error has been or shall be committed in determining that question, the petitioner has a sufficient remedy in the ordinary course of law by appeal. *Donohue v. Superior Court*, 93 Cal. 252, 28 P. 1043.

In *Mechler v. Superior Court*, 85 Cal. App. 353, 259 P. 452, 453, an application for writ of mandate was answered by the following language: "The question as to whether or not the parties to an action are entitled to a trial jury is a question of law which the trial court has jurisdiction to hear and determine, for error in the determination of which the party aggrieved has a sufficient remedy by appeal, and a writ of mandate will not be issued to compel the trial court to grant a jury trial. *Donohue v. Superior Court*, 93 Cal. 252, 28 P. 1043; *Widney v. Superior Court*, 84 Cal. App. 498, 258 P. 416. A party does not waive a right to a trial by jury by going to trial without one after objection, as the question can be reviewed upon a direct appeal from the judgment."

A very direct and practical disposition of the question was made in the case of *Amos v. Superior Court*, 196 Cal. 677, 239 P. 317, 318, wherein it was said: "It follows that the

presence of a lawful jury is not essential to jurisdiction of the subject-matter of a civil action at law, even though the parties thereto may have a constitutional right to a trial thereof before a jury. * * * The writ of prohibition is not a writ of error and we are not disposed to use it as such. The respondent court, having jurisdiction of both the parties and the subject-matter, may commit error in the exercise of such jurisdiction, and the appropriate remedy for the correction thereof is an appeal. This court is not disposed to encourage the practice of resorting to appellate courts for original writs for the purpose of procuring what amounts to a pro tanto review upon appeal before the cause has proceeded to final judgment in the trial court. Assuming, without deciding, that it may be reversible error for the trial court to deny plaintiffs' challenge and overrule their objections, nevertheless it may happen that the verdict and judgment when rendered will be entirely satisfactory to petitioners, in which event there will be no occasion to review this ruling." See other cases to the same effect: *Ex parte Miller*, 82 Cal. 454, 22 P. 1113; *In re Fife*, 110 Cal. 8, 42 P. 299; *Goodman v. Superior Court*, 8 Cal. App. 232, 96 P. 395; *Powelson v. Lockwood*, 82 Cal. 613, 23 P. 143.

[3] Petitioner has devoted a great deal of time and space in elaborate written argument and citation of cases in an effort to demonstrate the right of the stockholders to maintain an individual or personal action against the directors of said corporation. If this may be done, it is argued, the action is one at law and the right to a jury trial is guaranteed to petitioner. On the other hand, it is admitted that if the action can only be maintained as a stockholders' representative suit, then it is an equitable proceeding and it was not error to deny petitioner a jury trial. Petitioner has been at great pains to state, adhering to his theory, a cause at law, but whether he has done so must be determined from the nature of the relief he seeks, or which should be granted by the court, considering the rights of others who have an interest in the subject-matter of the action. However guarded complaints or bills in equity may be drawn to accord with the purpose of the pleader, courts, nevertheless, will look through forms in an effort to discern substance. Whether the action commenced in the superior court of the county of Alameda, in which the corporation is not made a party, and which is framed on the theory that a number of stockholders, without regard to the interests of the others, may obtain an individual judgment against the directors of the corporation and, forsooth, apply moneys derived from its misappropriated assets in satisfaction of said personal judgments to the detriment of the corporation and the other stockholders who have not been made parties to the action, and also to the detriment of the creditors, whether within or

without the jurisdiction in which the foreign corporation exists, is maintainable as an action at law for the sole benefit of said stockholders who are not affected or damaged differently or in a greater degree than all the stockholders in common, or whether the transaction, however brought, is one upon which equity will lay its hand in the interest of an equitable distribution of whatever assets may be recouped, are questions which are not properly before the court upon this hearing, and, therefore, whether the court was right or wrong in classifying the action as one in equity and not at law, would merely constitute error which would be disposed of upon an appeal, if taken, as other assignments of error are considered and disposed of.

It is true that the writ of mandate is to be indulged in all cases in which there is no plain, speedy, or adequate remedy in the ordinary course of the law. This court has frequently exercised this power in cases in which matters of great public interest are involved and in cases in which great and irreparable injury would result if the case was relegated to the ordinary course provided by law. But this is not such a case and there is ample authority in which the specific question here presented was considered which holds against the contention that the writ of mandate is an appropriate remedy for the correction of the alleged error complained of herein.

As to what effect, if any, section 309, Civil Code, before its repeal, may have had upon the merits of the case, is not important to a determination of the question as to plaintiff's right to a jury trial.

The general demurrer to the petition is sustained, and the alternative writ should be discharged. It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; CURTIS, J.

213 Cal. 694

STEWART et ux. v. CROWLEY et al.
L. A. 11294.

Supreme Court of California.
Sept. 26, 1931.

1. Appeal and error ☞1011(1).

Findings based on substantially conflicting evidence cannot be disturbed on appeal.

2. Evidence ☞434(1).

Fraud may be shown by parol, although written instrument purports to contain entire agreement between parties.

3. Cancellation of instruments ☞37(6).

Complaint for cancellation of lease and option to purchase realty held to contain all essential averments necessary to charge fraud.

Complaint fully alleged the representations and promises made by lessee in obtaining lease and option to purchase; that such representations were false and were known by lessee to be false; that the alleged promises were made without intention to perform the same, and with the purpose of deceiving the lessors and inducing them to execute the lease and option; and that lessors were in fact deceived and thereby induced to execute lease and option to their injury.

4. Trial ☞396(1).

Finding that lessee had fraudulently altered lease held not objectionable as not having been pleaded as ground of fraud in lessors' complaint, where such question was treated as one of main issues by both parties.

5. Contracts ☞94(1).

Single misstatement regarding material fact, knowingly made with intent to induce another into entering contract will, if believed and relied on, afford complete ground for rescission.

6. Cancellation of instruments ☞34(1).

That lessors learned lease had been sold in September, 1925, and accepted rent until July, 1926, held not to bar suit for cancellation of lease, since not constituting ratification or estoppel.

7. Appeal and error ☞1008(1).

Question of ratification of contract or laches is primarily for trial court.

8. Cancellation of instruments ☞55.

Judgment making rescission of lease conditional on lessors' paying lessee's assignee sum assignee had paid lessee for lease, and decreeing that lessee should reimburse lessors for such amount, held proper.

9. Cancellation of instruments ☞55.

In action for cancellation, court may grant any monetary relief necessary to do complete equity between parties.

In Bank.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Suit by Thomas P. Stewart and wife against Edward C. Crowley and A. E. Hudson. Judgment for plaintiff, and defendants appeal. The appeal of A. E. Hudson was dismissed by stipulation of parties filed in Supreme Court.

Judgment affirmed.

R. T. Lightfoot, of Los Angeles, for appellants.

Newlin & Ashburn, W. C. Mathes, Haight, Mathes & Sheppard, and Raymond L. Haight, all of Los Angeles, for respondents.

PER CURIAM.

[1] This action was brought for the purposes of securing the rescission and cancellation of a lease and option to purchase certain real property in the city of Los Angeles, on the ground that the same were secured through and by means of fraud. From a judgment in favor of plaintiffs, defendants prosecuted a joint appeal. After the opening brief of appellants had been, by stipulation of the parties, filed in this court, the appeal of A. E. Hudson was dismissed. Whatever merit there may have been in the joint appeal was eliminated from the case by this dismissal. The appeal of the remaining appellant, Crowley, basically presents nothing more than an attack on the sufficiency of the evidence to sustain the trial court's findings. An examination of the record shows ample evidence to sustain the findings complained of. As is to be expected in such cases, the evidence offered by Crowley conflicts in many material respects with that offered by respondents. It is elementary, however, that findings based upon substantially conflicting evidence cannot be disturbed by an appellate court.

According to the findings of the trial court, which findings are amply supported by the record, the facts out of which this controversy arose are as follows: Respondents owned certain real property in the city of Los Angeles. Crowley was engaged in the real estate business in the near vicinity. Some time in 1924 Crowley met the plaintiffs, and some discussion was had as to the possibility of his selling the property for them. Crowley contacted several prospective purchasers, but was unable to close a deal in respect to the property. In April, 1925, Crowley approached the plaintiffs and represented to them that his lease on his present office location was about to expire and that he had to move; that if plaintiffs would permit him to erect his real estate office on the property he could more quickly sell the property; that he could not afford to pay much rent, but that his being right on the property would assist materially in consummating an early sale. Plaintiffs informed Crowley that they were not particularly desirous of leasing the property, but wanted to sell it as quickly as possible, because they were contemplating moving to Australia. They told him, however, that if he believed it would assist in selling the property, they would lease him the property for the purposes specified. Later that month Crowley presented to plaintiffs for their approval an instrument entitled "Land Lease," and requested plaintiffs to sign it, stating

that he was familiar with lease forms and that plaintiffs were amply protected. Plaintiffs demurred to signing the lease, whereupon Crowley represented to them that as soon as the property was sold they could terminate the lease, and that he would protect them in this regard. Crowley later called for the lease and left it at the bank. Later plaintiffs called at the bank and signed the same, without reading it. The lease, which is pleaded as an exhibit to plaintiffs' complaint, provides that plaintiffs lease the lot to Crowley for a period of five years at a rental of \$38 a month for the first three years and \$43 a month for the last two years, with an option in the lessee to renew for five additional years at \$50 a month. No mention is made of the proposed real estate office, the lease giving the lessee the power to use the lot for any legal or legitimate purpose, and to sublease or re-lease the same. The lease further provided that any sale of the lot must be negotiated through the lessee as broker and any such sale must be made subject to the conditions of the lease, unless otherwise agreed upon. The lease was a form lease, with the necessary provisions typed in. In the printed form there was a clause which prohibited the subleasing or underletting of the premises without the consent of the lessor. This had been carefully "x-ed" out on the typewriter, so that it could not be determined what the provision was that had been thus crossed out. On conflicting evidence the trial court found that this provision had been in the form originally presented to the plaintiffs, but that later, and before plaintiffs signed it, this provision had been crossed out by Crowley, without informing plaintiffs, and that they signed the lease in the belief that this provision was still in the document.

The evidence also showed that, while the lease was in the possession of the plaintiffs, they asked Crowley what was meant by the five-year option, informing him that they did not know the meaning of the term. Crowley represented that by option was meant that either party could avoid the lease at the end of five years.

A few days after the lease had been executed Crowley presented to the plaintiffs a letter prepared by and addressed to himself. He represented that the purpose and effect of the letter was merely to reduce to writing the terms upon which he was to sell the property described in the lease, and that he was taking this means of protecting his commission in the event of the death or absence of plaintiffs. As a matter of fact the letter amounted to an option in the lessee to purchase the property for \$18,000 at any time during the life of the lease. This option likewise provided that the lessor would pay taxes on any improvements erected on the property up to an assessed valuation of \$1,000. Plaintiffs signed this letter on Crowley's representation

that he would change this figure to \$200. This was never done.

Crowley did not erect a real estate office on the property, but, within a short time of securing the lease and option, sold and assigned the same to Hudson for a cash consideration of \$2,500. Hudson started construction of a gas station on the premises. In March of 1926, plaintiffs consulted an attorney and, in July of that year, commenced this action for cancellation and rescission of the lease and option.

The trial court found that all of the above promises and representations were falsely and fraudulently made by Crowley, with the intent of inducing plaintiffs to execute the instruments, and were made without the intention of performing the same; that plaintiffs in fact relied upon them; that plaintiffs acted within a reasonable time after discovering the fraud. In order to do complete equity between the parties, the trial court ordered the option unconditionally canceled; ordered Hudson to remove all improvements, and ordered Crowley and Hudson to surrender for cancellation the lease and option. The removal of the improvements and the cancellation of the lease were made conditional upon plaintiffs' paying Hudson the sum of \$2,500 with interest, less certain deductions for unpaid rent; that, in the event that that sum was paid to Hudson, the plaintiffs were to have a personal judgment in that sum against Crowley.

[2, 3] Appellant Crowley's first contention is that the complaint does not state a cause of action against him. This contention is based on the fact that the lease and option are written instruments and are pleaded and relied on by plaintiffs; that it affirmatively appears from plaintiffs' pleading that the alleged false and fraudulent promises and representations relied upon all have to do with matters not contained in the writings; that as a matter of law all prior negotiations must be deemed to have been merged in the written instruments. This point is without merit. Fraud may always be shown by parol, even where the written instrument purports to contain the entire agreement between the parties. This court, in the recent case of *Hunt v. L. M. Field, Inc.*, 202 Cal. 701, at page 703, 262 P. 730, specifically held that it is "well settled that fraudulent representations as to a material matter, by which a party is induced to enter into a contract to his damage, may be established by parol evidence [citing cases], and this despite the fact that the written instrument purports to contain the entire agreement between the parties." The complaint fully alleges the representations and promises made by Crowley; that such representations were false and were known by Crowley to be false; that the alleged promises were made without the intention to perform the same; that said promises

and representations were made for the purpose of deceiving the plaintiffs and inducing them to execute the lease and option; that plaintiffs were in fact deceived and thereby induced to execute the lease and option to their injury. It is therefore obvious that the complaint contains all of the essential averments necessary to charge fraud. *Neff v. Engler*, 205 Cal. 484, 271 P. 744.

[4, 5] Appellant makes much of the fact that although the trial court on conflicting evidence made an express finding to the effect that Crowley had fraudulently altered the lease after presenting it to plaintiffs for their approval, such alteration was not pleaded as a ground of fraud in the complaint. Appellant can hardly claim to have been surprised by this omission, for the reason that this fact was developed by the plaintiff during the interrogation of the very first witness, and constantly referred to by both parties during the course of the trial. Defendant presented several witnesses for the purpose of refuting this contention. From a reading of the transcript, it is obvious that this was treated as one of the main issues by both parties. At the close of the trial, plaintiffs moved to amend to conform to proof. The trial judge indicated that he was not "inclined" to grant the motion, but, upon more mature deliberation, must have changed his mind, because he made an express finding on the point. Moreover, even if this finding were to be disregarded on the ground that it is not within the issues pleaded, it would not assist the appellant. There are ample allegations as to other representations and promises, all found by the court to have been fraudulently made, any one of which would be sufficient to sustain this action. It is elementary that a single misstatement as to a material fact, knowingly made with intent to induce another into entering the contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations. *Neff v. Engler*, *supra*; *Davis v. Butler*, 154 Cal. 623, 98 P. 1047.

[6, 7] It is also contended that, inasmuch as respondents learned of the fact that the lease had been sold as early as September of 1925, and accepted rent until July of 1926, when this action was commenced, they must be deemed to have ratified the contract, or are estopped by their laches. These points are without merit. The question of ratification or laches is primarily for the trial court and there were here no circumstances showing that the delay was unreasonable. *Hunt v. L. M. Field, Inc.*, *supra*.

[8, 9] Appellant likewise contends that the trial court committed error in decreeing rescission and in giving a \$2,500 judgment against him in the same action, on the ground that rescission and "damages" cannot be

granted in the same action. The trial court in its judgment made the rescission of the lease conditional upon respondents paying Hudson the \$2,500 he had paid Crowley for the lease, and decreed that Crowley must reimburse the respondents for this outlay. The judgment is a correct and proper one, and in accordance with the principle that in such actions the court should do complete equity between the parties. It is well settled that in such actions the court may grant any monetary relief necessary to do complete equity between the parties. 4 Cal. Jur. 797, § 29.

For the foregoing reasons, the judgment appealed from is affirmed.

Springer, Green & Morrison, of San Diego, for appellant.

Clock, McWhinney & Clock, of Long Beach, for respondent.

MARKS, J.

Respondent brought this action to recover a deficiency of \$5,198.41 upon a promissory note for \$25,000, secured by a deed of trust upon real property in San Diego county, which deficiency remained after the security had been sold and the proceeds applied upon the note. It recovered judgment, and appellant has prosecuted this appeal.

The record discloses that the note was in words and figures as follows: "San Diego, California, Sept. 7th, 1928. \$25,000.00 In installments and at all times hereinafter stated, for value received I or we or either of us promise to pay to H. L. Powers, or order, at Oceanside, California, the principal sum of Twenty-five Thousand no/100 Dollars, with interest from date on the amounts of principal remaining from time to time unpaid, until said principal sum is paid, at the rate of eight per cent. per annum. Principal payable in semiannual installments of Twenty-five Hundred Dollars, or more each, commencing March 7th, 1929, and every six months thereafter until the full sum has been paid, together with interest as above specified, payable quarterly, commencing December 7th, 1928, and every three months thereafter. Each of said payments shall be credited as follows: First on the interest then due; and the remainder on the principal sum; and interest shall thereupon cease upon the amount so credited on the said principal sum. Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any of said installments when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States of the present standard. This note is secured by a certain Deed of Trust to the Union Trust Company of San Diego, a corporation. Leonora C. Gaither. George W. Gaither."

On the 18th day of September, 1928, H. L. Powers and Agnes F. Powers, his wife, sold, assigned, and set over to appellant all of their right, title, and interest in and to the note, the deed of trust securing the same, and the property described therein. On the same day appellant sold the note to respondent and executed the following indorsement on the back thereof: "San Diego, California, September 18, 1928. Pay to the order of The Mutual Building and Loan Association, Long Beach, California. Presentment, demand, notice of default, protest and notice of protest are

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MUTUAL BUILDING & LOAN ASS'N OF LONG BEACH v. BEERS.

Civ. 869.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1931.

1. Appeal and error ⇨907(2).

Absent evidence, appellate court must presume evidence below sustained findings and judgment.

2. Bills and notes ⇨135.

Note and mortgage or trust deed securing it, must be construed together.

3. Appeal and error ⇨907(3).

In action on note, court assumed on appeal upon judgment roll that trust deed was introduced below authorizing acceleration of due date for nonpayment of interest, and that evidence showed sufficient declaration of default and notice of breach.

4. Trial ⇨404(2).

"Conclusion of law" that note holder declared entire sum due held sufficient, though not among fact findings.

5. Trial ⇨404(2).

That finding is mistakenly placed among conclusions of law does not destroy its efficacy as fact finding.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the Mutual Building & Loan Association of Long Beach against B. C. Beers. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

hereby expressly waived, and payment of this note hereby guaranteed. (Signed) B. C. Beers."

The trial court found that on August 23, 1929, nothing had been paid on account of the interest due on June 7, 1929; that on said date respondent, the owner of the note and security, filed with the trustee named in the deed of trust a notice of default under the terms of the deed of trust on account of the unpaid interest; that the trustee did on the same day record with the recorder of San Diego county a notice of the breach of the obligation of the deed of trust because of the nonpayment of the interest due on June 7, 1929, and of the election to sell the property; that due notice of the sale was given and that the property was sold on December 23, 1929, for \$15,000; that the sum of \$14,371.01, the net balance remaining after paying the expenses of sale, was credited on the note, leaving an unpaid balance of \$5,198.41.

Under the head of conclusions of law in the findings, the following appears: "The Plaintiff, The Mutual Building & Loan Association of Long Beach, a corporation, was, on the 18th day of September, 1928, ever since has been, and now is, the owner and holder of said Promissory Note herein sued upon. That the defendants herein, were on the 7th day of June, 1929, ever since have been, and now are, in default of the payment of interest due June 7, 1929, required to be made under and by virtue of the terms of said Promissory Note, and that thereafter, on or about the 23rd day of August, 1929, the plaintiff, under and by virtue of the terms and provisions of said promissory note, elected to, and did, lawfully declare the whole of the unpaid principal and interest of said promissory note forthwith due and payable, and did duly cause to be recorded, as required by law, a notice of breach of obligation, and duly elected to sell the property secured by the trust deed. That after due and legal notice given, as provided by law, the said trustee, on the 23rd day of December, 1929, did sell the said property. That said property was duly and legally sold, and that the net proceeds at the sale, to-wit, Fourteen Thousand Three Hundred Seventy-One and 01/100 Dollars (\$14,371.01) were duly credited on the aforesaid note. That there still remains due, owing and unpaid thereon, after deducting all just and proper credits, the sum of Five Thousand One Hundred Ninety-Eight and 41/100 Dollars (\$5,198.41), together with interest thereon at the rate of Seven per cent (7%) per annum from and after the 26th day of December, 1929."

Appellant urges as the sole ground for a reversal of the judgment that the findings of fact do not support it; first, because of the terms of the note the time of maturity of the principal could not be accelerated by a default in the payment of an installment of interest, and, second, because there is no finding of fact

that the respondent "elected to or did declare the principal of the note due on account of the nonpayment of interest, if such option is given by the terms of the note."

[1] The case comes before us on the judgment roll. When a party fails to bring the evidence up on appeal, it is mandatory upon us to presume that ample evidence was introduced in the court below to sustain the findings and judgment.

[2] It is well settled law in California that, where a promissory note is secured by a mortgage or deed of trust, the two instruments form parts of one transaction and must be read and construed together. *Mercantile, etc., Co. v. San Joaquin, etc., Corp.*, 89 Cal. App. 558, 265 P. 583. As was said in the case of *Trinity County Bank v. Haas*, 151 Cal. 553, 91 P. 385, 386: "The note and mortgage, being parts of one transaction, are to be read together, and the plaintiffs may therefore rely on the provision contained in the mortgage, making the principal due for nonpayment of interest at the payees' option, although the note contains no such provision. *Phelps v. Mayers*, 126 Cal. 549, 58 P. 1048; *Meyer v. Weber*, 133 Cal. 681, 65 P. 1110."

[3] As the evidence is not before us, we are entitled to assume in support of the judgment that the deed of trust was before the court below, and that it contained a provision in effect substantially as follows: Should a breach or default be made in the performance of an obligation for which this deed of trust is a security, or in the fulfillment of any covenant herein contained, including the payment of an installment of interest when due, then the holder or holders of any note or notes or indebtedness mentioned as security hereby may declare all sums secured hereby immediately due and payable and shall execute and deliver to said trustee a written declaration of default hereunder and demand for sale, and shall cause to be recorded, in the office of the recorder of the county wherein said property or some part thereof is situated, a notice of such breach and of election to cause said property to be sold to satisfy said obligations. We must also assume that the declaration of default made by respondent to the trustee and the notice of the breach of the obligation of the deed of trust and note were in every particular sufficient to support the conclusion of an election to declare the total amount of the unpaid principal immediately due and payable on account of a default in the payment of interest. *E. E. McCalla Co. v. Sleeper*, 105 Cal. App. 562, 288 P. 146. It follows that there is no merit in appellant's first ground for a reversal of the judgment.

[4, 5] Appellant's second ground for a reversal of the judgment is equally without merit. Those portions of the findings of fact denominated "conclusions of law" which we have quoted specifically find that respondent

"elected to, and did, lawfully declare" the entire sum of the unpaid principal and interest immediately due and payable because of the default in the payment of interest. Because a finding of fact is mistakenly placed among the conclusions of law does not destroy its efficacy as a finding of fact. *Burton v. Burton*, 79 Cal. 490, 21 P. 847; *Millard v. Legion of Honor*, 81 Cal. 340, 22 P. 864; *Brown v. Schroeder*, 88 Cal. App. 192, 263 P. 325.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 6

STORM & BUTTS v. LIPSCOMB et al.

Civ. 474.

District Court of Appeal, Fourth District,
California.

Sept. 22, 1931.

Rehearing Denied Oct. 16, 1931. Hearing
Denied by Supreme Court Nov. 19, 1931.

1. Principal and surety ⇨59.

Subcontractor's bond given in pursuance of terms of subcontract must be read in connection therewith.

2. Evidence ⇨417(11).

Where subcontract was silent as to many particulars, parol evidence held admissible to show that subcontractor accepted plans and specifications furnished to original contractor as basis of subcontract.

3. Evidence ⇨416.

Separate instruments may be shown by oral evidence to constitute but one transaction (Civ. Code, § 1642).

This is so even where there is in neither of the instruments no reference to the fact that another instrument accompanied it.

4. Contracts ⇨170(1).

In litigation involving construction of contract, practical construction of parties is adopted as true construction.

5. Principal and surety ⇨161.

Finding that specifications regarding construction of ocean front walk by subcontractor were not waived so as to constitute alteration of subcontract which would release non-consenting subcontractor's surety held supported.

6. Assignments ⇨120.

Original contractors, although assigning contract as security, held proper parties plaintiff in action against subcontractor and surety for breach of subcontract (Civ. Code, § 2888).

7. Subrogation ⇨7(1).

Original contractor's surety repaying finance company for advances made to original contractor was subrogated to contractor's rights, and proper party plaintiff in action against subcontractor and surety for breach of subcontract (Civ. Code, §§ 2777, 2848, 2849; Code Civ. Proc. §§ 369, 378).

8. Evidence ⇨355(1).

Daily report sheets kept by contractor during completion of subcontractor's work made by timekeeper from temporary memorandum supplied by others held admissible (Code Civ. Proc. § 1947).

Daily work sheets were admissible in action against subcontractor and surety for breach of contract, since they were kept for purpose of showing the money expended on the work which the contractor and surety had failed to perform, and the time sheets covering time that timekeeper who made sheets was not on work himself were made from memorandum supplied by foreman and night shift; it appearing that the timekeeper was in close touch with progress of work, and that the system of keeping time was complete and comprehensive, and records were such as were usually kept by constructing companies engaged in construction work.

9. Appeal and error ⇨1050(1).

Permitting introduction of evidence as to account sued on, over objection that plaintiff had failed to furnish proper bill of particulars, held without prejudice, where defendants were already in possession of original accounts.

10. Pleading ⇨326.

Party not satisfied with bill of particulars should immediately return it or move for further bill.

11. Appeal and error ⇨1078(1), 1079.

Alleged errors, neither argued nor seriously presented, need not be considered.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Storm & Butts, a copartnership consisting of Alf J. Storm and W. M. Butts and others, against E. C. Lipscomb and another, copartners doing business under the firm name and style of Lipscomb & Dutton,

and the Maryland Casualty Company. From an adverse judgment, the Maryland Casualty Company appeals.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellant.

Harvey H. Atherton, of San Diego, for respondents.

ALLISON, Justice pro tem.

This appeal is from a judgment against the defendants. The action grows out of a controversy between the original contractors and their sureties, as plaintiffs, against subcontractors and their surety, in the matter of the construction of an ocean front walk and boulevard erected and constructed at Mission Beach, in the city of San Diego, under the provisions of the 1911 Improvement District Act (St. 1911, p. 730, as amended). In taking the necessary proceedings and letting the contract the city divided the work in question into two units, one known as the south unit and the other as the north unit. The south unit constituted about one-third of the work. Charles and F. W. Steffen were the low bidders on what is known as the north unit. They immediately assigned their contract to the plaintiffs Storm & Butts, who become the contractors for the entire work and gave bonds with the Indemnity Insurance Company of North America as surety. The plaintiffs Storm & Butts sublet a portion of said work to the defendants Lipscomb & Dutton for driving the concrete piling and making back fills. The city had furnished a complete set of plans and specifications for the doing of the work. These were furnished to the defendants Lipscomb & Dutton by Storm & Butts and they had a copy of said plans and specifications in their possession at and prior to submitting the memorandum bid to Storm & Butts for driving the concrete piles and making the back fill. This bid was made prior to the awarding of the contract by the city. Subsequent to the entering into of the contract by Storm & Butts with the city of San Diego, said Storm & Butts addressed a letter, dated March 18, 1927, to Lipscomb & Dutton, which referred to the bid which had theretofore been made by Lipscomb & Dutton and outlined the amount to be paid for the work and the manner of payment, which was accepted in writing by Lipscomb & Dutton. Pursuant to said memorandum contract and as a part thereof, Lipscomb & Dutton furnished a bond to Storm & Butts with the Maryland Casualty Company as surety.

No other plans or specifications except the plans and specifications furnished and supplied by the city of San Diego were used by Lipscomb & Dutton in preparing their memorandum bid and in driving the piling and doing said work under said subcontract. No

other written agreement of any kind was ever entered into between Storm & Butts and Lipscomb & Dutton, or between the superintendent of streets of the city of San Diego and Lipscomb & Dutton, for doing the work any differently than as provided for in said plans and specifications. It appears that Lipscomb & Dutton, after making said contract, proceeded with the driving of the piling, but had considerable difficulty from the beginning in getting said piling down according to specifications, and complaint was being made from time to time by the inspector for the city and street superintendent that some of the pilings were broken and others had to be replaced. When the work was about half completed the superintendent of streets of the city stopped the further doing of the work by Lipscomb & Dutton for the reason, as stated by him, of the unsatisfactory manner in which they were attempting to drive the piling and demanded of them that they comply with the specifications of the city as to the manner of equipment to drive said piling. It appears that Lipscomb & Dutton had not complied with the specifications as to pressure of water used or as to weight of hammer in driving and neglected to do so, whereupon the superintendent of streets stopped the work. Storm & Butts demanded that they (Lipscomb & Dutton), as well as the Maryland Casualty Company, complete said subcontract and comply with said specifications, but they and each of them neglected and refused to do anything further, whereupon Storm & Butts proceeded to install proper equipment and complete the work. Arrangements were made by Storm & Butts and the Indemnity Insurance Company of North America, their surety, with the Municipal Bonding Company, to advance money as required by them from time to time for the doing of said work, as the financing agent of Storm & Butts. Security was given to the Municipal Bonding Company to protect it in advancing money, and all moneys advanced by the Municipal Bonding Company were fully repaid to it by the sale of bonds issued by the city for the doing of said work, the balance being paid in cash by the Indemnity Insurance Company of North America prior to the commencement of this action. At the time of the commencement of this action the Municipal Bonding Company had no interest and claimed no interest in the subject-matter of this action.

The complaint sets out the two contracts entered into by the superintendent of streets for the construction of the two sections of the sea wall; the giving of the bonds for the performance of the contracts by the Indemnity Insurance Company of North America; the letting of the said subcontract to the defendants Lipscomb & Dutton and the giving of a bond for the faithful performance of their contract by the Maryland Casualty

Company; the agreement of Lipscomb & Dutton to do the work in accordance with the original contract and the plans and specifications supplied by the city; the failure of Lipscomb & Dutton to perform the work provided in their contract, in that they failed to drive said piling and to do said work in accordance with the plans and specifications furnished by the city of San Diego for doing the same, and that said Lipscomb & Dutton did not perform the work in a diligent and proper manner, and that as a result the said Storm & Butts had been required to spend an additional sum of money to the amount of \$5,000 for the completion of other portions of said work which were not included in the subcontract, more than they would have been required to pay had Lipscomb & Dutton properly performed said contract; that the work was entirely abandoned by Lipscomb & Dutton on or about the first day of August, 1927; that the said subcontractors were repeatedly requested to complete their work and the appellant, the Maryland Casualty Company, had been notified of their default and demand had been made upon that company to proceed with said subcontract, which demand had been refused, whereupon the plaintiffs Storm & Butts took possession of said work and proceeded to complete the same; and prays for judgment against Lipscomb & Dutton for moneys expended in the completion of said work in the sum of \$30,339.34, and also a judgment against the Maryland Casualty Company for \$18,000 with interest.

The answer admitted the execution of the various original contracts with the superintendent of streets and the giving of the bonds by the Indemnity Insurance Company of North America; also the assignment of the Steffen contract to the plaintiffs Storm & Butts, but denied all other allegations. An amendment was by leave of court filed in which the defendants allege that the contract between plaintiffs Storm & Butts and the superintendent of streets had been assigned, and that the plaintiffs had parted with all their rights in said contract by way of assignment, and that Storm & Butts were without any interest upon which they could maintain the action. During the course of the trial a second amendment to the answer was filed, in which the defendants allege that the contract between Storm & Butts and Lipscomb & Dutton was based in part upon a memorandum in writing. Neither did the memorandum bid nor said contract of March 18, 1927, set forth the specifications under which the work by Lipscomb & Dutton was to be performed. It is further alleged by way of defense that the firm of Storm & Butts stated and represented to the defendants Lipscomb & Dutton that in performing the work specified in said agreement they might use, and they would be permitted to use, in driving the piles referred to, water from the city

mains instead of sea water as specified in the contract between Storm & Butts and the city of San Diego. It is further alleged that the said Storm & Butts further stated and represented that the defendants Lipscomb & Dutton might use pile drivers different in size and capacity than the pile drivers specified in the contract between Storm & Butts and the city of San Diego, and that the bid submitted by Lipscomb & Dutton was based upon said representations in order that the bid of Storm & Butts to the city might be reduced in amount, and that it was understood that, if said piles were driven through the use of sea water and hammers of different size and capacity from those specified, such method would require a considerable expenditure of money and would greatly increase the bid of Storm & Butts.

It is contended by the appellant that the evidence is not sufficient to justify the decision of the court in finding, as a fact, that the plans and specifications prepared and furnished by the superintendent of streets and upon which the original contractors based their contract to perform the work in question were considered and became a part of the contract between Storm & Butts and Lipscomb & Dutton. The contract reads as follows:

"Phone Main 8281

"Alf J. Storm W. M. Butts

"Storm & Butts

"General Contractors and Engineers

"521 A Street

"San Diego, California

"March 18, 1927.

"Messrs. Lipscomb & Dutton, West Santa Fe Wharf, San Diego, California.

"Gentlemen: It is now possible for us to consummate the letting of the contract of the Mission Beach seawall, upon which you gave us a quotation.

"It is our understanding that you will accept the concrete piles to be driven on this work when they are deposited within 150 feet of the point where they are to be driven; that you are to do all of the excavating required and all of the back filling and wetting down for the fill inside between the front wall and the rear wall of the structures for both sections for the sum of Thirty-five Thousand Six Hundred Thirty-five (\$35,635.00) Dollars.

"It is further understood that you will make the back fill required behind the wall on the South section for 30¢ per cubic yard. It is understood at this time that the filling behind the wall in the North section will be subject to future arrangements which we may make with yourselves or others.

"It is further understood that you are to use two pile driving outfits and that you will place these piles as fast as possible.

"We, on our part, will do everything possible to expedite the work.

"It was the understanding at the time you submitted your subbid to us that you would furnish a Surety Bond for the entire amount of your subcontract in order that we might be protected. It is the understanding now that you will deliver such a bond to us within ten days.

"It is further agreed that Storm & Butts are to advance 85 per cent. of the estimated amount of completed work every two weeks, a particular week day to be named by Lipscomb & Dutton and to be adhered to. It is also agreed that Lipscomb & Dutton are to pay the current rate of interest on any moneys advanced to them during the progress of the work.

"Trusting that this contract will prove profitable to both of us, we are,

"Very truly yours,

"Storm & Butts,

"By Alf J. Storm, W. M. Butts.

"Accepted

"Lipscomb & Dutton

"By E. C. Lipscomb

"E. E. Dutton."

The bid referred to is in writing, and is as follows:

"Approx 6104 Piles driven

"All excavating south of amusement center necessary for all forming.

"All back filling for entire length of wall necessary to fill between front & back walls.

"\$35,635.00

"Back fill behind back wall 30c per yard."

Pursuant to the said memorandum contract and as a part thereof, Lipscomb & Dutton furnished a bond to Storm & Butts, with the Maryland Casualty Company as surety, which recites in part as follows:

"The Condition of this obligation is such that, whereas, the said Obligee, on the 1st day of March, 1927, entered into a written contract with City of San Diego for the construction and completion of the Mission Beach Sea Wall, Mission Beach, California.

"Whereas, said Principal on the 18th day of March, 1927, entered into a written subcontract with said Obligee, for the driving of the piles and the excavation incidental thereto, the back filling and wetting down for the fill inside between the front and rear walls and for the back filling for the rear wall in the South Section of the said Sea Wall, on the public work covered in said written contract hereinabove mentioned.

"Whereas, the said Obligee in connection with and as a part of the consideration for the contract first above mentioned has been required to make, execute and file a bond for the performance of his contract and also a labor and material bond pursuant to the pro-

visions of the Act of Legislature of the State of California, entitled 'An Act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work,' approved March 27th, 1897, as the said act was amended by Acts of the Legislature of the State of California, approved May 1, 1911, and May 29, 1915, respectively.

"Now, therefore, if the above bounden Principal shall well and truly perform the work contracted to be done under said subcontract between him and said Obligee, and shall hold the said Obligee free and harmless from and against all loss or damage under the labor and material bond hereinbefore mentioned which shall arise by reason of the failure of said Principal, to pay claims arising in connection with the said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect."

[1-4] Appellant contends that the subcontract of March 18, 1927, being in writing, contains the full agreement between the parties except in so far as the memoranda bid might add anything thereto, and that no other writings or documents can properly be considered as forming a part thereof, for the reason that no reference is made in said contract to any other writings or documents. The bond in question is a part of the contract, was given in pursuance of the terms thereof, and must be read in connection therewith. *Roberts v. Sec. T. & S. Bank*, 196 Cal. 557, 238 P. 673; *W. P. Fuller v. Alturas S. Dist.*, 28 Cal. App. 609, 153 P. 743; *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 124 P. 978, 981. It will be noted in reading the bond that it provides that the principal, Lipscomb & Dutton, had entered into a written subcontract with Storm & Butts to do a certain part of the public work covered in a written contract between Storm & Butts and the city of San Diego. Both documents refer to the contract as a subcontract. The subcontract in question is an agreement on the part of Lipscomb & Dutton to perform a part of the obligation which Storm & Butts owed by their contract to the city of San Diego. Separate instruments may be shown by oral evidence to constitute but one transaction, "even where there is in either of the instruments no reference to the fact that another instrument accompanies it." *Hancock v. Clark*, 56 Cal. App. 277, 204 P. 1098. See, also, *Spotton v. Dyer*, 42 Cal. App. 585, 184 P. 23; section 1642, Civ. Code. An inspection of the documents making up the subcontract will disclose that they make no pretense of being complete. No provisions are therein made for the manner in which the work was to be done or what piling is to be driven or how far apart or to what depth they were to be driven, whether they should be placed in line or in groups, etc. In all these particulars and in many

others the contract is silent. The court found that at the time of making the subcontract of March 18, 1927, and prior thereto, Lipscomb & Dutton had in their possession a copy of the plans and specifications in question, which included the work agreed to be done by Lipscomb & Dutton, and that said plans and specifications were considered and became a part of said contract. At the trial of the case the plaintiffs were permitted to show by oral testimony that the plans and specifications were from the inception of the contract accepted by Lipscomb & Dutton as the basis of all their dealings on the subject-matter, that they formed the basis of their bid and were consulted during the construction of the work. The plaintiffs do not seek to contradict by parol proof the covenants of the contract in question. "In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." *Mitau v. Roddan*, 149 Cal. 1, 84 P. 145, 150, 6 L. R. A. (N. S.) 275. Citing *Mayberry v. Alhambra, etc., Co.*, 125 Cal. 446, 54 P. 530, 58 P. 68; *Keith v. Electrical Engineering Co.*, 136 Cal. 181, 68 P. 598. "It is a well-settled rule of law that, when the meaning of the language of a contract is doubtful, the construction which the parties to it place upon it during the course of its execution will be adopted where the language will reasonably permit such an interpretation." *Kales v. Houghton*, 190 Cal. 294, 212 P. 21, 23. See, also, *U. S. Trading Corp. v. Newmark G. Co.*, 56 Cal. App. 176, 205 P. 29; *Laiblin v. S. J. Agr. Corp.*, 60 Cal. App. 516, 213 P. 529; *Kennedy v. Lee*, 147 Cal. 596, 82 P. 257. We are of the opinion that there was no error in admitting the testimony in question.

[5] It is next contended by the appellant that the specifications were waived, and that the subcontract was altered without the consent of the Maryland Casualty Company, and that the surety company was thereby released from liability. We are unable to agree with the appellant in this respect. An examination of the record discloses ample evidence to the effect that the specifications were not waived and were by all parties considered an integral part of the contract, down to the time when the operations were stopped by the superintendent of streets. It will be remembered that the contracts in question were in writing. There could be no subsequent alteration binding on the parties unless the same were in writing or by an executed oral contract. Section 1693, Civ. Code. There is no claim that there was any writing affecting the contract in question after giving the bond

on March 25, 1927, and it cannot be seriously contended that there was any executed oral agreement, for the reason that the work was only half done. "An executed agreement is one the terms of which have been fully performed." *Henehan v. Hart*, 127 Cal. 656, 60 P. 426, 427. It is not claimed, however, that there was any change in the contract as to the work but only as to the method of performing it. The trial court found as a fact against this contention, and we perceive no grounds for disturbing the court's finding in that respect.

[6] It is next contended that Storm & Butts are not proper parties plaintiff, for the reason that the original contract executed by them with the city of San Diego for performing the work was assigned to the Municipal Bonding Company as security for advancing them money from time to time as the work progressed. The only relation the Municipal Bonding Company had with Storm & Butts and the Indemnity Insurance Company of North America was that of financial agent, by advancing money for labor and material as the work progressed, for which they charged interest and which was reimbursed to them with money received from sale of bonds issued by the city in payment of the work. The balance was paid to the Municipal Bonding Company on behalf of Storm & Butts by the Indemnity Insurance Company of North America in cash, prior to the commencement of this action. The trial court found that the Municipal Bonding Company was fully repaid and reimbursed prior to the commencement of this action and had executed a release and reassignment of the said contract to Storm & Butts, and the said bonding company did not have or claim any interest by virtue of said assignment in said contracts, or either of them. "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." Section 2888, Civ. Code. "While a pledgee has a special property or interest in a pledge, the title or general property remains in the pledgor, notwithstanding an apparent transfer of legal title or condition broken. He is not divested of his title in assigned securities merely by force of an assignment thereof." 21 Cal. Jur. 328. In passing upon a similar question the Supreme Court held the assignment was by way of security only and the plaintiff still had an interest in the property assigned and was therefore a proper party plaintiff. To the same effect, see *Stackpole v. Pacific Gas & Electric Co.*, 181 Cal. 700, 186 P. 354; *Allen v. Chatfield*, 34 Cal. App. 785, 168 P. 1149; *Webb v. Casassa*, 82 Cal. App. 307, 255 P. 541.

[7] It is next urged that the Indemnity Insurance Company was not subrogated to the rights of Storm & Butts by reason of the pay-

ment by said company to the Municipal Bonding Company for the use and benefit of Storm & Butts. It will be remembered that the Indemnity Insurance Company executed certain bonds by which it became obligated to see that the contracts of Storm & Butts were fully performed; that the Municipal Bonding Company acted as the financial agent of Storm & Butts, the bonding company in turn being secured for all payments to be made by it. A part of the advances made by the bonding company was repaid by the sale of certain bonds issued by the city for doing said work. The balance remaining was paid by the Indemnity Insurance Company before the commencement of this action. Appellant insists that the Indemnity Insurance Company is by reason of said payment subrogated to the rights of the bonding company, but not to the rights of Storm & Butts, and therefore are not proper parties plaintiff in this suit. Section 2777 of the Civil Code provides that he "who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act." Section 378 of the Code of Civil Procedure provides: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." Section 369 of the Code of Civil Procedure provides that a "trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." The rules pertaining to subrogation are clearly stated in the Civil Code as follows:

"A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards. * * *" Section 2849, Civ. Code.

"A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal. * * *" Section 2848, Civ. Code.

We believe the rights of the Indemnity Insurance Company were subrogated to the rights of Storm & Butts in this suit. This conclusion is amply sustained by the following cases: *Estate of Elizalde*, 182 Cal. 427, 188 P. 560; *Fresno Investment Co. v. Brandon*, 79 Cal. App. 387, 249 P. 548; *Title Guar., etc., Co. v. Duarte*, 54 Cal. App. 260, 201 P. 790.

[8] It is next urged that the court erred in admitting into evidence the daily report sheets kept by Storm & Butts during the progress of the completion of the work of the Lips-

comb & Dutton subcontract. It appears that after Storm & Butts took over the work, they operated under three full eight-hour shifts. The time books and records were kept by the witness Smith, who was the timekeeper of the work. This witness was only a part of the time on the work in question. The time book and time sheets covering the time that the timekeeper was not on the work himself was made up from information obtained from the foreman in charge of the work and was, as a rule, contained in memorandums made on slips of paper of a temporary nature. These memorandums were not preserved by the bookkeeper and were not produced at the trial. Neither was the foreman who supplied the memorandums produced at the trial. The witness Smith testified as to the system employed on the work, how the time sheets were made out, and it appears from his testimony that he kept in close touch with the progress of the work. He checked up on the time of the men employed at least twice a day and personally made the entries from the memorandums supplied by the foreman and night staff. It appears that the system of keeping of the time of the force of men employed and other items of expense was complete and comprehensive, and were such records as are usually kept by construction companies engaged in construction work of the kind in question. The witness testified that the records made by him were correct. These daily reports were admitted into evidence over the objection of the defendants, the objections going principally to those portions thereof as are based on information obtained by the witness from the foreman on the work at the time when he was not there. The foreman kept this data for Smith, the timekeeper, under his direction. These memorandums and time sheets were made up daily. It clearly appears that the records made up from the memorandums in the manner stated would constitute original records. See section 1947, Code Civ. Proc. In the case of *Chan Kiu Sing v. Gordon*, 171 Cal. 28, 151 P. 657, the Supreme Court lays down the rule for the establishing of the proper foundation for the admission of such evidence, to the effect that the books in question must be kept in the regular course of business; that the business is of a character in which it is proper or customary to keep such books; that the entries were original entries or the first permanent entries of the transaction; that they were made at the time or within reasonable proximity of the time of the respective transactions; and that the person making them had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business, whose duty it was to make the same in the regular course of business. The question of the admissibility of records of similar origin to those under

consideration is fully considered in the case of *Patrick v. Tetzlaff*, 46 Cal. App. 243, 189 P. 115. Under the authority of that case we believe the evidence was clearly admissible and that the court committed no error in so ruling.

[9] It is next urged that the plaintiffs should have been precluded from introducing evidence as to the accounts sued on, because of the alleged failure to furnish a bill of particulars. It appears that upon the demand of defendants a bill of particulars was supplied and filed. The defendants in due time demanded a further bill of particulars and statement of account, and, upon motion, the court thereafter made an order requiring the plaintiffs to file a further bill. The plaintiffs, in compliance with said order, served and filed a further bill, which the defendants insist is not a sufficient compliance with the court's order. It appears that, prior to the trial of the case, a representative of the appellant Maryland Casualty Company was given free access to all of the daily reports and records in the possession of the plaintiffs, made copies thereof, and took such data as he desired, and that the defendants had full and complete information of the contents of all the records and vouchers that were offered in evidence, long before the case came to trial. Assuming that the defendants were entitled to be furnished with a copy of the original records and accounts, the failure of the plaintiffs to supply such copies is without prejudice to the defendants if they were already in possession of the original accounts rendered by the plaintiffs. *Auzerais v. Naglee*, 74 Cal. 60, 15 P. 371. In the case of *McCarthy v. Mt. Tecarte Land & Water Co.*, 110 Cal. 687, 43 P. 391, 392, an attempt was made to preclude testimony offered in support of the accounts sued on, on the ground that the bill of particulars was served six days after demand therefor or one day later than the statute contemplates, but forty days before the trial. In sustaining the trial court in admitting the evidence in question over objection, the court says: "We are referred to no authority construing the provisions of such a statute as mandatory; but, upon the other hand, it is uniformly held that the language serves but to name a penalty, vesting the discretionary power of exacting it or not in the sound discretion of the trial judge. *Robbins v. Butler*, 13 Colo. 496, 22 P. 803. In *Graham v. Harmon*, 84 Cal. 181, 185, 23 P. 1097, it is said that the penalty only applies where the party refuses to furnish the copy; and in *Conner v. Hutchinson*, 17 Cal. 279, it is held that, if the bill of particulars is for any reason objectionable, and the adverse party proposes to object to the introduction of evidence, he may not wait until the trial, but previous to the trial must move for and obtain

an order excluding the evidence. Such is also the rule laid down in *Kellogg v. Paine*, 8 How. Prac. [N. Y.] 329, and in *Isham v. Parker*, 3 Wash. 774, 29 P. 835. This defendant failed to do, and for that additional reason his objection was properly overruled."

[10] If a party is not satisfied with the bill of particulars because it is defective either in form or substance, he should immediately return it or move the court for a further or amended bill. *Dennison v. Smith*, 1 Cal. 437. We are of the opinion that the defendants could not be prejudiced by the fact that the plaintiff did not furnish them with a copy of the records and data which they already had in their possession.

[11] Appellant has suggested other points in its brief, but has neither argued nor seriously presented them. It is held in *Dolley v. Ragon*, 66 Cal. App. 707, 228 P. 52, that in such circumstances, under the rule frequently announced by the Supreme Court of this state, such alleged errors as are not argued and seriously presented are entitled to no consideration. See cases there cited.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 244
STANLEY W. SMITH, Inc., v. PILGRIM.
Civ. 6895.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1931.

1. Replevin ⇐76.

In action for claim and delivery, aggrieved party is entitled to usable value of property claimed without showing actual loss resulting from purchase or hire of substitute property (Code Civ. Proc. § 667).

2. Replevin ⇐76.

Compensation for unlawful detention of personal property need not be limited by its value (Code Civ. Proc. § 667).

3. Replevin ⇐76.

Owner of wrongfully detained automobile held entitled to recover market value of its use from time automobile was detained until rendition of judgment (Code Civ. Proc. 667).

Owner was entitled to recover such value as against contention that he failed to show that he had suffered an actual loss by being compelled to purchase or hire a substitute machine, where, from the positive testimony of qualified experts, the

market rental value of the automobile detained could be ascertained.

4. Appeal and error ☞1070(1).

Where amount of verdict in action for claim and delivery was not excessive, discrepancy in phraseology cannot be held prejudicial to losing party.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Stanley W. Smith, Incorporated, against W. M. Pilgrim. From a judgment in favor of defendant, the plaintiff appeals.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Fredericks, Hanna & Morton and Byron F. Story, all of Los Angeles, for respondent.

CRAIG, J.

The plaintiff and appellant instituted this action against the respondent for the possession of an automobile or for its value. The defendant denied all of the allegations of the complaint and by affirmative answer alleged in himself ownership and the right to possession, praying judgment for the value of the property and damages for its detention by the plaintiff. Upon a trial by jury it developed that the plaintiff had more than three years previously deprived the defendant of his car, and that it had disposed of the same. Under the instructions given by the trial court a verdict and judgment were rendered in favor of the defendant for the value of the automobile at the time of trial and for its usable value, based upon a reasonable rental, until that time.

[1-3] The appellant does not seriously challenge the amount allowed for the property. But it is insisted that the defendant is not entitled to damages upon the evidence adduced, and principally because he failed to show that he had suffered an actual loss by being compelled to purchase or hire a substitute machine. By positive testimony of qualified experts it appeared that the market rental value of an automobile of the type and in the condition of that involved varied from \$200 per month during the first year down to \$125 per month during the third year of its use and \$20 to \$25 per week during remaining months of the term under consideration, with proper upkeep and allowing for usual depreciation. The jury were instructed that if they should find for the defendant he would be entitled during the stipulated time of detention to compensation based upon its reasonable rental value, if any, deemed by the law as the net usable value less the expense of upkeep and maintenance. If such be the correct rule, the verdict rendered

might legally have been approximately double the amount actually allowed and we would not be authorized to say as a matter of law that their estimate upon all of the evidence was excessive. In such a case the statute affords a defendant the right to a return of the property or the value thereof in case its return cannot be had, together with damages for taking and withholding the same. Code Civ. Proc. § 667. "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civ. Code, § 3333. In an action for claim and delivery of personal property the party aggrieved is entitled to the usable value, regardless of whether or not he be shown to have hired other property to take its place. *Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471; *Ruzanoff v. Retailers Credit Ass'n of Sacramento*, 97 Cal. App. 682, 276 P. 156. And compensation therefor need not be limited by the value of the property. *Tucker v. Hagerty*, 37 Cal. App. 789, 174 P. 908, 910. Where property detained has a usable value, its owner is entitled to recover damages equivalent to the reasonable value of such use during the period he was wrongfully deprived thereof up to the time of the rendition of judgment. *Drinkhouse v. Van Ness*, 202 Cal. 359, 260 P. 869. We are advised of no modification of the principles announced in *Tucker v. Hagerty*, supra, that "this value is to be estimated by the ordinary market price of the use of such property. 34 Cyc. 1562-1564. There are exceptions to this rule, but, as there is neither evidence nor findings from which it may be ascertained whether or not the case falls within any of the exceptions, we must apply the rule as above stated." The same rule was applied to facts not materially dissimilar in *Mutch v. Long Beach Impr. Co.*, 47 Cal. App. 267, 190 P. 638; *Taylor v. Bernheim*, 58 Cal. App. 404, 209 P. 55; and *Bonestell v. Auto-Motive Fin. Corp.*, 69 Cal. App. 719, 232 P. 734.

[4] Remaining contentions, that objections to evidence calculated to show that respondent rented no substitute car were improperly sustained, and that the verdict and judgment failed to specify separately the value of the property and its usable value, do not require extensive discussion. Rules already stated eliminate the materiality of the first point; and since the amount of the verdict was not excessive, the discrepancy, if any, in its phraseology cannot be held prejudicial to the appellant.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 181

PEOPLE v. CLINE et al.

Cr. 1164.

District Court of Appeal, Third District,
California.

Sept. 28, 1931.

Rape §51(4).

Evidence held to show sufficient resistance of complaining witness so as to support conviction of rape (Pen. Code, § 261).

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Emory Cline and another were convicted of rape, and named defendant appeals.

Affirmed.

C. C. McDonald, of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J.

The defendants were convicted of the crime of rape committed upon the person of one Sumiyo Matsumura, a Japanese woman. The defendant Emory Cline moved for a new trial; his motion for a new trial being denied, the cause was appealed to this court.

Upon this appeal the only contention made is that the testimony is insufficient to show the commission of the crime of rape, and that the Japanese did not resist the attacks of the respective defendants to the extent required by section 261 of the Penal Code. No contention is made that the evidence is insufficient to justify the jury in finding that both of the defendants had sexual intercourse with the complaining witness.

The record shows that the two defendants spent the night of January 29 and 30, 1931, at a cabin on a farm not far distant from where the prosecuting witness and her husband were living in Yolo county. The record shows that about the hour of 9 o'clock on the evening of the 29th, the defendants at that cabin began drinking wine, and continued there drinking wine until about 5 o'clock of the following morning, when their supply of wine became exhausted, and one of the defendants suggested that they go over to the home of Mr. and Mrs. Matsumura and obtain an additional supply. Thereupon the two defendants went over to the Matsumura home, and one of them knocked on the door, in response to which Mr. Matsumura got up, made a light, and came to the door. The defendants asked Mr. Matsumura for a supply of wine. Mr. Matsumura replied that the defendants were drunk and told them to go away. Thereupon the defendant Power

struck Matsumura upon the head, dealing him a very heavy blow. The blow was of sufficient force to render Mr. Matsumura unconscious for a considerable period of time. The testimony of the physician, who examined Mr. Matsumura, is to the effect that Matsumura was badly beaten. Following this, Mr. Powers entered the kitchen of the house occupied by the Matsumuras and immediately assaulted the prosecuting witness. At the time of this assault it appears that the defendant Cline came to the kitchen door and saw what was taking place, and made no effort to cause Powers to desist; that after Powers had succeeded in accomplishing his purpose and Mrs. Matsumura had succeeded in releasing herself from his embraces, she started toward the door of the kitchen to go to the side of her husband. As she opened the door of the kitchen, she was grabbed by the defendant Cline, thrown down by him, and the offense charged in the indictment inflicted upon her person.

A résumé of the testimony of Mrs. Matsumura we think sufficiently answers the appellant's contention as to the question of resistance to be sufficient to render the defendants amenable to the provisions of section 261 of the Penal Code.

After testifying that she lived with her husband at the place referred to and that she saw the defendants about 5 o'clock on the morning of the 30th of January, 1931, the witness testified as follows: "We were in bed when we heard a knock at the door. I told my husband to answer the knock, he got up; at the knocking at the door he went to the kitchen, got dressed and then went to the door; I got up and lit the light; I was standing by the kitchen stove when my husband opened the door and stepped out; I did not see him after he stepped out; I heard a remark which expressed surprise and also a sound of beating; I heard a voice like Mr. Cline's say 'that's all right, that's all right'; I had known Mr. Cline for about four years; he worked at our house and also at the home of the father of my husband; after I heard the sound of exclamation and the sound of blows outside I started to go out; I went to the door, the door was closed, I opened the door. As soon as I opened the door, the man with a moustache opened the screen door and came right in; that man is the defendant Powers; he said something but I did not understand what he said; he grabbed me and tried to put his face near my face and I struggled away from him; then he grabbed me up and walked right into the room and threw me down on the floor; after he threw me down, he went on top of me; I tried to struggle and free myself and then he slapped me in the face and then Mr. Cline came into the room. Cline said something to the man.

As soon as he saw my face he walked out; after Powers slapped me, he accomplished what he was after; he held me down all the time; he succeeded in the act of penetration; I struggled to get away and he hit me; I finally got away from him. As soon as I got away from him I went out to save my husband; he was outside lying down at the entrance of the door. As soon as I opened the screen door and tried to get out another person grabbed me by the hands and dragged me. I think it was Cline; then I was knocked down and assaulted again but I do not remember very much of the details. I was all excited, so I don't remember how I was thrown down. Cline got on top of me; I screamed; I struggled to the best of my ability until I was hit and was unable to struggle any further."

There is some testimony to the effect that after the defendant Cline had succeeded in the act of penetration no further resistance was offered.

The defendants, of course, deny the charges preferred against them, but admitted being present at the Matsumura house at the time in question and made no denial of the fact of knocking Mr. Matsumura into an unconscious condition.

Upon this state of facts, we think the offense charged in the indictment clearly established and sufficiently supported by the following authorities:

"Although there is authority that there must be the utmost reluctance and the utmost resistance, the rule of 'resistance to the uttermost' has been expressly repudiated; and even where the term 'utmost resistance' is still employed, it is held to be a relative term, which actually means the greatest effort of which the woman is capable to foil the assailant and preserve the sanctity of her person. Too, it has been stated that the requirement that the act be without the female's consent or against her will signifies that it be committed against the utmost reluctance and against the utmost resistance which she is capable of making, and that the female's opposition of the man to the utmost limit of her power is the test of resistance. Thus the prevailing rule is that there must be the most vehement exercise of every physical means or faculty within the female's power to resist penetration, and a persistence in such resistance until the offense is consummated. The female need not resist as long as either strength endures or consciousness continues. Rather the resistance must be proportioned to the outrage; and the amount of resistance required necessarily depends upon the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested, which rule is in some jurisdictions expressly adopt-

ed by statute. Stated in another way, the resistance of the female to support a charge of rape need only be such as to make non-consent and actual resistance reasonably manifest. The female need resist only until physical penetration occurs, when the crime is complete, and her failure to resist after that is immaterial; and she need only resist until resistance becomes so useless as to warrant its cessation." 52 C. J. 1019.

In the case of *Bulls v. State*, 33 Okl. Cr. 64, 241 P. 605, 606, we find the following: "The old rule of 'resistance to the uttermost' is obsolete, and is repudiated by the more modern authorities. The law does not require that the woman shall do more than her age, strength, the surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition. In reference to the degree of resistance required, the jury should be instructed that it is necessary, not that the prosecutrix should have made the uttermost resistance, but that she has made such resistance as she was capable of making at the time."

In *People v. Norrington*, 55 Cal. App. 103, 202 P. 932, 935, the Court of Appeal for the Second District, in this case speaking through Justice Finlayson, quoted the following from the Supreme Court of Idaho, which we think pertinent to this case, and when fully considered in connection with the facts set forth, shows that the jury was fully warranted in finding both of the defendants guilty. It must be borne in mind all the while that the defendants were acting in concert in their criminal endeavors. The quotation is as follows:

"A * * * number of authorities are cited by counsel for appellant to the effect that the state must show in such cases that the female 'showed the utmost reluctance and used the utmost resistance.' *Devoy v. State*, 122 Wis. 148, 99 N. W. 455. To our minds the trouble with a number of these authorities is that they reverse the order of the inquiry. They go about inquiring into the kind, character, and nature of the fight put up by the woman, rather than the nature of the assault and evident and manifest purpose and intent of the assailant. For the purpose of reaching the conclusions announced in some of these cases it is necessary to assume that, in the first place, a man has a right to approach a woman, lay hold on her person, take indecent liberties with her, and that, unless she 'kicks, bites, scratches and screams' (*People v. Morrison*, 1 Parker Cr. R. [N. Y.] 625) to the 'utmost of her power and ability,' she will be deemed to have consented, and indeed to have invited the familiarity. Such is neither justice, law nor sound reason. On the contrary, under the statute a case might arise where a conviction could properly be had for assault with intent to commit rape, and still

no personal encounter or contact have ever taken place. In fact, many such cases are reported. 23 Am. & Eng. Ency. of Law, 866, and notes; 1 McLains Cr. Law, sec. 463; 10 Ency. of Ev. 607, and cases cited. * * * It is true that she (the prosecutrix) must not have consented, because if she did there would be no offense; but, on the other hand, men should not be allowed, under the protection of law, to construe every indiscreet act or word of a woman into a consent to carnal knowledge, nor should they be allowed to indulge in presumptions against the virtue and chastity of women. Rather let the evil-minded man incur the risk and hazard of misjudging the opposite sex, and (sic) endeavoring to degrade them and destroy their peace and happiness. A little of this kind of law would go a long way with some of the brutes who unfortunately bear the names of men. There would be far less illicit intercourse if there were no assaults by the seducer in the first place, and the oftener he is brought to justice the less annoyance the community will suffer from the graver offenses toward which his conduct leads."

No contention is made that the jury was not properly instructed, and a reading of the testimony convinces us that the jury could not reasonably have brought in any other verdict.

The judgment and the order of the trial court are affirmed.

We concur: R. L. THOMPSON, J.; PRESTON, P. J.

117 Cal.App. 292

GRADY et al. v. LUY et al.
Civ. 7679.

District Court of Appeal, First District,
Division 1, California.
Oct. 1, 1931.

Rehearing Denied Oct. 31, 1931. Hearing
Denied by Supreme Court Nov. 30, 1931.

1. Fraud ☞18.

Materiality of misrepresentation depends largely on attendant circumstances.

2. Fraud ☞18.

Vendors' misrepresentation that vendors had deeded adjacent wash to county, which had duty to and would protect land held material.

Such representation was material, since the question of the wash and its potential danger was a matter of prime importance to prospective purchasers, and the representation was not entirely as to ownership, but explicitly to the fact that the vendors themselves had deeded the prop-

erty to the county and carried the fair implication that the conveyance, of which they would have knowledge, evidenced the duty and liability of the grantee, and, further, the title being in a governmental agency implied the right of the vendees to protest against a harmful use and to appear and urge such remedial measures as might be deemed necessary for the protection of the land.

3. Fraud ☞22(1).

Vendees of lots, to whom vendors misrepresented that vendors had deeded adjacent wash to county, had no duty to ascertain from public records whether transfer was made.

Vendees had no duty to ascertain from the public records whether the transfer was made, since the absence of a record of the transfer would not conclude the inquiry, inasmuch as there is no law requiring the recordation of such an instrument, and nonrecordation would not be conclusive of the fact that no such transfer had been made.

4. Appeal and error ☞932(1).

Where complaint, not demurred to, plead damages from sand separator's operation generally, judgment therefor was presumably for damage accruing before filing of complaint.

Presumption that damages accrued before the filing of the complaint operated notwithstanding defendants' claim that the damages accrued after filing of complaint, and that, there being no supplemental pleading, the finding was without the issues, since there was a period of approximately two months of operation prior to the filing of the complaint, and the complaint alleged the installation and operation of the sand separator, and further alleged that by reason thereof plaintiffs had been damaged.

5. Fraud ☞59(2).

In action for misrepresentation regarding land sold, judgment for value of land washed away complied with rule that damage is difference between actual value of premises and value if as represented.

Misrepresentation on which action was based was that the wash which resulted in the destruction of part of the land sold to plaintiffs, though actually owned by the vendors, had been deeded and transferred by them to the county, whose duty it was to protect the land, and that such protection would be given as would remove all source of danger.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Thomas Grady and others against Leonard Luy and wife, Mary Luy, which was dismissed as against Mary Luy on her death. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Halverson & Halverson and George Halverson, all of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondents.

PARKER, Justice pro tem.

This is an appeal from a judgment for the plaintiffs in an action brought to recover damages for alleged fraudulent misrepresentations and deceit in an executory contract of purchase and sale of real estate.

The defendants were husband and wife; the defendant Mary Luy deceased prior to trial, and the action as against her was dismissed. The defendants were the owners of certain property located in the county of Los Angeles. From the record before us, and the fact is admitted, this property was adjacent to a wash or arroyo, which said feature would naturally detract from both the appearance and saleability of the said property. The defendants had mapped out this property and subdivided the same for sale, and in response to advertisement the plaintiffs entered into negotiations for the purchase of certain of the lots embraced within the subdivision. Upon viewing the lots, the first thing that plaintiffs noticed was this adjacent wash and the obvious danger of floods and torrents. At the same time there was located in the wash a sand separator, the result of the operation of which would naturally be to deepen the channel and cut out the banks. These two things apparently halted negotiations and lessened the interest of the prospective purchasers. Thereupon defendants represented to plaintiffs that the wash in question, though formerly owned by defendants, had been deeded and transferred by them to the county of Los Angeles, a branch of government, whose duty it was to protect the lands, and that such protection would be given as would remove all source of danger; further, defendants assured plaintiffs that the sand separator then present would be removed and the county would permit no other separator to be installed or to operate in the wash; and, further, defendants represented to plaintiffs that no other separator or similar machine would ever be permitted to operate in the wash. The truth was that defendants had deeded the wash to no person but remained the owners thereof. The plaintiffs, relying upon the representations thus made, entered into the contract of purchase and erected improvements on the property. Subsequently the defendants deeded the property described as the wash to a third

person, who for a period of some three months operated thereon a sand separator. The working of this separator undermined the lands of plaintiffs adjacent to the wash, as a result of which a portion of the said lands were washed away and destroyed.

Upon this state of facts the trial court rendered judgment in favor of plaintiffs for the sum of \$750, found to be the damage to the lands through the washing away of a portion thereof. It may be here further noted that the trial court found upon sufficient evidence, not here disputed, that the plaintiffs relied upon the representations as made, that the same were false and intended to deceive the said plaintiffs, and that, without reliance upon said representations, the contract would not have been made by them.

[1, 2] Appellant urges at the outset that no material misrepresentations appear to have been made; that the allegation of ownership in the county of Los Angeles was immaterial, and could in nowise have been a factor in the negotiations. To some extent this argument seems persuasive, yet coupled with the statement of ownership in the county was the statement that the ownership was not in the defendants. The courts have never attempted to draw any hard and fast lines differentiating a material misrepresentation from one immaterial, nor is there any definite line of demarcation between matters of mere opinion and matters of representation. Whether or not a representation or misrepresentation is material would and does depend largely upon the attendant circumstances of each particular case.

Analyzing the representation here discussed, there is included therein some concealment of what might be a governing factor in the sale. The question of the wash and its potential danger was a matter of prime importance to the prospective purchasers. The seller falsely stated that the ownership was not in him, but that it was in a public governmental agency, to wit, the county of Los Angeles; that by reason of such ownership, and as a fact represented, this agency would protect the lands from overflow, and would also prohibit the placing of any separators or gravel crushers in the wash. Under the conditions existing, this representation became material through the fact of defendants' ownership. The representation was not entirely as to ownership, but explicitly to the fact that defendants themselves had deeded the property to the county and carried the fair implication that the conveyance, of which they would have knowledge, evidenced the duty and liability of the grantee. Further, the title being in a governmental agency implied the right of the plaintiffs to protest against a harmful use and to appear and urge such remedial measures as might be deemed necessary for the protection of the land. And it seems readily

apparent that the untruth must have been told for a purpose. Defendants knew of the existing menace to the property sought to be sold, and this representation was made solely for the purpose of expediting the negotiations through giving to plaintiffs a sense of security. In *Wells v. Zenz*, 83 Cal. App. at page 140, 256 P. 484, 485, it is said: "Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. * * * The statutes of California expressly provide that the suppression of a fact by one who gives information of other facts likely to mislead for want of communication of the fact concealed is deceit (Civ. Code, § 1710), and any other act fitted to deceive is actual fraud (Civ. Code, § 1572)."

[3, 4] Appellant urges further, in this connection, that the fact of a transfer having been made was ascertainable from the public records, and that it was plaintiffs' duty to consult these records rather than to accept the statement of defendants. The fact is that such a transfer was never made. The absence of a record thereof would not conclude the inquiry, inasmuch as there is no law requiring the recordation of such an instrument, and nonrecordation would not be conclusive of the fact that no such transfer had been made.

The next ground urged by appellant concerns the question of damages. The complaint alleged the operation of the separator and counted upon the disturbance created thereby and the inconvenience resulting to plaintiffs, coupled with injuries to the health of plaintiffs. The trial court found against this claim of damage. There was, however, the general allegation in the complaint that, by reason of the acts complained of, a general damage had been suffered, though the elements of this damage were not specifically pleaded.

The court found that the sand separator was operated for a period of three or four months after January 3, 1927; the complaint was filed on February 21, 1927. It is appellant's contention that the damage accrued after the filing of the complaint, and, there being no supplemental pleading, the finding was without the issues, and was likewise for damage accruing after the filing of the complaint. There was still a period of approximately two months of operation prior to the filing of the complaint, and the presumption would follow, in the absence of any contrary showing, that the damage accrued before the filing of the

complaint, if such a presumption were necessary to uphold the judgment. The complaint alleged the installation and operation of the rock crusher and sand separator, and further alleged that by reason thereof plaintiffs had been damaged. In the absence of any demurrer, issue being joined, the allegations were sufficient to support a finding as made, without an allegation especially detailing each item of damage.

[5] Finally, appellant complains that the trial court adopted the wrong measure of damages; that the true measure of damage is the difference between the actual value of the premises and what the value would have been had the representations been true. However, conceding that to be the rule, its application works out consistent with the judgment. It is obvious that the actual value of the land which was destroyed and washed away totaled nothing. The finding of the court that its actual value at the time of the washing out was \$750 meets the requirements of the rule by implication. Diagraming the thought, the actual value of the land received was nothing; if the representations had been true, the land would have been retained to the vendees and would have been of the value of \$750. Reference, in this connection, is made to the case of *Gordon v. Perkins*, 36 Cal. App. page 92, 171 P. 698, 699, wherein it is said: "We can conceive of no similar case where the damage to the whole would be less than that to a portion; and, if this be true, how can the defendants be heard to complain?"

Summing up, we find that plaintiffs elected to stand upon the contract rather than to seek a rescission. They sought, as they were entitled to do, damages for the loss inflicted upon them through the deceit practiced by the defendants. From the evidence adduced and the findings of the trial court thereon, it is apparent that they received only a portion of that which they were induced to buy in reliance upon the misrepresentations made. It cannot be gainsaid that the physical destruction of the property caused a loss to plaintiffs. The entire negotiations surrounded the question of the wash and the sand separator, and, when plaintiffs, relying upon the assurances of defendants as hereinbefore set forth, purchased the property, it would seem an unusual precedent to hold that the property could be destroyed by agencies assured against and no relief given to the plaintiffs. It is conclusively shown that defendants deliberately falsified the conditions existing, thereby inducing the contract, and that, by reason of the falsity of these representations, the plaintiffs have been damaged as found.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 205

BROWN et al. v. BROWN et al.

Civ. 485.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1931.

1. Appeal and error ⇨694(1).

Finding that judgment debtor at time of satisfaction by assignee had knowledge of prior assignment *held* conclusive, in absence of evidence.

2. Judgment ⇨898(4).

To set aside second assignee's satisfaction of judgment, on ground judgment had been previously assigned to another, notice must be given second assignee.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by George B. Brown and another against A. F. Brown, in which plaintiffs recovered judgment. The judgment was twice assigned, and satisfaction was filed with the county clerk, and, from an order vacating the satisfaction of the judgment, defendant and E. A. Brown, one of the assignees, appeal.

Reversed.

A. F. Brown and E. A. Brown, in pro. per.

Ray D. Johnson, of El Centro, for respondents.

JENNINGS, J.

This is an appeal from an order of the Superior Court vacating a satisfaction of judgment theretofore entered in favor of plaintiffs George B. Brown and Alta Blanche Brown. The facts relevant to the appeal herein are briefly as follows:

Respondents George B. Brown and Alta Blanche Brown recovered a judgment for the sum of \$750 against appellant Arthur F. Brown. The judgment is dated June 30, 1930, and was entered on July 1, 1930. On June 16, 1930, the above-named respondents executed a written assignment of the judgment to one Ray D. Johnson. This assignment was filed with the county clerk on June 30, 1930. On August 8, 1930, respondent George B. Brown executed a second assignment of the same judgment to one E. A. Brown, reciting that it was made in consideration of the surrender to the assignor of a certain promissory note made by the assignor to E. A. Brown, on which note the sum of \$270 principal and interest was then due. This assignment was filed with the county clerk on August 13, 1930. Written notice of the second assignment directed to the judgment debtor was made un-

der date of August 12, 1930. This instrument was likewise filed with the county clerk. On August 18, 1930, there was filed with the county clerk a satisfaction of judgment apparently executed by E. A. Brown, reciting that, in consideration of the sum of \$200 paid by the judgment debtor to E. A. Brown, the latter acknowledged full satisfaction of the judgment. This instrument was duly acknowledged by E. A. Brown before a notary public.

[1] The notice of motion to vacate the satisfaction of judgment states that it is made by respondents Alta Blanche Brown and Ray D. Johnson, and that the motion to set aside the satisfaction of judgment will be made upon the ground that, at the time of the purported assignment by George B. Brown of the judgment to E. A. Brown, the said George B. Brown had no interest in the judgment because of the prior assignment of the judgment to Ray D. Johnson. In the court's order granting the motion and vacating the satisfaction of judgment, it is recited that the court finds that Arthur F. Brown had knowledge of the assignment to Johnson prior to the assignment to E. A. Brown. This finding, in the absence of any record of the evidence produced before the court at the hearing of the motion, is conclusive, and would be determinative of the question involved in this appeal, if the court had before it all parties necessary to its determination. The notice of motion to vacate the satisfaction of judgment was directed to the judgment debtor and his counsel and to E. A. Brown, the second assignee.

[2] The order made by the court decrees that the assignment to E. A. Brown is void and of no legal effect. It is, however, undisputed that E. A. Brown was not before the court, and that there was no showing that he had been notified of the hearing of the motion which resulted in the rendering of an order decreeing that the assignment which had been made to him by the judgment creditor was void. In *Cramer v. Tittle*, 79 Cal. 332, 21 P. 750, the plaintiff was assignee of a cause of action for the recovery of a certain amount of money and an interest in a parcel of land and purchaser of an undivided half interest in the property which was the subject-matter of the litigation. After the rendition of a judgment in favor of plaintiff's assignor, the latter assigned the judgment to a third person, who subsequently filed a written satisfaction of the judgment. The action was instituted against the judgment debtor and the second assignee to recover one-half of the money and land awarded to plaintiff's assignor. A judgment in plaintiff's favor against both defendants was reversed; the Supreme Court holding that the judgment against the assignee of the former judg-

ment was not warranted. It was said that the simplest and most direct remedy was for the plaintiff to proceed in the court below by motion to set aside the satisfaction of judgment in the original action, and that in such a proceeding the second assignee would have been a necessary party. Respondents herein, by moving to set aside the satisfaction of judgment, utilized a simple and direct method to achieve the desired result, but the failure to give notice to the second assignee is fatal to the order which decreed the second assignment void and without legal effect.

The order is reversed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 254

PEOPLE v. COX et al.

Cr. 2112.

District Court of Appeal, Second District,
Division 2, California.

Sept. 29, 1931.

1. Criminal law ☞745.

Case will not be taken from jury merely because inference of innocence may reasonably be drawn from evidence, as well as inference of guilt.

2. Receiving stolen goods ☞8(3).

Evidence *held* sufficient to sustain conviction for unlawfully receiving stolen property of other persons.

There was evidence tending to show that one codefendant feloniously possessed personal property of other persons, knowing that it had been stolen, and there was further evidence of residence of both defendants in houses where spoils of thefts were stored, and of defendant's attempted flight and silent acquiescence in accusations of officers and admissions of codefendant.

3. Criminal law ☞1159(2).

Weight of evidence may not ordinarily be questioned upon appeal.

4. Criminal law ☞823(4).

Instruction authorizing jury's consideration of defendant's failure to account for his possession of stolen property, when considered with other instructions, *held* not erroneous, in prosecution for receiving stolen goods.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Frank Cox and another were convicted of unlawfully receiving stolen property of other persons, and they appeal.

Appeal from verdict dismissed, and judgments affirmed.

Everett W. Leighton, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J.

Upon three informations filed by the district attorney of Los Angeles county, charging the defendants with having unlawfully received stolen property of other persons, Kramer was found guilty by a jury, and Cox was convicted upon two of them. Each filed a motion for a new trial, both of which were denied, and their individual appeals from orders denying said motions, and from the judgments, were consolidated and presented upon one transcript and a single set of briefs.

[1-3] It appears that personal property which had been stolen from N. C. Gredis and Lawrence Frank was discovered at the apartment of Kramer, and property stolen from Fred E. Dilg was found at the room of Cox, in the city of Los Angeles. Officers first visited Kramer's apartment, requesting that they be admitted, whereupon the defendants fled, carrying sample cases, or suitcases, and parcels, from the rear of the premises. They "asked the defendant Cox where he got the stuff, and he said 'San Francisco.'" At the latter's lodging stolen wearing apparel allegedly of the value of \$500 was recovered. The value of property unlawfully in Kramer's possession at his abode was alleged as \$1900. All of the stolen goods were identified by salesmen as having been taken from their automobiles which had been parked or left in garages in the city of Los Angeles. The owner of a bungalow court where Cox resided testified that Kramer visited him at his home. As observed, Cox ran with Kramer from the home of the latter when the officers appeared. When apprehended they were questioned together in Kramer's apartment, as to why they ran, to which Kramer replied: "Did you think we want to be caught with this stuff?" An officer testified: "I looked in the closet, dressing room, and found 71 ladies' apparel, such as dresses, coats, about 12 or 14 hats, a dozen pair of shoes, a Luger gun on a little place back of the dresser found a rifle;" and that Kramer offered to plead guilty to a charge of receiving stolen property, stating that he was not a burglar, that "we are only small fries in this outfit. You did not get the big man, you just got the small people." It does not appear that Cox was questioned to any great extent, but witnesses swore that Kramer answered questions directed to both of the men.

and that Cox made no response. The latter was found not guilty upon the charge involving the property found in his room, and it is contended that the evidence was not sufficient to sustain the verdicts and judgments against him upon the other counts. But where there is evidence from which an inference of guilt is justified, a case will not be taken from the jury because an inference of innocence might also reasonably be drawn therefrom. The jury must choose between such inferences. *People v. Staples*, 149 Cal. 405, 86 P. 886; *People v. Muhly*, 15 Cal. App. 416, 114 P. 1017. We think the evidence was amply sufficient to warrant the conclusion that Kramer feloniously possessed the personal property of other persons, knowing that it had been stolen. The residence of both defendants in houses where the spoils of theft were stored by him, Cox's association with him, and attempted flight, together with silent acquiescence in accusations of the officers and admissions of Kramer, all were circumstances submitted under instructions of the trial court, from which the jury were vested with the duty and power to determine upon the whole case before them the question of fact as to whether or not Cox was a participant in the commission of either offense. *People v. Hay*, 74 Cal. App. 464, 241 P. 275.

It is ingeniously argued that certain of the identified stolen property discovered at the residence of appellant Cox was introduced in evidence as against Kramer only, and was thereafter stricken out; that all of the property found at Kramer's home was also introduced as to him only; hence that there was no evidence sufficient to warrant the verdict finding Cox guilty of possession, and that the people failed to prove that Kramer knew that they had been stolen. The contention is predicated upon the assumption that there were no other circumstances tending to show guilty knowledge. As herein stated, it lay with the jury to determine whether or not the acts, statements, and circumstances, coupled with the direct evidence of theft and possession, were of sufficient weight to satisfy them to a moral certainty and beyond a reasonable doubt of the defendants' guilt. The jury were instructed in accordance with section 1096 of the Penal Code that: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." The weight of evidence may not ordinarily be questioned upon appeal. Such evidence in a case not essentially dissimilar was held sufficient. *People v. Carrow*, 207 Cal. 366, 278 P. 557.

[4] The trial court instructed the jury: "If you believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, or the giving of a false account as to such possession, may be circumstances tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." This instruction is challenged as error upon the ground that it does not constitute a correct statement of the law, and appellant mainly relies upon *People v. Boxer*, 137 Cal. 562, 70 P. 671, and kindred cases relating to the crime of burglary, which are in themselves clearly distinguishable. As was said of a similar instruction in the case cited: "As already stated, the defendants were upon trial charged with burglary, and, that being the case, the mere fact, if it be a fact, that subsequent to the burglary they received the fruits of the crime into their possession, cannot be said to be a circumstance tending to show their guilt of the crime of burglary. In cases of larceny, the recent unexplained possession of the stolen property is a circumstance tending to show guilt. Probably the same may be said as to the recent unexplained possession of stolen property the fruits of a burglary, but this instruction assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties. It is very evident that nothing which these defendants could do in the way of accepting or holding the possession of the stolen property after the burglary had been committed would tend to prove their guilt of the crime of burglary." In *People v. Jacobs*, 73 Cal. App. 334, 238 P. 770, 773, wherein a hearing in the Supreme Court was denied, the rule was announced after an exhaustive examination of numerous authorities. As there stated: "If we take as a guide the cognate rule in this state concerning charges of larceny, we should possibly be justified in adopting as principles of our criminal jurisprudence each of the two rules last stated in the preceding paragraph; that is, that either, first, the possession of stolen property, when attended by other suspicious circumstances; or, second, the possession of such property, when not satisfactorily explained, will support a conviction on a charge of receiving stolen property. If we take the rule in California in cases of larceny as a guide, there is apparently no difference between the first and second principles just stated as applying to charges of receiving stolen property, for it has been determined, in larceny cases, that, where there is no explanation of his possession by a possessor, the possession alone will not justify a conviction.

but that there must be other incriminating circumstances. *People v. Reed*, 58 Cal. App. 7, 207 P. 1025. It is to be noted also that where the possessor attempts to explain, but the explanation is unsatisfactory, that is in itself a suspicious circumstance." It is not contended that the jury were instructed that a failure to explain, or the unsatisfactory attempted explanation, standing alone, would be sufficient to justify a conviction in the instant case. Other instructions, embodying all of the principles stated in the quoted authority, were given by the court, and we are not convinced that upon the whole the instruction assailed was erroneous.

From what has been said we think other instructions of which appellants complain require no further discussion, and that prejudicial error does not appear.

An appeal having been taken from the verdict, the same is dismissed. *People v. Ruiz*, 144 Cal. 251, 77 P. 907. The judgments and orders denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 155

McNEAL et al. v. FOREMAN.
Civ. 7658.

District Court of Appeal, First District, Division 1, California.
Sept. 28, 1931.

Rehearing Denied Oct. 28, 1931. Hearing Denied by Supreme Court Nov. 25, 1931.

1. Attorney and client ⇨123.

Relationship of attorney and client is one of trust, binding attorney to utmost good faith in dealing with client.

2. Attorney and client ⇨140.

Rule that attorney is limited to reasonable sum, without regard to contract for fees made during existence of relation of attorney and client applies only in special cases.

Rule applies only in special cases, as where special relations of confidence exist or where the client had no other independent adviser, or where the attorney failed to make full disclosure or secured assurance of compensation greater than was previously agreed upon.

3. Trial ⇨105(1).

In action on claim against estate evidence supporting claim received without objection or motion to strike could be considered in support of court's finding (Code Civ. Proc. § 1880, subd. 3).

Evidence was that a complete statement of the total receipts and expenses relating to the contract on which the claim was based had been given the testatrix.

4. Contracts ⇨221(3).

Under contract for services providing that plaintiffs should furnish statement of, and be reimbursed for, expenses, payment for services held not conditioned on rendering of expense statement.

Contract provided that plaintiffs should be reimbursed for all expenses incurred and paid, in addition to the payment provided for services, and a further clause of the agreement provided that the plaintiffs acknowledged receipt of \$3,000 on account of the expenses advanced and incurred, and promised to furnish a statement of total expenses and a statement of the total receipts.

5. Executors and administrators ⇨241.

Where claim against estate failed to show claimant's capacity, claimant was not estopped from timely presenting claim in due form and suing thereon after rejection within time allotted by statute (Code Civ. Proc. § 1498).

6. Contracts ⇨129(3).

Contracts wherein detective agrees to procure evidence of certain fact are void.

7. Contracts ⇨129(3).

Contracts wherein detective agrees to procure evidence sufficient to sustain definite action are void.

8. Contracts ⇨129(3).

Contract whereby detective agrees to search for witnesses or to procure existing testimony supporting or defending action held not void.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by Mabel McNeal and others against L. O. Foreman, executor of the estate of Rose Foreman, deceased. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Joe Crider, Jr., John M. Martin, and Frank L. Martin, Jr., all of Los Angeles, for appellant.

Minor Moore, Kyle Z. Grainger, and O. V. Caldwell, all of Los Angeles, for respondents.

PARKER, Justice pro tem.

This action is based on a claim against the estate of Rose Foreman, deceased, filed by plaintiffs, in the sum of \$9,000 alleged to be

due for services rendered decedent during her lifetime. Plaintiffs Dodson and Stockton are attorneys at law; plaintiff McNeal is the assignee of one Sloan, a private detective. The action is founded upon a written contract duly executed by Sloan, Dodson, and Stockton, as parties of the second part, and Rose Foreman, as party of the first part. The case was tried by the court sitting without a jury, and judgment went for plaintiffs as prayed. Defendant prosecutes this appeal, and as grounds for reversal urges four points, as follows: (1) The plaintiffs failed to affirmatively prove that the contract was fair and reasonable; there being a fiduciary relationship between the parties. (2) The plaintiffs failed to prove the performance or offer of performance of the conditions concurrent. (3) The claim of Mabel McNeal, assignee of Sloan, is barred by section 1498 of the Code of Civil Procedure. (4) The contract as to Sloan, the detective, was invalid as against public policy.

[1, 2] As to the question of the fairness of the contract under the relationship existing between the parties, little need be said. We may concede that the relationship of attorney and client is one of trust and confidence, and that the attorney is bound to the utmost of good faith and conscience in dealings with his client. In the instant case, the contract sued upon was executed upon the termination of the service, and when nothing further remained to be done in the nature of advice or service; at this point the relationship had well nigh ended. The rule that, where the relation of attorney and client already exists, when a contract is made concerning attorney's fees, the attorney is precluded from recovering more than a reasonable sum without regard to the attempted fixation of the value of such services by the agreement, is applicable only in special cases, as where special relations of confidence exist or where the client had no other independent adviser, or where the attorney failed to make full disclosure or secured assurance of compensation greater than was previously agreed upon. *Countryman v. California Trona Co.*, 35 Cal. App. 728, 170 P. 1069; *In re Estate of Mallory*, 99 Cal. App. 96, 278 P. 488.

In the case before us, plaintiffs were eager to open up the question of the fairness of the contract, but were at first precluded by the trial court; subsequently, on motion for nonsuit and the argument following, the court threw open the question at the insistence of plaintiffs, and the facts were most fully examined. The exact relationship of the parties was shown; the circumstances surrounding the service rendered and the quality and amount of service, together with the results obtained, were most minutely gone over. As a result thereof, the trial court made its finding specifically that the contract between the attorneys and their client was in all respects

fair and reasonable; that no fact or circumstance material to the rights of the client was withheld from her; that she was fully apprised of all of her rights with respect to the litigation pending and as to all of her rights against the attorneys prior to the execution of said agreement, and also the facts and circumstances known to counsel. It would serve no useful purpose to detail the facts supporting this finding. No evidence thereon was offered by the defendant, and his attack upon the finding consists wholly in an attempt to tear down the case as presented by plaintiffs and to attempt the creation of unfavorable inferences from his reconstructed version thereof. Suffice it to say that the record most amply supports the conclusion of the court below.

[3, 4] In the written agreement it was provided that the parties of the second part should be reimbursed for all expenses incurred and paid, in addition to the payment provided for services. A further clause in the agreement provides: "The parties of the second part acknowledge receipt on this date of Three Thousand (\$3000.00) Dollars on account of expenses advanced and incurred. Said parties of the second part further promise and agree to furnish party of the first part with a statement of the total expenses, and a statement of their total receipts since the date of their several employment." Appellant contends that this created a condition precedent or at least a condition concurrent, and that proof of the compliance by plaintiffs with this provision was essentially a part of both the claim presented and the cause of action thereon. Appellant contents himself with the mention of the point, and presents us with no authority in support thereof. By permission of court, the original complaint was amended to allege that the plaintiffs and each of them did and performed each and every act required to be performed by them under and by virtue of the terms of the contract. The finding of the court is specific to the point that such allegation is true. This finding is supported by direct evidence to the effect that a complete statement of the total receipts and total expenses was given the deceased. The testimony was received without objection, and no motion was made to strike; therefore it stands. *Kinley v. Largent*, 187 Cal. 71, 200 P. 937. After this testimony was in, counsel for plaintiffs proceeded to elaborate on the details, when a discussion arose concerning its admissibility under section 1880 of the Code of Civil Procedure, subd. 3. No objection of any kind was offered, even at that time; the argument going entirely to the point as to whether or not the requirement was a condition precedent or concurrent. Upon the court's holding that the provisions of the contract were severable, the subject was dropped; the net result of the entire dis-

cussion being that the record discloses affirmatively a compliance without contradiction or impeachment.

Further, the agreement on its face provides that plaintiffs were to be reimbursed for all expenses incurred, in addition to the fee agreed upon. They acknowledge that they have already received \$3,000, not in settlement of such expenses disbursed, but merely as a payment on account thereof, and obligate themselves that at some future time they will furnish a statement of the total expenses and total receipts. The two matters of fees and expenses were entirely separate. The client by the agreement acknowledges a debt due of \$9,000, without deduction or claim of set-off. The payment of the fee is in nowise conditioned upon the rendering of the statement of expense. It seems clear that, were the action against the obligee in person, she could not have defeated the same by merely claiming or showing that the statement of expense had not been rendered. Her remedy or defense would have been by way of set-off or recoupment, showing that plaintiffs were in possession of moneys paid and not accounted for, and she could have then demanded an accounting for and application of the moneys theretofore paid to or received by plaintiffs for expenses. In no sense would the rendition of the statement have been a condition precedent to the maintenance of the action. It is likewise clear that the executor would be in no different position in this respect. He had and has the same rights as his testator in demanding an accounting, and in the court below ample opportunity was offered him so to do, and he declined.

[5] The next point urged by appellant is that the claim of Mabel McNeal, assignee of Sloan, is barred by the provisions of section 1498, Code of Civil Procedure. The facts are that Mabel McNeal first presented her claim to the executor for \$3,000, which said claim was the individual claim of said Mabel McNeal for the one-third of the amount due the original three parties to the contract. This claim was rejected by the executor, and suit was brought thereon within the time allowed by statute. Thereafter the suit was dismissed and the claim withdrawn; the suit being dismissed without prejudice. Thereafter there was presented to the executor the joint claim sued upon, and, this claim being rejected, the present suit followed. Section 1498 of the Code of Civil Procedure provides: "When a claim is rejected either by the executor or administrator, or a judge of the superior court, written notice of such rejection shall be given by the executor or administrator to the holder of such claim or to the person filing or presenting the same, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice * * *

or within two months after it becomes due, otherwise the claim shall be forever barred." It is conceded that the claim forming the basis of the present action was presented within the time allowed by statute and notice to creditors.

The contract under which the claim arises is a joint contract. There is no mention therein as to the amount to be apportioned each of the obligees thereto or thereunder. The claim of Mabel McNeal, as first presented, merely set up that one Sloan had performed certain services of the value of \$10,000, and that, after deducting payments made thereon, there remained due the sum of \$3,000. That is the extent of the claim. There is no statement therein that Mabel McNeal is the assignee of Sloan nor any showing of her capacity to make the claim. On its face, the claim was not only irregular and informal, but totally without foundation of any sort to support an executor's approval. In *Palmer v. Guaranty T. & S. Bank*, 45 Cal. App. at page 577, 188 P. 302, 304, it is said: " * * * If a party makes an improper attempt to present a claim to an administrator, particularly where it is so defective as to be insufficient to constitute the basis for a cause of action, he is not estopped from presenting one in due form, if within proper time, and upon which an action may be based." Citing *Warren v. McGill*, 103 Cal. 153, 37 P. 144; *Westbay v. Gray*, 116 Cal. 660, 48 P. 800.

It seems quite clear that the only right or claim that Mabel McNeal may have had against the estate was as the assignee of Sloan. As an individual, without the assignment, she had no claim whatsoever under the contract. It is equally clear that, if Mabel McNeal had gone to suit on the first claim, and had been unable to prove the assignment, and had thereby suffered a nonsuit, a subsequent procurement of the assignment would have served as the basis for the filing of a separate claim enforceable after rejection without regard to the prior proceedings. The claim as presented, in the absence of any claim of assignment, was insufficient to constitute a basis for any cause of action, coming clearly within the rule of the cited cases permitting the filing of a new claim. The entire scheme of probate looks to the payment of all just debts of the decedent, and goes to the extreme in protecting the estate against unjust or unlawful demands. But the law has never gone so far as to penalize, to the extent of his claim, one who through mistake or inadvertence files a claim so lacking in detail as to preclude its allowance.

[6-8] Lastly, it is urged by appellant that the claim of Sloan, assignor of McNeal, is void as against public policy. As hereinbefore noted, the service rendered by Sloan and for which the compensation is claimed was service as a detective. Appellant cites

many cases in support of his contention, but the same have no application to the facts. There are many contracts wherein a detective agrees to procure evidence of a certain fact, or evidence sufficient to sustain a definite cause of action. These contracts have uniformly come within the ban of the law. But the contract in the present case was of an entirely different character. The following, from *Hare v. McGue*, 178 Cal. at page 742, 174 P. 663, 664, L. R. A. 1918F, 1099, most aptly fits the case before us: "Now, while appellant sets forth quite extensively * * * cases * * * in support of these principles, he does not point out how the particular contracts entered into between the plaintiff and appellant * * * are brought under the ban of the rule, and our examination of the findings and the evidence show no analogy between the facts as recited in the cited cases and the case at bar. Certainly there is no rule of law which precludes a party in a divorce action or in any other action, from employing a person to do detective work, or in a divorce action itself to search for witnesses or to procure existing testimony either to support or defend such an action, or to acquire information of the past conduct or life of either spouse, or, to set a watch upon the personal acts or associates of either. Any one has a right, when threatened with litigation, or desiring himself to sue, to employ assistance with a view of ascertaining facts as they exist, and to hunt up and procure the presence of witnesses who know of facts and will testify to them; and this is true whether the action be one of divorce or of any other character."

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 252

PEOPLE v. FOSTER.

Cr. 2089.

District Court of Appeal, Second District,
Division 2, California.

Sept. 29, 1931.

1. False pretenses ☞49(1).

Conviction of grand theft by inducing prosecuting witness to purchase defendant's business by false representations *held* supported.

2. False pretenses ☞9.

If jury believed defendant with fraudulent intent made misrepresentations inducing prosecuting witness to part with something

of value, jury were required to convict defendant of grand theft.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

James B. Foster was convicted of grand theft, and he appeals.

Affirmed.

Buel R. Wood, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

CRAIG, J.

The appellant was found guilty by a jury of the crime of grand theft, a felony, and appealed from the judgment entered accordingly.

Witnesses who testified on behalf of the people swore that Foster represented to prospective purchasers of a place of business in Los Angeles county that the daily returns therefrom were remunerative and profitable; that he induced them to observe from a nearby vantage point the large patronage of his establishment and to form their own conclusions as to the truthfulness of his said representations, stating that he received all of the custom from an adjoining hotel, and that the business was a success. In reliance upon such statements and apparently attractive clientele, the complaining witness purchased appellant's business. From evidence of the purchaser, certain patrons, and others, and from actual accounts, it appeared that the custom during negotiations was principally fictitious, that appellant conspired with various persons to visit his store, with the agreement that he had "suckers outside in an automobile ready to buy," and that no charge would be or was in fact made for service at such times. The earnings prior to the sale were much less than the daily amounts stated, and thereafter the business was found to be a failure rather than a success.

[1, 2] The ground assigned for reversal is an asserted insufficiency of the evidence to sustain the judgment, and it is argued that since appellant did not guarantee the volume of trade to the purchaser which might be expected after sale, and in the absence of a showing that the latter did not receive returns equal to the represented volume of sales, that no offense was shown to have been committed.

It was not charged that the defendant misrepresented the future prospects of said business other than by falsely portraying a worthless project as an attractive investment, in response to the buyer's insistence that he be furnished with knowledge as to true conditions. If the jury believed that the

defendant, with intent to defraud, knowingly made false representations of an existing fact, for the purpose and with the effect of inducing the prosecuting witness to part with something of value, it was their duty to find him guilty. *People v. Jordan*, 66 Cal. 10, 4 P. 773, 56 Am. Rep. 73. The representation as to volume of business and the falsity of its character might well have been inferred from all of the evidence. It was a representation and statement of present or past fact by which appellant intended to convey, and did convey, the idea that he had a remunerative business which was of some magnitude. It may have been deemed a material factor in leading the purchaser to believe that he would make large profits if he accepted appellant's offer. *People v. Walker*, 76 Cal. App. 192, 244 P. 94.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 145

JOHNSON v. JOHNSON.

Civ. 8092.

District Court of Appeal, First District,
Division 2, California.

Sept. 26, 1931.

1. Attorney and client ☞92.

In absence of fraud, a client is bound by act of her attorney in waiving findings in conducting her case (Code Civ. Proc. § 283).

2. Attorney and client ☞92.

Client present and unprotesting when attorney waived findings, there being no fraud, could not complain (Code Civ. Proc. § 283).

3. Divorce ☞184(5).

Court's action upon application for motion to set aside interlocutory decree for divorce, being discretionary, will not be disturbed unless abuse of discretion is clearly shown.

Appeal from Superior Court, Los Angeles County; Harry E. Archbald, Judge.

Action for divorce by Charles A. Johnson against Lulu E. Johnson, who filed a cross-complaint. From an order denying motion to set aside interlocutory decree of divorce, the defendant appeals.

Affirmed.

Carroll Allen, of Los Angeles, for appellant.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff commenced this action for divorce charging extreme cruelty upon the part of his wife. Defendant answered, denying the allegations of the complaint and filed a cross-complaint for maintenance and charging that plaintiff, her husband, had inflicted extreme cruelty upon her. On July 15, 1929, the case came on regularly for trial, both parties to the action being represented by counsel and the defendant being personally present in court. Thereupon evidence upon the part of both plaintiff and defendant was produced before the court. Judgment was given for the plaintiff as prayed and an interlocutory decree was duly entered. Findings were waived by the respective parties.

On September 19, 1929, appellant filed a motion to set aside the said interlocutory decree upon the ground that it was entered against appellant through her mistake, inadvertence, and excusable neglect, and in support of her motion she filed her affidavit to the effect that at the trial of said action she was represented by G. R. Lessing and that said Lessing waived findings, that she did not consent thereto, nor did she know that if said findings were waived that an appeal could not be taken except upon the judgment roll. That she desires to appeal, but is advised that any appeal would be futile in the present condition of the record, and that said waiver of findings was taken against her through mistake, inadvertence and excusable neglect.

A counter affidavit was filed by G. P. Adams, respondent's attorney, to the effect that appellant's attorney, G. R. Lessing, announced in open court and in the presence of appellant that findings would be waived in said case and that a stipulation so stating was duly signed and filed in said action. The motion was denied, and from the order denying the said motion this appeal is prosecuted.

[1-3] Section 283 of the Code of Civil Procedure provides that: "An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." In the absence of fraud the acts of an attorney in the ordinary conduct of a case will bind his client, *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Simpson v. Budd*, 91 Cal. 488, 27 P. 753; *Clemens v. Gregg*, 34 Cal. App. 245, 167 P. 294; and he may waive findings, *Dougherty v. Friermuth*, 68 Cal. 240, 9 P. 98. Appellant was present in court when her attorney agreed to the waiver of findings and made no protest against such waiver, nor does she claim that the said waiver was brought about through fraud or collusion. We find nothing in her motion nor in her af-

fidavit supporting same nor in the record which would justify a reversal. So far as anything to the contrary is shown, she had a full and fair trial on the merits of the case. An application of this kind is addressed to the sound legal discretion of the court, and its action in granting or denying the prayer of appellant will not be disturbed unless clear abuse of such discretion is shown. *Mills v. Mills*, 101 Cal. App. 248, 281 P. 707; *McDonald v. McDonald*, 173 Cal. 175, 159 P. 426; *Cottrell v. Cottrell*, 83 Cal. 457, 23 P. 531.

Appellant has not shown any abuse of discretion on the part of the trial court; therefore the order denying the motion is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 298

**WASCO CREAMERY & CONSTRUCTION
CO. v. COFFEE et al.**

Civ. 8089.

District Court of Appeal, First District, Division 2, California.

Oct. 1, 1931.

As Modified on Denial of Rehearing Oct. 30, 1931. Hearing Denied by Supreme Court Nov. 30, 1931.

1. Frauds, statute of *§* 56(2).

Oral agreement is insufficient to transfer title to realty (Civ. Code, *§* 1091).

2. Escrows *§* 13.

Deeds placed in escrow, when finally delivered after fulfillment of conditions, relate back to date of execution, and parties have same rights as though deeds had then been delivered.

3. Mechanics' liens *§* 57(1).

Since trust deed executed solely to secure debt conveys legal title only so far as necessary to execution of trust, trustor is "owner" as regards mechanic's lien (Civ. Code, *§§* 865, 866; Code Civ. Proc. *§* 1186).

Under trust deed executed solely to secure debt, legal title is conveyed only for purpose of security, leaving in trustor or his successors a legal estate in the property, as against all persons except trustees and those lawfully claiming under them, and hence with that exception, trustor or his successor is holder of the legal title.

[Ed. Note.—For other definitions of "Owner," see Words and Phrases.]

4. Mortgages *§* 173.

Unrecorded trust deed is "lien or other incumbrance" within statute giving priority to mechanic's lien claimant who begins work

without notice thereof (Code Civ. Proc. *§* 1186).

[Ed. Note.—For other definitions of "Lien," see Words and Phrases.]

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the Wasco Creamery & Construction Company against Samuel W. Coffee and others. From a judgment granting partial relief, plaintiff appeals.

Affirmed in part, and reversed in part.

E. H. Hoar, of Bakersfield, for appellant.

Bernard Dauser, Barbara Dauser, and William J. M. Heinz, all of Anaheim, for respondents.

JAMISON, Justice pro tem.

Plaintiff brought this action to foreclose a mechanic's lien growing out of a contract for the remodeling of a four-room cottage by adding thereto three rooms and thereby making it a seven-room cottage. Defendants Samuel W. Coffee and Audrey B. Coffee defaulted, and judgment was rendered against them for the debt alone and judgment went for the other defendants to the effect that plaintiff had no lien against the property. Plaintiff moved for a new trial and, same being denied, prosecuted this appeal.

It is not denied that appellant furnished labor and material upon the building in question under said contract with said defendant Coffee, said contract having been entered into on June 13, 1927, and that work under said contract was commenced on July 6, 1927, and completed about July 25, 1927. The property which is the subject of litigation was formerly owned by respondents Dauser and wife, and some time prior to the contract between Coffee and appellant, they had sold it to W. H. Jones under a contract of sale. Some time in the early part of June, 1927, Coffee and Jones entered into negotiations for the exchange by Jones of his interest under said contract of sale for certain property belonging to Coffee at San Luis Obispo. Pursuant to these negotiations there were executed on June 17, 1927, a quitclaim deed from Jones to Dauser and wife and a grant deed from Dauser and wife to Coffee, also a deed of trust for \$8,000 from Coffee to Dauser and wife, respondent; First National Bank of Anaheim being named as trustee therein. All of these instruments were placed in escrow to be recorded when a search of the records showed the title to the property to be in Coffee. Thereafter search of the records having been made and the title found to be in Coffee all of said instruments were released from escrow and filed for record on July 13, 1927.

[1-4] Respondents contend that Coffee was not the owner of the building upon which ap-

pellant claims a lien, nor of the land upon which the building is situated, either at the time the contract was entered into between Coffee and appellant or at the commencement of the work under said contract. On the other hand, appellant claims that Jones' equity in the property had been transferred to Coffee by Jones in exchange for property owned by Coffee in San Luis Obispo prior to said contract. It does not appear that Jones ever assigned to Coffee the said contract of purchase which he had received from Dauser and wife. The fact that Jones executed a quitclaim deed to Dauser and wife, which was one of the instruments that was placed in escrow, would indicate that Jones did not assign the said contract of purchase to Coffee. From these circumstances the inference would arise that Jones and Coffee merely had a verbal agreement for the transfer to Coffee of Jones' interest under the contract of purchase. An oral agreement is not sufficient to transfer title to real property. Section 1091, Civ. Code; *Cranmer v. Porter*, 41 Cal. 462. Deeds placed in escrow, when finally delivered after the conditions of the agreement have been fulfilled, relate back to the date of their execution, and the rights of the parties are the same as though the deeds had been delivered upon such date. *Marr v. Rhodes*, 131 Cal. 267, 63 P. 361; *Whitney v. Sherman*, 178 Cal. 435, 173 P. 931; *Hawi Mill, etc., Co., Ltd., v. Finn*, 82 Cal. App. 255, 255 P. 543. It appears to be the well-settled law in this state that the trustee in a deed of trust is vested with the entire estate. *Bayer v. Hoagland*, 95 Cal. App. 403, 412, 273 P. 58; *Weber v. McCleverty*, 149 Cal. 316, 86 P. 706; *Anglo-California Trust Co. v. Oakland Rys.*, 193 Cal. 464, 225 P. 452. But where the deed of trust is executed solely for the purpose of securing a debt, it conveys the legal title to the trustee only so far as may be necessary to the execution of the trust. *MacLeod v. Moran*, 153 Cal. 97, 94 P. 604, 605; *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 100 P. 698; *Wyser v. Truitt*, 95 Cal. App. 727, 273 P. 147. In the case of *MacLeod v. Moran*, supra, which was a case where the deed of trust was given to secure a debt, Judge Angellotti delivering the opinion of the court said: "The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. [Citing authorities.] The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Sections 865, 866, Civ. Code. Except as to the trustees and those holding under them, the

trustor or his successor is treated by our law as the holder of the legal title. *King v. Gotz*, 70 Cal. 236, 11 P. 656. The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust."

Therefore, the title to said property was vested in Coffee on June 17, 1927, except for such title as the trustee in the deed of trust held for the purpose of carrying out the said trust and in contemplation of law Coffee was the owner of said property when appellant commenced work on the said building. Section 1186 of the Code of Civil Procedure provides in substance that mechanics' liens are preferred to any lien that may have attached subsequent to the time when the building or improvement was commenced; also to any lien, mortgage, or other incumbrance of which the lienholder had no notice or which was unrecorded at the time the building or improvement was commenced. In the case of *Fickling v. Jackman*, 203 Cal. 657, 265 P. 810, 812, the court said: "By a long line of decisions in this state a deed of trust is a lien or other incumbrance within the meaning of that section. The general rule is stated to be: 'Accordingly, if recorded before any work is done or materials are commenced to be furnished, a trust deed is in the ordinary course of things prior to mechanics' liens.'" In the case under consideration the work was commenced on the building on July 6, 1927, but the deed of trust was not recorded until July 13, 1927. The trial court found that Dauser and wife were the owners of said property until July 13, 1927, upon which date they transferred it to Coffee and wife and simultaneously with said transfer Coffee and wife transferred the legal title thereof to the trustee named in said deed of trust. The court further found that the above facts concerning the title of said property were known to appellant at the time of entering into the contract with Coffee and that with such knowledge it furnished the material and performed the work for Coffee and that it looked to him personally for payment for said work and material.

H. C. Hull, president of the appellant company, testified on behalf of said company that he entered into the agreement with Coffee for remodeling the cottage; that Coffee was then residing on the property and stated that he had purchased it, that he had made a payment in the way of trading some other land that he owned, and that he had a deed for the property. On cross-examination Hull testified that he was informed by the Wasco Branch of the Bank of Italy that Coffee's papers were in escrow; that he was purchasing the prop-

erty and had made a material payment on it. It was stipulated that the deeds and the deed of trust were placed with the Abstract Title Company of San Luis Obispo, who in turn placed them with the Kern County Abstract Company for the purpose of passing on the title. He further stated that at no time prior to July 13, 1927, did appellant know that the respondent First National Bank of Anaheim, the trustee in the deed of trust, had or claimed any interest in said property. The finding of the trial court that appellant had knowledge of the existence of the said deed of trust before commencing work on said building is not only not supported by evidence, but is also contrary to it.

The trial court also found that Dauser and wife were the owners of the said property up to the time the deeds were released from escrow on July 13, 1927. This finding is contrary to the evidence. Coffee became the owner of said property at the date of the execution of the deed to him from Dauser and wife and continued to be such owner until the sale under the deed of trust late in July, 1927. It is true that the deed of trust took effect at the same time the deed to Coffee from Dauser and wife became effective, but the execution of the deed of trust did not destroy Coffee's ownership of said property except so far as was necessary to carry out the purposes of the trust.

That part of the judgment decreeing that the said premises are free from the lien of appellant and adjudging costs to respondent is reversed, and that part thereof giving to appellant a judgment against Samuel W. Coffee and Audrey B. Coffee for the sum of \$1,429.54 is affirmed, appellant to recover costs of appeal.

We concur: NOURSE, P. J.; SPENCE, J.

PEOPLE v. FEWKES. *

Cr. 2119.

District Court of Appeal, Second District, Division 2, California.

Sept. 29, 1931.

Rehearing Denied Oct. 14, 1931. Hearing Granted by Supreme Court Oct. 30, 1931.

1. Criminal law ☞1023(12).

Order, made after appeal, that judgment be modified to show prior conviction, *held* appealable as affecting defendant's rights, although not constituting "resentence" (Pen. Code, §§ 969a, 1237).

"Sentence" is a term used to designate the final determination and order of a trial court in the presence of the defendant and his counsel, pronouncing judgment and directing the same to be carried into execution, being more than mere judgment in favor of people, and includes imposition of a punishment or enforcement of a penalty.

[Ed. Note.—For other definitions of "Sentence," see Words and Phrases.]

2. Criminal law ☞1083.

Order, made after appeal, for modification of judgment so as to conform record to facts, *held* within court's jurisdiction.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John B. Fewkes was convicted of grand theft, and, from the conviction and from an order permitting the filing of a supplemental information charging prior conviction, he appeals.

Affirmed.

See, also, 298 P. 840.

Wm. J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CRAIG, J.

After verdict, judgment, and notice of appeal therefrom, based upon charges of grand theft, a supplemental information alleging a prior conviction was filed against the appellant. To the last-mentioned charge pleas of not guilty and once in jeopardy were entered, and a motion to strike said supplemental complaint from the files was interposed, which motion was denied. Thereafter the prior conviction was admitted, but objections were made that it had been discovered before sentence was pronounced, and that the appeal had deprived the trial court of jurisdiction to entertain the supplemental information. Each of these contentions was overruled, and it was ordered and adjudged that the original judgment and sentence be "modified by adding thereto the phrase 'and having theretofore been convicted of a felony as charged in the supplemental information.'" The defendant thereupon appealed from "the judgment this day pronounced by the court upon the supplemental information heretofore filed." The grounds of objection below are here urged for reversal.

[1] A careful perusal of the record seems to reveal a substantial basis for deeming the action of the court an order or judgment affecting the rights of the defendant, rendering it appealable within the contemplation of section 1237 of the Penal Code, and that the

notice of appeal was sufficient. *People v. O'Brien*, 4 Cal. App. 723, 89 P. 438; *People v. Perez*, 9 Cal. App. 265, 98 P. 870; *In re Mayen*, 49 Cal. App. 531, 193 P. 813; *People v. Godfrey*, 100 Cal. App. 91, 279 P. 1030.

The provisions of section 969a of the Penal Code which are here pertinent read as follows: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said indictment or information shall be forthwith amended to charge such prior conviction or convictions, and such amendment may and shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary. Defendant shall promptly be re-arraigned on such information or indictment as amended and be required to plead thereto. Whenever after sentence, and before the sentence has expired, it shall be discovered that the indictment or information on which defendant was convicted did not charge all felonies of which defendant had theretofore been convicted, either in this state or elsewhere, it shall be the duty of the district attorney of the county wherein defendant was sentenced to cause to be filed a supplemental information setting up such prior conviction or convictions. * * * Defendant shall thereupon be arraigned upon such supplemental information and be required to plead thereto. * * * If defendant admit the prior conviction or convictions charged, the court shall resentence him to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence. * * *

It can readily be inferred that the original information did not contain a charge of the prior conviction for a felony, that it was not amended previously to conviction and appeal in the instant case, and that the fact of prior conviction was discovered but not alleged as a basis for resentence before sentence was pronounced. It is contended that the quoted statute did not permit of the charging of a prior conviction after sentence, which had been discovered previously thereto. However, from the view which we are compelled to take, we think the discussion of this question may not be necessary nor warranted. While, as observed, an attempted amendment of the original information would have been late, it appears that, notwithstanding the appeal, the trial court still retained physical possession and control of the record, and directed that it be made a part of the proceedings before it. It has been held that in such event the superior court is vested with jurisdiction to conform its record to the facts. *People v. Romero*, 18 Cal. 90; *People v. Mur-*

back, 64 Cal. 369, 30 P. 608; *People v. O'Brien*, 4 Cal. App. 723, 89 P. 438.

[2] The question of moment, and which seems controlling, is as to whether or not the order itself constituted such compliance with the statute as to permit of its effective execution. Upon admission of the prior conviction, it became the duty of the trial court to "resentence him to the sentence which would have been legal" had the same facts been properly before it in the first instance. If the judgment be sufficiently clear to show that it was a pronouncement of sentence by the court for the offense punishable, and the penalty thereby imposed be authorized by law, the demands of the statute may be held to have been satisfied in that respect. *People v. Camp*, 42 Cal. App. 411, 183 P. 845. But the judgment must be definite and certain in its terms, so that the penalty may be ascertained therefrom. *Ex parte Murray*, 43 Cal. 455. "Sentence" is a term used to designate the final determination and order of a trial court, in the presence of the defendant and his counsel, pronouncing the judgment and directing that the same be carried into execution. *Noel v. State*, 17 Okl. Cr. 308, 188 P. 688; *Ex parte Fisher*, 95 W. Va. 397, 121 S. E. 287; *Stewart v. Stewart*, 93 N. J. Eq. 1, 114 A. 851. It is more than merely a judgment in favor of the people, and includes the imposition of a punishment or enforcement of a penalty. *Commonwealth v. Bishoff*, 13 Pa. Co. Ct. R. 503. It denotes the action of the court before which a trial has been had, declaring the consequence to a convict of the fact of guilt, ascertained by a jury or by the court. *People v. Adams*, 95 Mich. 541, 55 N. W. 461; *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699; *Munkley v. Hoyt*, 179 Mass. 108, 60 N. E. 413; *State ex rel. Butler v. Moise*, 48 La. Ann. 109, 18 So. 943, 35 L. R. A. 701. It has been defined as the judicial declaration of the consequence of the fact of guilt confessed or ascertained by verdict. *People v. Jenkins*, 322 Ill. 33, 152 N. E. 549. The section of the Penal Code under consideration does not permit of the modification or amendment of a judgment. Yet here the record discloses no attempt to do more than order that the original judgment be modified. That the appellant was ever "resentenced" as unquestionably intended by the statute is not contended by either party, nor can it be so held under any authority of which we are aware. However, as heretofore observed, the Superior Court cannot be said to have exceeded its jurisdiction in modifying an existing judgment in such a case.

The order and judgment from which this appeal was taken are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 280

FULLER v. HARWELL et al.

Civ. 490.

District Court of Appeal, Fourth District, California.

Sept. 30, 1931.

1. Husband and wife ⇨264, 268(2).

Evidence sustained finding that live stock was wife's separate property, rather than community property, and therefore not subject to levy of execution under judgment against husband.

2. Appeal and error ⇨1011(1).

Trial court's findings upon conflicting evidence are conclusive.

3. New trial ⇨105.

Affidavits supporting motion for new trial upon ground of newly discovered evidence which simply impeached adversary's testimony and was cumulative *held* insufficient to authorize granting motion for new trial.

Affidavits were insufficient to authorize granting motion for new trial because of newly discovered evidence, since the record failed to disclose that the evidence was newly discovered, or that it was unknown to the plaintiff prior to the trial, and that any diligence was used to produce this evidence at the trial, or that it could not with reasonable diligence have been produced at the trial.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Arthur Fuller against Sue Harwell and husband. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. L. Seville, of Brawley, for appellant.

Hickcox & Trude, of El Centro, for respondents.

MARKS, J.

On or about June 13, 1927, plaintiff recovered a judgment against the defendant T. J. Harwell. On May 9, 1928, an execution was issued and a levy made upon the live stock described in plaintiff's complaint in the action now here on appeal. The defendant Sue Harwell filed a third-party claim against which the plaintiff indemnified the sheriff. Thereupon Mrs. Harwell gave an undertaking pursuant to the provisions of the Code of Civil Procedure (sections 710, 710½ et seq.), and the property was released to her.

This action was subsequently filed, and the only issue involved here is whether or not this personal property so released was the

separate property of the defendant Sue Harwell, or the community property of both defendants, and therefore subject to the levy of the execution. The trial court found that the property was the separate property of Mrs. Harwell, and rendered a judgment in accordance with such finding.

[1, 2] The case comes before us upon a bill of exceptions in which the only specification of error is that the evidence is insufficient to sustain the finding of the trial court that the personal property described in the complaint was not community property of the defendants, but was the separate property of Mrs. Harwell.

There is evidence in the record which discloses that in the year 1924 Mrs. Harwell was given young turkeys by her brother, which turkeys she later sold for about \$300. She invested a small portion of this money in hogs, which she sold in a few months for \$350. She reinvested a small portion of this money in more hogs in 1925. She was given other young turkeys and young heifer calves. From the profits on these adventures she accumulated additional dairy cows, and in June, 1927, had some of the hogs, dairy cows, and about \$700 in cash. She purchased additional dairy cows for \$1,700, using the \$700 profits from the former transactions and \$1,000 which she borrowed from a bank upon her note secured by a chattel mortgage upon the hogs and cows she already possessed and the ones which she was purchasing. There is evidence that the loan was made to her upon the sole security of the live stock described in the mortgage. This evidence is ample and sufficient to support the finding of the trial court that the cattle and hogs were her separate property. Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092; Tennyson v. Beggs, 176 Cal. 255, 168 P. 140; Oldershaw v. Matteson, etc., Co., 19 Cal. App. 179, 125 P. 263. While there is some testimony in the record contradicting the foregoing, we are not concerned with conflicts of evidence on this appeal, but are bound by the conclusions of the trial court when it resolved that conflict against the plaintiff and in favor of the defendants.

The plaintiff further complains that the trial court erred in denying his motion for a new trial, and in this connection urges that an order of the trial court striking out certain affidavits filed in support of the motion was erroneous.

[3] One of the grounds of the motion for new trial was newly discovered evidence, in support of which plaintiff filed three affidavits. The bill of exceptions shows that these affidavits were read to the trial court and the motion argued on April 25, 1930, when it was taken under advisement. On April 30,

1930, the motion was denied, and upon motion made by the defendants the affidavits were stricken from the record.

Disregarding the defendants' objection that these affidavits, and the ruling of the trial court striking them from the record, are not properly before this court, we have examined the affidavits and find them insufficient to furnish a ground for granting the motion for new trial because of newly discovered evidence. "It has been held that the application must show affirmatively that the evidence is new, material and not cumulative; that the applicant used due diligence in preparing his case for trial; and that the new evidence was discovered after the trial, and will be important and tend to prove facts which were not directly in issue on the trial, or were not then known or investigated. An affidavit is insufficient if it does not show that the evidence claimed to be newly discovered was discovered since the trial, or in what particular it is material, or what important fact it would tend to establish, or that due diligence was used, or why it could not with reasonable diligence have been discovered and produced at the trial." 20 Cal. Jur. 183. The record fails to disclose that the evidence was newly discovered or that it was unknown to the plaintiff prior to the trial, and, further, that any diligence was used to produce this evidence at the trial, or that it could not, with reasonable diligence, have been produced at the trial. The evidence set forth in the affidavits simply impeaches certain testimony introduced on behalf of the defendants and was cumulative of other evidence of the plaintiff.

The trial court's ruling in denying the motion for new trial was correct, and its order striking the affidavits from the record, if erroneous, was not prejudicial to the plaintiff.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 270

MONARCH METAL WEATHER STRIP CO.
v. CLYNICK et al.
Civ. 8060.

District Court of Appeal, First District,
Division 2, California.
Sept. 30, 1931.

1. Mechanics' liens §154(2).

Mechanic's lien claim signed and verified by claimant's attorney, and stating that claim was true, *held* sufficiently verified (Code Civ. Proc. § 1187).

2. Mechanics' liens §93.

Substitution of fiber for wire brush in brushing exterior of building *held* not to preclude enforcement of mechanic's lien, since not breach of contract.

Substitution of fiber brush for wire brush did not constitute breach of contract, since there was no evidence that fiber brush used did not effect same results in removing loose particles from walls, which was the purpose of the brushing, that would have been effected if wire brush had been used.

3. Mechanics' liens §281(1).

Evidence established building was coated with waterproof paint, and that painting was done in workmanlike manner, entitling claimant to enforce mechanic's lien.

4. Mechanics' liens §93.

Claim for mechanic's lien could not be defeated because walls of building were not made waterproof, where owners made no complaint to claimant under contract.

Contract provided that materials and workmanship furnished by claimant for mechanic's lien was guaranteed to be waterproof and damp proof for period of five years, and that, should any leak or dampness come through, the claimant would make necessary repairs to rectify the same, and there was no evidence that the owners ever notified the claimant that dampness had appeared.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by the Monarch Metal Weather Strip Company against Lulu W. Clynick and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

William G. Allen, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This is an action to foreclose a mechanic's lien. The complaint alleges that defendants contracted in writing with plaintiff to have some painting and repair work done on property belonging to them; that plaintiff duly performed the work and furnished the necessary material in accordance with said contract; that the sum of \$728 is due and owing it from defendants; that a claim of lien was duly filed. Defendants answered denying plaintiff had performed said work in accordance with said contract or that defendant J. L. L. Clynick had any interest in said prop-

erty, or that defendant Lulu W. Clynick ever entered into any agreement with plaintiff for said work. Defendants also filed a cross-complaint wherein they alleged that plaintiff performed said work in such an unworkmanlike manner as to leave the walls in an unsightly condition, to defendants' damage in the sum of \$5,500. Plaintiff had judgment as prayed for. A motion for new trial was filed and denied, and defendants appealed.

[1] Appellants' first contention is that the complaint does not state a cause of action for the reason that the claim of lien is not a valid claim in this, that it was not signed and verified by respondent or by any of its officers. We find no merit in this contention. Section 1187 of the Code of Civil Procedure provides that the claim must be verified by the oath of the claimant or some other person. In the case of *Arata et al. v. Tellurium Gold & Silver Mining Co.*, 65 Cal. 340, 4 P. 195, 344, the Supreme Court used the following language regarding such verification: "It does not require that the verification shall be in form like that attached to a pleading; indeed, such form would probably not comply with the requirement of the section. The affidavit attached to each claim is that the same 'is true.' The omission to state 'of his own knowledge' is not a defect." *Parke & Lacy Co. v. Inter Nos, etc., Co.*, 147 Cal. 490, 82 P. 51; *Reed v. Norton*, 90 Cal. 590, 602, 26 P. 767, 27 P. 426; *Jones v. Kruse*, 138 Cal. 613, 72 P. 146. The claim in the case under consideration was signed and verified by plaintiff's attorney, and stated that it was true. This met the requirement of said section 1187. Besides, appellants admit by their answer that the claim of lien was duly verified.

The contract for the work provided: (1) Wire brush all stained portions of exterior magnesite walls and remove loose particles. (2) Repair and fill all cracks with waterproof noncracking filler sold under name of Hydro-Seal by the Paraffine Cos., Inc. (3) Calk between wood and stucco of all door and window frames with Kuhl's Elastic Ship Seam Calking Compound. (4) Thoroughly coat all exterior magnesite with two coats of Pabco Stucco Paint No. 6403 (Travertine color). (5) All woodwork and trim, including shed in rear, to receive one coat of grade A lead and oil paint. Trim to have terra cotta color, and door sills to have steel gray color. Lamp posts, iron grille work and staff work to be painted. (6) When units are repapered, to apply two coats of Pabco Clear Waterproofing to stained walls prior to hanging of new paper. (7) Fill cracks between parapet walls and roof. Guaranty: All material and workmanship furnished guaranteed to be waterproof and damp proof for a period of five years from date of completion of work. Should any leaks occur or dampness come through,

respondent will make all necessary repairs to rectify same free of costs.

[2] Appellant claims that respondent did not wire brush the exterior walls, and that by its failure to do so it breached the contract. C. J. Wilbur, respondent's foreman, testified that they did not use the wire brush for the reason that the wire brush did not take hold, but rode over the top; that the purpose of wire brushing is to remove loose particles from the wall. Finding that the wire brush did not accomplish that purpose, they use a cocoa broom with stiff bristles instead. C. H. Zeus, president of the respondent company, testified that the reason the wire brush was not used was because it would not take hold and that they used a heavy fiber brush to get off the loose particles and they brushed the walls several times. There is no evidence that the substitution of the cocoa broom for the wire brush, in brushing the exterior walls, did not effect that same result in removing the loose particles that would have been effected had the wire brush been used.

[3] The next contention of appellant is that the cracks were not filled with waterproof filler. There is no merit in this contention. Respondent produced evidence that the cracks were filled with waterproof noncracking filler sold under the name of Hydro-Seal by the Paraffine Company, as called for by the contract. Appellant claims that the walls were not coated with waterproof paint, nor was the paint and trimming done in a good and workmanlike manner. There was evidence on the part of respondent to the effect that, not only were two coats of Pabco stucco paint placed upon the exterior magnesite walls, but, owing to the insistence of appellant Lulu W. Clynick, who was the owner of the property and who was present during the larger part of the time while the work was being performed and who was not satisfied with the color, in the endeavor to satisfy her, that it caused three coats of said paint to be put on some of the said walls and four on the others.

[4] Lastly, appellants contend that the walls were not made waterproof or damp proof. The contract provides that the material and workmanship furnished by respondent is guaranteed to be waterproof and damp proof for a period of five years from date of completion of work, and, should any leak or dampness come through, respondent will make all necessary repairs to rectify same. There is no evidence that appellants ever notified respondent that dampness had appeared on any work that they had done, nor in fact that such condition existed prior to the commencement of this action, nor that respondent ever refused to carry out this part of the contract.

Appellants complain that the filled cracks upon the exterior walls present a checker

board effect that renders its appearance unsightly. While there is nothing in the contract requiring respondent in any manner to prevent these cracks from showing otherwise than filling them and painting them in a workmanlike manner, still the evidence shows that respondent did everything that could be reasonably done to cover them up.

We find nothing to justify a reversal, and therefore affirm the judgment.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 266

NEUDECK v. VESTAL (two cases).
Civ. 7581.

District Court of Appeal, First District, Division 1, California.
Sept. 30, 1931.

1. Physicians and surgeons ⇨18(10).

Instructions in malpractice action relating to obligations of physicians and surgeons *held* proper.

Court instructed that physician or surgeon possessing requisite qualifications and applying his skill and judgment with care, in making diagnosis, in prescribing treatment, or in determining on operation, where there is reasonable doubt as to nature of physical condition involved, or as to what should be done in accordance with recognized authority and good current practice, is not liable for damages consequent on honest mistake or error of judgment, and further that, where physician possesses and exercises the requisite degree of care and skill which is possessed and used by physicians practicing in same or similar localities, he is not responsible for mistake or error of judgment.

2. Physicians and surgeons ⇨14(4).

Physician exercising requisite care and skill used by physicians practicing in same or similar localities is not responsible for mistake of judgment.

3. Physicians and surgeons ⇨15.

Physician is not negligent in allowing intervals to elapse between visits to patient needing no attention during intervals.

4. Physicians and surgeons ⇨15.

Physician is negligent in allowing intervals to elapse between visits to patient where attention is needed.

5. Physicians and surgeons ⇨14(4).

Question as to attention needed by patient depends on custom or practice of reputable physicians in that locality in treatment of injuries.

6. Appeal and error ⇨1064(1).

Instruction that physician was sole judge of frequency and necessity of calls on patient *held* not prejudicial under circumstances.

Circumstances disclosed that, although action was one for harmful neglect, there was no claim that physician's visits were not sufficiently frequent, but only that physician neglected to give patient proper treatment while in attendance.

7. Physicians and surgeons ⇨18(10).

Court's instruction in malpractice case on sufficiency of evidence to show negligence *held* not misleading (Code Civ. Proc. § 2061, subd. 5).

Instruction that negligence of physician must appear by clear and satisfactory evidence, mere conjecture, surmise, or suspicion not being sufficient, and that, if evidence was such that jury could not conclude that negligence had been satisfactorily shown, verdict should be for physician, was not misleading, even in light of rule that, when evidence is contradictory, the decision must be made according to preponderance of evidence, since it was evident from charge of court taken as whole that words of instruction objected to were used by court in sense synonymous with word "preponderance."

8. Appeal and error ⇨216(1).

Court's failure to define term "preponderance" of evidence could not be taken advantage of on appeal, in absence of request for instruction defining term.

9. Appeal and error ⇨1030.

Error in matter of procedure must result in miscarriage of justice to justify reversal.

Appeals from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Separate actions by June Alma Neudeck, by G. H. Neudeck, as guardian ad litem, and by G. H. Neudeck, individually, against H. Vestal. Judgments for defendant, and plaintiffs appeal.

Affirmed.

Gillis & Edwards, of Oakland, for appellants.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

PER CURIAM.

On June 16, 1927, June A. Neudeck, a minor, fell and broke her right arm. The child was immediately taken to a hospital, and defendant, a duly licensed physician, was called to treat her. An X-ray photograph was made and the bone set, following which the arm was placed in a plaster cast. Defendant continued to treat the child until July 1, 1927, when he was discharged.

Two actions were filed against him, one by the minor, through her guardian, for damages caused by his alleged negligence in treating the arm, and the other by the child's father to recover the expenses subsequently incurred for medical services which the alleged negligence made necessary. The actions were tried together by a jury, which returned a verdict for the defendant in each case, and appeals were taken by the plaintiffs from the judgments entered thereon. As grounds therefor it is contended that the trial court at defendant's request gave certain instructions which were prejudicially erroneous.

Two of the instructions complained of were as follows: "You are instructed that a physician or surgeon entitled to practice his profession, possessing the requisite qualifications and applying his skill and judgment with due care, in making a diagnosis, in prescribing treatment or in determining upon an operation, where there is reasonable doubt as to the nature of the physical condition involved, or as to what should be done in accordance with recognized authority and good current practice, is not liable for damages consequent upon an honest mistake or error of judgment."

"You are instructed that where a physician possesses and exercises the requisite degree of care and skill that is possessed and used by physicians practicing in the same or similar localities, he is not responsible for a mistake or error of judgment."

[1, 2] These instructions state substantially the obligations of physicians and surgeons as held by the courts of this jurisdiction, and were properly given. *Hesler v. California Hospital Co.*, 178 Cal. 764, 174 P. 654; *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128; *Johns v. Pond*, 38 Cal. App. 643, 177 P. 293.

The following instruction was also given: "You are instructed that the physician is the sole judge of the frequency and necessity of his calls on the patient, and this is determined by the condition of the patient."

The complaint alleged that the defendant negligently allowed the cast to remain on the child's arm for several days, during which time the arm became swollen; that as a result the cast exerted such pressure as to hinder the circulation of the blood, thereby causing the arm to be permanently injured. There was no allegation or claim that defendant neglected to visit the child at proper times;

and the evidence shows without dispute that he either called or that the child was taken to his office for treatment daily until the date of his discharge.

[3-6] It has been held in actions to recover for medical services that a physician employed to attend a patient is the best and proper judge of the necessity of frequent visits; and, in the absence of proof to the contrary, the court will presume that all visits were necessary and properly made. *Todd v. Myres*, 40 Cal. 355. But, where the action is for harmful neglect, we find no authority for holding the physician is the sole judge of the frequency and necessity of his visits; the rule being that a physician is not chargeable with neglect in allowing intervals to elapse between his visits where the patient needs no attention during the intervals, but he is negligent in doing so where attention is needed (48 Cor. Jur., *Physicians and Surgeons*, § 117, p. 1130); and the question as to the attention needed depends upon the custom or practice of reputable physicians in that locality in the treatment of such injuries (*Hesler v. California Hospital Co.*, supra; *Tomer v. Aiken*, 126 Iowa, 114, 101 N. W. 769; *Sinclair v. Brunson*, 212 Mich. 387, 180 N. W. 358, 12 A. L. R. 593).

Considering the fact that there was no claim that defendant's visits were not sufficiently frequent, but only that he neglected to give the child proper treatment while in attendance, we are unable to see how the instruction could have prejudiced appellants' cause.

[7] Appellants further complain of two instructions by which the jury was told in substance that negligence must appear by clear and satisfactory evidence; mere conjecture, surmise, or suspicion not being sufficient; that, if the evidence was such that they could not conclude that negligence had been satisfactorily shown, their verdict must be for the defendant.

Instructions that the proof must be clear, that a fact must be established to the satisfaction of the jury, and similar expressions, have been frequently criticized by the courts of this state (*Lawrence v. Goodwill*, 44 Cal. App. 440, 186 P. 781; *Boa v. San Francisco-Oakland Terminal Railways*, 182 Cal. 93, 187 P. 2; *Fidelity & Casualty Co. v. Paraffine Paint Co.*, 188 Cal. 184, 204 P. 1076), it being the rule that, when evidence is contradictory, the decision must be made according to the preponderance of the evidence (*Code Civ. Proc.* § 2061, subd. 5), and no higher degree of proof is required (*Ellis v. Central Cal. Traction Co.*, 37 Cal. App. 390, 174 P. 407); but, where it is apparent that the words are used by the court in a sense synonymous with the word "preponderance," they are unobjectionable (*Boa v. San Francisco-Oakland Terminal Railways*, supra; *De La Torre v. Johnson*, 203 Cal. 374, 264 P. 485; *Kruse v. White Brothers*, 81 Cal. App. 86, 253 P. 178).

[8] Preceding the instructions complained of, the jury was instructed at appellants' request that in a civil action the plaintiff is entitled to a verdict whenever the evidence preponderates in his favor, no matter how slight such preponderance may be; and, while there was no instruction defining the meaning of the term "preponderance," there was no request for such an instruction by any of the parties; and, as held in the following cases, in the absence of a request, a failure to define the term cannot be taken advantage of on appeal: *Hardy v. Schirmer*, 163 Cal. 272, 124 P. 993; *Los Angeles City, etc., School District v. Schumann*, 78 Cal. App. 353, 248 P. 737; *Putnam v. Pickwick Stages*, 98 Cal. App. 268, 276 P. 1055. It is evident from the charge of the court taken as a whole that the words criticized were used in the above sense, and there is no reason to conclude that the jurors were misled thereby.

[9] To justify the reversal of a judgment for any error in a matter of procedure, it must appear that the error complained of resulted in a miscarriage of justice; and, while the evidence on the issue of negligence was conflicting, yet, after an examination of the entire cause including the evidence, we are of the opinion that no error has been shown which justifies the conclusion that the same resulted in a miscarriage of justice.

The judgments are affirmed.

117 Cal.App. 312

YING v. PICKWICK STAGES SYSTEM et al.
Civ. 449.

District Court of Appeal, Fourth District, California.

Oct. 2, 1931.

1. Automobiles ⇨245(14).

Whether driver operated passenger stage colliding with motorist attempting left-hand turn at intersection in careful manner with due regard to traffic *held* for jury.

2. Automobiles ⇨245(80).

Whether motorist injured in collision while attempting left-hand turn at intersection was contributorily negligent *held* for jury.

3. Appeal and error ⇨1002.

Jury's finding on conflicting evidence is conclusive.

4. Appeal and error ⇨1033(5).

Instruction which deviated from substance of language of statute *held* not prejudi-

cial, where imposing greater duty on prevailing party than if omitted words had been incorporated therein (St. 1923, p. 558, § 129, subd. a, par. 2, as amended by St. 1929, p. 541, § 54).

Court instructed jury that in region where collision occurred motorist intending to turn to left shall approach point of turning to right of and next to center of roadway, and, unless otherwise directed by markings, "shall pass to the right of the intersection before turning" instead of "shall pass to the right of the center of the intersection before turning," as required by St. 1923, p. 558, § 129 subd. a, par. 2, as amended by St. 1929, p. 541, § 54.

5. Damages ⇨131(4).

\$2,000 *held* not excessive for injury to ankle and back of motorist.

Motorist was unable to get up from bed for a week and unable to work for an additional week. His back and ankle were sore and painful for two months, and six months after the accident his back was still painning him.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Leo Ying against the Pickwick Stages System and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

B. P. Gibbs and Libby & Sherwin, all of Los Angeles, for appellants.

John Coker, of San Diego, for respondent.

MARKS, J.

Respondent was injured on October 5, 1929, in an automobile collision between a Ford truck which he was driving and a passenger stage belonging to the Pickwick Stages System and driven by George Lowery as its servant. In the language of appellants, the accident occurred as follows: "The accident took place on the La Jolla boulevard, some distance north of San Diego, where Colima street intersects La Jolla boulevard. The plaintiff Ying was proceeding in a southerly direction on La Jolla boulevard, driving his vegetable truck; the defendant Lowery was following the plaintiff Ying at a short distance, driving the automobile stage owned by defendant, Pickwick Stages System. The plaintiff endeavored to make a left-hand turn into the easterly limb of Colima street and the automobile stage and the vegetable truck of plaintiff collided, the front left fender, bumper and headlight of the stage striking the right rear tail-gate of the truck; after the collision the truck ran part way across the

intersection and tipped over and the stage was driven by the defendant Lowery to a point about two hundred feet down the boulevard. There is practically but one important conflict in the testimony of the various witnesses of the accident as to how the accident happened and that is, that the plaintiff testified that he gave a signal that he intended to make a left turn and the two eye-witnesses placed upon the stand by the defendants testified that no signal was given by the plaintiff. * * * The case was tried before a jury and a verdict of two thousand dollars (\$2000.00) returned in favor of the plaintiff and against the defendants, Pickwick Stages System, a corporation, and George Lowery. Both of these defendants moved for a new trial which was denied."

Appellants specify the following grounds upon which they urge a reversal of the judgment: (1) That the evidence shows no negligence on the part of appellants proximately causing the accident; (2) that the evidence clearly shows contributory negligence on the part of respondent; (3) that the trial court erred in its instructions to the jury; (4) that the damages awarded were excessive; (5) that the court erred in denying appellants' motion for nonsuit; and (6) that the court erred in denying appellants' motion for new trial. We will consider the questions raised by appellants in the order in which we have stated them.

[1] The evidence clearly shows that the stage driven by Lowery ran into respondent's truck. There is evidence in the record justifying the conclusion that the accident occurred on the westerly half of La Jolla boulevard, being the right half of this highway from the direction in which the vehicles were proceeding. It further contains evidence to the effect that respondent, for a considerable distance prior to the point of the accident, had his left arm extended horizontally, lawfully signaling his intention to make a left turn into Colima street. Under these circumstances the question of whether or not the stage was being operated in a careful and prudent manner with due regard to the traffic upon La Jolla boulevard was a question of fact to be determined by the jury, and the jury, upon the conflicting evidence before it, having resolved this question against appellants, and, having inferentially determined by its verdict that the stage was operated in a negligent and careless manner, such finding is binding and conclusive on this court and cannot be disturbed here.

[2] We have also reached a similar conclusion upon the contributory negligence of respondent. The jury having by its verdict inferentially found upon conflicting evidence that no such contributory negligence existed, such finding is conclusive and cannot be disturbed here.

[3] Appellants complain of the following instruction given by the trial court: "It is the law applicable to the region where the two vehicles here involved were traveling at and immediately before the time of the accident under investigation, that the operator of a vehicle intending to turn to the left, shall approach the point of turning in the traffic lane to the right of and next to the center of the roadway, and, unless otherwise directed by turning markings, shall pass to the right of the intersection before turning." They maintain that this instruction does not contain all of the provisions set forth in the second paragraph of subdivision (a), § 129, of the California Vehicle Act (as amended by St. 1929, p. 541, § 54).

[4] From a reading of the instruction given, it is made apparent that the words "the center of" were omitted from the last phrase of this instruction. To be literally and technically correct, this last phrase should have read as follows: "Shall pass to the right of the center of the intersection before turning." We are of the opinion that the omission of the words "the center of" in this instruction is not prejudicial error requiring a reversal of the judgment. The instruction as given required the respondent to pass to the right of the intersection before turning. He could not pass "to the right of the intersection" without passing to the right of its center. The instruction as given placed a greater duty upon respondent than would have been the case had the omitted words been incorporated therein. Under these circumstances appellants cannot complain of the instruction as they were not prejudiced thereby.

In the recent case of *Page v. Mazzei*, 3 P. (2d) 11, the Supreme Court has held that a deviation from the substance of the language of the California Vehicle Act, in attempting to summarize it in an instruction to a jury, is not necessarily reversible error. The instruction under consideration by the Supreme Court in that case was as follows: "I instruct you that if you find from the preponderance of the evidence that plaintiffs and defendant approached the intersection at approximately the same time and you further find that plaintiffs had reached the *center of said intersection* driving at a lawful rate of speed and that defendant at approximately the same time reached the *center of said intersection* driving at an unlawful rate of speed, plaintiffs had a right to expect that defendant would allow plaintiffs to cross said intersection first." (Italics ours.) In the *Page Case* the defendant was approaching the intersection from the plaintiffs' right. In approving this instruction the Supreme Court used the following language: "Under proper instructions, and on ample evidence to support its verdict, the jury awarded the plaintiffs substantial damages for injuries sus-

tained by Mrs. Page when the automobile of defendant crashed into the automobile of plaintiffs at the intersection of two roads."

[5] After an examination of the entire record we cannot conclude that the damages awarded were excessive. The evidence discloses that respondent was thrown from his truck onto the pavement and was bruised and otherwise injured; that he was not able to get up from his bed for a week and was unable to do any work for an additional week; that thereafter he did some light work; that his back and one of his ankles were sprained and were sore and painful for about two months, and that, at the time of the trial, six months after the accident, his back was still paining him. Respondent also suffered damage to his property. Under these circumstances the verdict rendered was not so excessive as to indicate that the jury was influenced by any improper motives in fixing the amount of the award.

It is unnecessary for us to devote any space to appellants' other assignments of error. There is no merit in them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 231

SANDERS v. SANDERS.

Civ. 7900.

District Court of Appeal, First District,
Division 1, California.

Sept. 29, 1931.

Rehearing Denied Oct. 28, 1931. Hearing
Denied by Supreme Court Nov. 27, 1931.

1. Limitation of actions ☞172.

Plaintiff suing to enforce written property settlement, *held* entitled to invoke limitation statute against affirmative defense alleging mistake, wherein defendant sought reformation and cancellation (Code Civ. Proc. § 338, subd. 4).

2. Limitation of actions ☞96(2).

To obtain reformation of written property settlement, party thereto should have sought reformation within three years after discovering alleged mistake (Code Civ. Proc. § 338, subd. 4).

3. Limitation of actions ☞99(1).

In actions to enforce agreements, defense of fraud is available at any time, notwithstanding limitation statutes, since fraud invalidates instrument from beginning.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Norabelle Sanders against W. B. Sanders. Judgment for plaintiff, and defendant appeals.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellant.

Edwin H. Williams, of San Francisco, for respondent.

KNIGHT, J.

The parties to this action, in contemplation of divorce proceedings, entered into a property settlement evidenced by an agreement in writing dated January 5, 1920, which read in part as follows: "Said party of the first part [defendant herein] agrees to pay said party of the second part [plaintiff], *so long as she remains unmarried to any other person*, the sum of Fifty Dollars per month, * * * on the first day of each month, commencing with the first day of January, 1920. Said monthly payments to be made in full payment for the support of said party of the second part and their minor children Lucile Sanders and Doris Sanders. In the event of a divorce being granted to either party *and the remarriage of said party of the second part*, said party of the first part agrees to continue the payment of said sum of Fifty Dollars per month, to said children for their support and maintenance until such time as they are self-supporting or married." (Italics ours.) Defendant agreed also to pay to plaintiff at least one-half of the medical expenses incurred by her in the event of serious illness of either of said children, provided the total amount of the expense incurred exceeded \$25. Following the execution of the agreement, defendant obtained a divorce and paid the monthly installments called for by the agreement up to and including November 1, 1929, at which time he refused to make any further payments; and, after a lapse of several months, plaintiff instituted this action to collect the delinquent installments and also one-half of the amount of medical expenses incurred by her in caring for one of the children. Judgment was rendered in favor of plaintiff, and defendant appeals.

Defendant admits that plaintiff never remarried and that he has not paid the sums for which suit is brought; and he concedes, therefore, that the judgment rendered conforms to the terms of said agreement. But he claimed at the trial that the attorney employed by him to prepare said agreement made a mistake in drafting the clause relating to the termination of the monthly payments; and that consequently, as executed, said agreement did not truly express the in-

tention of the parties, all of which was set up in his answer by way of an affirmative defense. In this regard it was alleged "that when said agreement was executed, plaintiff and defendant supposed said agreement to mean and said agreement was intended to mean and the legal consequences of said agreement were intended by plaintiff and defendant to be that the defendant was to pay the sum of fifty (50) dollars per month * * * *only until such time as said minor children become self-supporting or married*" (italics ours); that one of the children became self-supporting on September 1, 1925, and the other on September 1, 1929; and the prayer of the answer was: "1. That plaintiff take nothing by her action; 2. That said written agreement be revised so as to express the intention of the parties thereto; and that it be adjudged that said agreement is fully performed and that it be delivered up and cancelled. 3. That defendant have such other and further relief as the equity of the case may warrant." Plaintiff filed an "answer to the affirmative defense" denying that any mistake had been made in the preparation of the agreement, and alleging that "the cause of action set out in said affirmative defense" was barred by the statute of limitations. Code Civ. Proc. § 338, subd. 4. Upon the ground last mentioned, the trial court excluded certain evidence offered by defendant in support of said affirmative defense; and in conformity with such ruling found that the relief asked for in said affirmative defense was barred by the statute.

[1,2] The question presented for determination is, therefore, whether a plaintiff may invoke the statute of limitations against an affirmative defense based on allegations of mistake, wherein the defendant is seeking reformation and cancellation of the instrument sued upon; the contention of defendant herein being that a party may abide his time, and, when enforcement is sought against him, interpose such defense and obtain such relief, regardless of lapse of time. The decision in the case of *Bradbury v. Higginson*, 167 Cal. 553, 140 P. 254, 255, evidently holds to the contrary, and in our opinion is decisive of this appeal. There the defendant, in an action brought against him for rent claimed to be due under the terms of a written lease, interposed the affirmative defense of mistake, and in holding that the plaintiff was entitled to invoke the statute of limitations against such defense the court said: "If the defendant's right to obtain the equitable relief sought is barred by limitation, the plea of the statute may be interposed to the attempted defense just as it might have been in case the relief had been sought by an independent action. This court has held that the statute of limitations is applicable to claims asserted in an answer by way of set-off or counterclaim (*Lyon v. Petty*,

65 Cal. 322, 4 P. 103; *Moore v. Gould*, 151 Cal. 723, 732, 91 P. 616), and the same reason exists for making the statute apply to defenses based upon an equitable cause of action asserted by the defendant against the plaintiff. In the case under consideration the plaintiff, in her demurrer, pleaded subdivision 4 of section 338 of the Code of Civil Procedure, which fixes a limitation of three years for actions 'for relief on the ground of fraud or mistake.' This is the statute applicable to the relief sought by the answer. * * * This is no sufficient excuse for the defendant's alleged ignorance of the terms of a writing executed and accepted by him. No reason appearing to the contrary, he must be deemed to have known the precise terms of the lease when he signed it. If it omitted a provision which it should have contained, his right to compel a reformation accrued at once and should have been asserted within three years."

In the present case the evidence shows that the question of whether the monthly installments called for by said agreement should terminate when the children became self-supporting, or should continue thereafter as long as plaintiff remained unmarried, became a disputed one some five years prior to the commencement of this action, at the time the elder daughter reached the age of majority; nevertheless defendant continued to make such payments thereafter and until the younger daughter became self-supporting. It is clear, therefore, under the law as declared in the case above mentioned, that, if defendant desired to have the agreement reformed upon the ground of mistake, he should have sought such relief within three years after having discovered the mistake.

[3] The case of *California Packing Corp. v. Larsen*, 187 Cal. 610, 203 P. 102, cited and emphasized by defendant, is not in point because there the statute of limitations was not involved; the single question presented being, as the court expressly stated, whether the evidence was sufficient to sustain the trial court's finding that the instrument there sought to be enforced was entered into as a result of mutual mistake. Defendant has also cited a number of cases adhering to the well-established rule that in actions to enforce agreements the statute of limitations may not be invoked against the defense of fraud. *Estate of Cover*, 188 Cal. 133, 204 P. 583. Of course, in such cases, the defense of fraud may be interposed at any time, and, if established, renders the instrument void and unenforceable from the beginning. But our attention has not been called to any case wherein the same rule has been applied to an affirmative defense based on mistake, where, as here, in order to grant a defendant the relief he is seeking, affirmative action on the part of the court is required in three distinct respects: First, in determining that, by rea-

son of mistake, the portions of the agreement challenged do not truly express the intention of the parties; secondly, in reforming the instrument, by declaring the real purpose and intention of the parties; and, third, in determining that, as reformed, the agreement has been performed. To hold that the statute of limitations may not be invoked against the granting of such affirmative relief would be to depart from the doctrine stated in the case of *Bradbury v. Higginson*, supra, which we are not prepared to do.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

SAN DIEGO IMPROVEMENT CO. v. BRODIE et al.*
Civ. 879.

District Court of Appeal, Fourth District, California.

Sept. 28, 1931.

Rehearing Denied Oct. 21, 1931. Hearing Granted by Supreme Court Nov. 25, 1931.

1. Quieting title $\S$ 44(4).

Statutory presumption that grantors were owners of property when conveying warrants judgment quieting title in grantee, in absence of contrary evidence (Code Civ. Proc. $\S$ 1963, subd. 12).

2. Quieting title $\S$ 51.

Generally, in actions to quiet title, if court finds plaintiff has no title, it may not adjudicate title of defendant not asking for affirmative relief.

3. Appeal and error $\S$ 1149.

Conclusions of law and judgment in quiet title action could be amended to include finding plaintiff was owner and entitled to immediate possession of property involved (Code Civ. Proc. $\S$ 956a).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by the San Diego Improvement Company against Harry D. Brodie, Percy W. Marshall, and others. Judgment for plaintiff, and Percy W. Marshall and another appeal.

Judgment amended, and, as so amended, affirmed.

James R. Jaffray, of Los Angeles, for appellants.

Paul W. Sampsell, of Los Angeles, for respondent.

FINNEY, Justice pro tem.

This is an action to quiet title to real estate, and, from a judgment in favor of the plaintiff, the defendants Percy W. Marshall and Alice C. Marshall appeal.

The complaint alleges that the plaintiff is a corporation "and is the owner in possession and entitled to the possession" of the real property in question, and that the defendants make some claim thereto, but have no right, title, interest, or equity therein. The defendants by their answer deny "that the plaintiff is the owner, or the owner in possession, or entitled to the possession" of said property, and deny that the defendants, "have no right, title, interest, claim, lien, demand or equity therein."

The case is here upon a bill of exceptions from which it appears that, in the language of the record, "plaintiff offered certain records and files which were stipulated to be official, identification being waived, and defendants specifically objected to each as incompetent, irrelevant, immaterial, hearsay and that proper foundation had not been laid, which objections were overruled and such records and files admitted, upon which plaintiff rested and defendant offered no evidence, whereupon the court directed findings for plaintiff." Then follows a brief abstract of each of the documents offered in evidence, being forty-five in number and containing the name of the document, the names of the parties thereto, if any, the date thereof, the date of filing, and the description of the property therein, in briefest possible form. No evidence was offered by the plaintiff that it, or any of its grantors, were, or ever had been, "in possession" of the premises or any part thereof, and the defendants offered no evidence whatever. From the bill of exceptions, it further appears that the premises consist of a large number of tracts of land, the title to all of which, except a small parcel referred to as the "unnumbered triangular tract," appears to be deraigned from the government to the plaintiff by an unbroken chain of title. The "unnumbered triangular tract" does not appear in this record to be traced back to the government or to any party shown to be in actual possession, but title to this tract is traced to the plaintiff through several conveyances, the last of which was a deed to the plaintiff executed by Paul W. Sampsell et al., dated January 20, 1930, and filed for record January 22, 1930. This deed also conveyed a part of the other lands involved in this suit, and the balance thereof was conveyed to the plaintiff, in part, by deed executed by Charlotte C. Rabin, dated December 27, 1929, and filed for record January 22, 1930, and, in part, by deed executed

by R. M. Helfend, dated January 7, 1930, and filed for record January 22, 1930.

[1] Appellants contend that the title to the "unnumbered triangular tract," not having been traced back to a paramount title or to one in possession, is fatally defective, and they also contend there are many serious defects in plaintiff's chain of title to the balance of the land. In the view we take of this matter, it will not be necessary for us to consider any of these objections. The property in question was sold and conveyed to the plaintiff by the parties who made and executed the three above-described deeds as grantors. In thus selling and conveying the same, each of these grantors exercised acts of ownership and dominion, over the property conveyed by him, of the very highest character, viz., the disposition thereof by sale, and, from the exercise of such acts of ownership, the statute presumes that the grantors were the owners of the property at the time of the conveyances. Section 1963, subd. 12, Code Civ. Proc. This presumption, however, is a rebuttable presumption and may be overcome by evidence, but, in the absence of any evidence tending to overcome it, the presumption is of sufficient weight to warrant a judgment quieting title in the grantee of one exercising such acts of ownership. *Bickerdike v. State*, 144 Cal. 698, 78 P. 277; *Pearson v. Hellman, etc.*, 199 Cal. 305, 249 P. 10; *Lowe v. Penn*, 105 Cal. App. 366, 287 P. 509. In this case there is not the slightest evidence tending to overcome the presumption implied by the statute. Therefore, when the plaintiff introduced in evidence the deeds referred to, it had established a prima facie case, and, when the defendants rested without introducing any evidence, or making any claim to the property whatever, by answer or otherwise, the plaintiff was entitled to judgment declaring its title and quieting the same against any right, title, or interest of the defendants.

[2, 3] Appellants also raise the objection that the plaintiff's title has not been declared or adjudicated in the judgment rendered and entered in this case, in that the judgment fails to show the nature of the plaintiff's title, or that plaintiff has any title at all, and therefore, it is contended, the court had no jurisdiction to pass upon defendants' title. It is a general rule, in actions to quiet title, that, if the court finds the plaintiff has no title, it may not then adjudicate the title of the defendant, if the defendant has not set up an affirmative defense or asked for affirmative relief. 22 Cal. Jur. 190, § 59. In the instant case, the court has found that the plaintiff "is the owner and entitled to the immediate possession of the premises," but has not included such finding, or any statement declaring plaintiff's title, as it should have done, in the conclusions of law or the judg-

ment rendered in the case. We think, therefore, acting under authority of section 956a of the Code of Civil Procedure, that the conclusions of law and the judgment rendered should be amended by adding to the first paragraph of the conclusions, and as the opening sentence thereof, the following declaration, to wit: "That the plaintiff is the owner and entitled to the immediate possession of the premises hereinafter described," and, further, by adding the same declaration to paragraph II of the judgment, as the opening sentence thereof. This will meet, fully, the objections of the defendants above referred to, and the trial court is therefore directed to amend its conclusions of law and the judgment entered herein accordingly.

The judgment appealed from, as amended, is affirmed. Respondent to recover costs.

We concur: JENNINGS, Acting P. J.; MARKS, J.

117 Cal.App. 286
HANDY v. SAMAHA et al.
Civ. 868.

District Court of Appeal, Fourth District, California.

Sept. 30, 1931.

Rehearing Denied Oct. 21, 1931. Hearing Denied by Supreme Court Nov. 27, 1931.

1. Injunction ⇨252(8).

Plaintiff suing on injunction bond may recover attorney's fees for procuring dissolution of injunction alone, and not fees for defending entire suit.

2. Injunction ⇨252(8).

In action on injunction bond, recovery for attorney's fees for procuring dissolution of injunction *held* not improper merely because attorney moved to dismiss action after injunction was dissolved.

Recovery of damages for attorney's fees for procuring dissolution of injunction was not improper merely because attorney moved for dismissal of action about two months after temporary injunction was dissolved, since attorney was apparently simply completing his work, and it was not to be assumed that he made any extra charge on that account.

3. Injunction ⇨252(4).

Damages for time lost in defending injunction action *held* not recoverable, since not "damages sustained because of injunction" within bond.

Damages for loss of time were not within injunction bond, since such an incon-

venience as necessity of making a defense is not one that accrues as direct effect of injunction, but is one of incidents in an action of that nature, just as it is incidental in any suit, and is effect of being sued rather than effect of injunction; and as matter of public policy, in any judgment rendered, no man should be penalized for attempting to secure the rights to which he thinks he is entitled by mere fact that opponent happens to be a man of large affairs or one whose time is, or may be made to appear, of a value beyond that of the ordinary man.

4. Witnesses ⇨25.

In cases where witnesses are allowed compensation, none is allowed to party to action.

5. Injunction ⇨256.

In action on injunction bond, where plaintiff's recovery should have been less than \$300, no costs should have been allowed.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by J. W. Handy, doing business under the firm name and style of the J. W. Handy Company, against R. Samaha and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

See, also, 107 Cal. App. 565, 290 P. 492.

Fred H. Thompson, of Brawley, for appellants.

W. E. Abraham, of Brawley, for respondent.

BARNARD, P. J.

This is an action to recover on an injunction bond. In a former action this plaintiff recovered a judgment against R. Samaha, which judgment became final. 107 Cal. App. 565, 290 P. 492. The sheriff, having attached Samaha's bank account, held sufficient money to satisfy the judgment. Samaha brought an action in the Superior Court of Imperial county, numbered 12817, seeking to enjoin the sheriff from paying over this money in satisfaction of the judgment. He secured a temporary restraining order and an order to show cause, filing a bond signed by the other defendants in this case. This plaintiff and his counsel appeared at the time set in the order to show cause, and the matter was continued for three days. Within these three days the plaintiff in that action, having discovered some technical error in the proceedings, caused the temporary restraining order and the order to show cause to be set aside and vacated, and, in the same proceeding, immediately secured a new temporary restrain-

ing order and a new order to show cause, filing a new undertaking with the same sureties as the first one. The defendant in that proceeding then filed a notice of motion to dissolve the temporary restraining order, and all of the matters were heard together. The temporary restraining order was dissolved and the money paid over by the sheriff. Two months later that action was dismissed on motion of the defendant therein.

Subsequently this action was filed; the complaint setting up two causes of action based upon the two bonds. Two items of damage were claimed, one consisting of attorney's fees paid in resisting the injunction proceeding and the other being for loss of this plaintiff's time in preparing his defense and attending the various hearings in the injunction proceeding. The court found that the plaintiff herein had paid \$150 for attorney's fees for services rendered in action No. 12817, and also that the plaintiff was damaged in the sum of \$175 for loss of time and expenses paid in the preparation of his defense in said action. Judgment was rendered for \$325 and costs, from which judgment this appeal is taken.

[1, 2] In respect to the matter of attorney fees, appellants concede, as they must, that such fees are allowable for services rendered in procuring a dissolution of an injunction, not including any part of such an expense incurred by reason of the suit itself, as distinguished from the injunction. *Curtiss v. Bachman*, 110 Cal. 433, 42 P. 910, 912, 52 Am. St. Rep. 111; *Bustamente v. Stewart*, 55 Cal. 115. As we understand appellants' contention, it is that there were really two proceedings for an injunction, the first being voluntarily dismissed, and that the court's allowance of \$150 was improper, since it actually covered the proceeding that was dismissed, the one that was heard, and the defense of the entire case. What appellants denominate as two separate proceedings were both proceedings in the one action No. 12817, and counsel appeared in response to the first order before that portion of the proceeding was dismissed by the party who had instituted it. While it is true that attorney's fees may not be allowed for services rendered in defending the entire action as distinguished from those performed in resisting an injunction, this particular action was for the purpose of securing an injunction only, and, the entire fee being paid for services rendered in securing a dissolution of the injunction, the amount was properly allowed as an element of damage. Nor do we think the allowance was improper, because the evidence shows that the attorney to whom the fee was paid moved for a dismissal of the action some two months after the temporary injunction was dissolved. Apparently, the attorney was simply completing his work, and it is not

to be assumed that he made any extra charge on that account. We think the evidence is sufficient to sustain the finding that this attorney fee was paid for services made necessary by the issuance of the injunction.

[3] The court also allowed as damages the sum of \$175 for time claimed to have been lost by this respondent in defending action No. 12817, and for "expenses" incurred in the preparation of his defense. The record shows no sufficient evidence of any such expense, and the only evidence called to our attention concerning respondent's loss of time, aside from testimony that he appeared in court on three occasions, is the following:

"Q. And in particular in the middle of February * * * is that one of the busiest times of the year? A. Yes.

"Q. Your time during the month of February would be of more value to you than some time later in the year? A. Absolutely.

"Q. What would you consider, basing the time you spent in my office preparing for the trial and the time you spent in the Court here to be the reasonable value of your time? A. I would say every trip down here is worth at least fifty dollars to me and, in some cases more, depending on the time of the year, particularly during the lettuce season and especially at this time."

Not only is this evidence very unsatisfactory as to the amount and value of the time thus devoted, but we are of the opinion that that item is not properly allowable as an element of respondent's damages. In *Curtiss v. Bachman*, supra, the court said: "The loss of time and injury to the business of the appellant were clearly outside of the undertaking of the sureties." The bonds here in question covered "such damages * * * as such party may sustain by reason of the said injunction."

In *Black v. Hilliker*, 130 Cal. 190, 62 P. 481, 482, the court said: "It is contrary to the general policy of the law that a plaintiff who is unsuccessful in his suit shall be mulcted in damages merely by reason of his failure to obtain a judgment. It is only in exceptional cases that the successful party in an action, either at law or in equity, is permitted to recover as a part of his damages the attorney's fees paid by him. In *Asevado v. Orr*, 100 Cal. 293, 34 P. 777, we said: 'The courts of the state are open to every citizen for the redress of his wrongs, and, unless he is at liberty to seek such redress without rendering himself liable in damages to the defendant in case he shall fail to establish his complaint, this right would, in many instances, be a barren privilege.' In *Mitchell v. Hawley*, 79 Cal. 301, 21 P. 833, it was said: 'The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point

to which former decisions have taken it.' The rule thus stated has been strictly followed."

In *Moore v. Maryland Casualty Co.*, 100 Cal. App. 658, 280 P. 1008, 1010, the general rule for allowing damages in such a case is set forth as follows:

"It is well-settled law that, when an injunction is wrongfully issued and subsequently dissolved, the party enjoined will be entitled to such damages, within the limit of the penalty of the bond, as he may have sustained by reason of the issuing of the injunction. * * *

"We conclude that, where the damage is not remote, but may be reasonably anticipated and attributed to the effect of the injunction, as in the present case, the bond is liable."

It will be remembered that damage is not here claimed for such an interference with a going business as is the direct result of an injunction itself. Respondent sought only the value of the time devoted by him to the defense of the injunction proceeding. The danger and the uncertainty of permitting such an item is well illustrated by the present case. The allowance seems to have been made largely for three trips to court, although the record discloses that the injunction was dissolved through the presentation of points of law, and nothing appears to show any necessity for the presence of the respondent in court. The respondent was allowed to testify that every trip made from Brawley to El Centro was worth at least \$50 to him. The record is silent both as to the amount of time consumed and as to facts justifying his conclusion as to its value.

[4] It appears to us that such an inconvenience as the necessity of making a defense is not one that accrues as the direct effect of an injunction but that it is one of the incidents in an action of that nature, just as it is incidental in any suit. In cases where witnesses are allowed compensation, none is allowed to a party to the action. Even where it is the policy of the law to compensate a witness who is compelled to leave his business and come to court, he is not paid according to his individual earning power, but in accordance with a fixed standard applicable to all alike. Courts are established and the right to bring an action is given for the purpose of settling disputes in an orderly and peaceful manner. The right of every man to bring an action carries with it the corresponding risk of being sued, and the possibility of inconvenience in making a defense. This applies to an injunction case as to any other, and such inconvenience is the effect of being sued and not the effect of the injunction. If such an item of damages were allowed, the resulting possibilities would be many, varied and uncertain. Such valuations would be uncertain, difficult of ascertainment, and largely affected by vague and general ideas of the party himself. The cost of seeking

legal relief might vary greatly in proportion to the wealth or ability of particular defendants, and this perhaps through hidden causes unknown to a plaintiff. In two cases, apparently under exactly similar circumstances, one might be subjected to small damage and the other find he had been more unfortunate in picking an adversary. While a party seeking an injunction might be willing to incur such risk of damage as may be attributed directly to the effect of the injunction, he might well hesitate to incur, in addition, the risk of any such indefinite and uncertain element of damage as the one in question. As a matter of public policy, not only should courts be open to the rich and the poor alike, but in any judgment rendered no man should be penalized for attempting to secure the rights to which he thinks he is entitled by the mere fact that his opponent happens to be a man of large affairs or one whose time is, or may be made to appear, of a value beyond that of the ordinary man. We think the rules heretofore existing should not be so extended as to include as an element of damage, in such a case as this, the value of the time devoted by a defendant to preparing or presenting his defense.

[5] The costs in the trial court were fixed at \$16.75. Since the judgment should have been for less than \$300, no costs should have been allowed. For the reasons given, the judgment is modified by striking from the same the sum of \$175 and the further sum of \$16.75, and, as so modified, the judgment is affirmed, the appellants to recover their costs on appeal.

We concur: MARKS, J.; JENNINGS, J.

117 Cal.App. 247

MOFFITT v. FORD MOTOR CO. et al.
Civ. 7279.

District Court of Appeal, Second District,
Division 2, California.

Sept. 29, 1931.

1. Trial $\hookrightarrow$ 109.

In considering motion for nonsuit after opening statement, every fact stated as among matters to be proved, and all favorable inferences therefrom, must be considered as facts.

2. Trial $\hookrightarrow$ 109.

Opening statement in action for injuries received when plaintiff fell in leaving automobile exhibit sufficiently showed negligence, resulting injuries, and defendant's connection therewith.

3. Appeal and error $\hookrightarrow$ 241.

Sufficiency of complaint is not reviewable on appeal from order granting new trial, on another ground.

Particularly is this true where the alleged defect in the complaint would seem to be merely technical and probably easily remedied by an amendment.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Alice D. Moffitt against the Ford Motor Company and others. From an order granting a motion for new trial, defendants appeal.

Affirmed.

See, also, 292 P. 698; 297 P. 553; 1 P.(2d) 994.

George H. Moore, Gerald O'C. Egan, and Lucius K. Chase, all of Los Angeles, for appellants.

Benj. M. Stansbury and Mott, Vallee & Grant, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal by all defendants from an order granting a motion for new trial.

The case was set for trial before a jury. After the jury had been impaneled and sworn, counsel for plaintiff made an opening statement, at the conclusion of which defendants, through their respective attorneys, moved for nonsuit upon the ground that the statement made did not show any negligence on the part of defendants. The motion was argued to some extent and counsel for plaintiff given permission to add to the original statement, after which the motion was renewed and finally granted. Motion for new trial was then made by plaintiff upon the grounds (1) that the decision theretofore made was against law, and (2) errors in law at the trial, excepted to by plaintiff. From this order the appeal before us was taken.

It appears that plaintiff fell and was injured while leaving an exhibit of the new Ford automobile, alleged to have been put on by defendants. We quote from the opening statement: "We expect that the evidence will show that all the Ford dealers in Los Angeles county joined together with the Ford Motor Company for the purpose of holding this Ford show and exhibiting the new Ford and Ford accessories and Ford parts to the public at the Ambassador Auditorium; * * * that they by advertisements in the various newspapers in this city invited the public to attend this exhibition. * * * Mrs. Moffitt, the plaintiff in this case, went to the Ambassador Auditorium in the afternoon of December 2, 1927, for the purpose of visiting this show and seeing the new Ford. * * *

When she got ready to leave she went to the door * * * where she had entered. * * * As she approached the place one of the attendants there told her that she could not leave by that door, but that she would have to leave by another door, pointing to a large door at the south of the auditorium. There were a large number of people leaving the auditorium at this time * * * and as she went out the door she either tripped or stumbled or fell in some way. We expect the evidence to show that the reason that she fell was that the surface of the floor just inside this door was very uneven, some of the boards projecting as much as a quarter or three-eighths of an inch above the other flooring, and that the step-down at this place was about fourteen inches, and that the ground outside the step was covered with debris, rocks, very uneven, soft, and that there were two or three loose boards placed just outside the door as she stepped down; and that in stepping down she either tripped on one of the boards inside that was raised above the others or that the step was so high that she fell"—the injuries complained of resulting therefrom.

Adjournment was had until the next morning, when attorneys for plaintiff were given permission to amplify the statement made. At that time counsel, among other things, said: "The evidence, we believe, will show that Mrs. Moffitt visited the hotel grounds that day and the shops in the hotel in addition to visiting the auditorium where the Ford show was held, and that she did that at the invitation of the defendants in this case. The evidence, I believe, will show that the attendant who directed Mrs. Moffitt to use the exit from the building that she did use was an employee or agent of the defendants in the case. * * * I believe the evidence will show that this exit was in an unsafe and dangerous condition, which was known to the defendants, or should have been known to them, by reason of the fact that the step was about fourteen inches from the surface of the floor in the auditorium to the ground outside * * *; also that the ground outside where she was caused to step down this fourteen-inch step was constituted of debris, clods and rocks and loose dirt. * * * I believe the evidence will show that it was because of this unsafe and dangerous condition at the exit that Mrs. Moffitt was caused to fall * * * and that her injuries were caused by the negligence of these defendants and without any negligence whatever on her part."

The jury was excused while the motion for nonsuit was argued, and during the argument counsel for plaintiff asked permission to state more definitely to the jury the way in which they expected the evidence to show how the accident happened, viz.: "That the plaintiff in passing out at this exit which was fourteen inches high and stepping down,

that—coming out with a crowd of people—in a crowd of people, and stepping down onto this rough, uneven, dangerous surface, by reason of the height of the step and of the rough, uneven and dangerous landing place where she stepped down, that she was caused to fall and did fall heavily to the ground and suffered injuries by reason of those elements. * * * That she looked where she was going; that she went out with a big crowd of people, who were passing out of this door, and didn't have the opportunity that she would otherwise have had." The court apparently did not think that such statement would add anything to what had already been said, and granted the motion for nonsuit. Counsel for plaintiff caused an exception to be noted to all the rulings of the court.

[1, 2] Appellants urge that the opening statement leaves the cause of the injuries open to conjecture and speculation. With this we cannot agree. It does not say that plaintiff tripped on the uneven boards at the top of the step or those on the ground, but that by reason of the unusually high step and the precarious footing plaintiff was caused to fall; and we cannot say as a matter of law that the condition of the step and footing as shown, by the statement might not constitute negligence on the part of any one who permitted the public to use them. The statement also shows that plaintiff expected the evidence to show that by the use of such step and footing she was injured, and that the agent or employee of defendants, including the Ford Motor Company, compelled her to use this particular exit in leaving the exhibit which they were jointly engaged in carrying on. In granting a nonsuit after the opening statement and before evidence has been introduced, the same rules would seem to apply as govern the granting of such a motion after the introduction of evidence. "Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried." *Bias v. Reed*, 169 Cal. 33, 38, 145 P. 516, 518. Applying such rule to the statement made and the amplification thereof requested to be made in the instant case, we are of the opinion that it was sufficient both as to the negligence and resulting injuries alleged in the complaint and the connection of the defendant Ford Motor Company therewith, and that the trial court erred in granting the motion for nonsuit, but corrected the error by granting the motion for new trial appealed from.

[3] The opening brief herein was not filed by the Ford Motor Company, but by counsel for other defendants, and it urges that the complaint is insufficient as a matter of law in that it does not show any causal connection between the negligence pleaded and the in-

juries sustained. Such a defect cannot be considered on an appeal from an order granting or denying a motion for new trial where it was not a ground upon which the lower court acted in granting or denying such motion (*Green v. Duvergey*, 146 Cal. 379, 384, 80 P. 234), and particularly where the alleged defect in the complaint would seem to be merely technical and probably easily remedied by an amendment if necessary (*County Bank v. Jack*, 148 Cal. 437, 83 P. 705, 113 Am. St. Rep. 235. See, also, *Frey v. Vignier*, 145 Cal. 251, 253, 78 P. 733).

The conclusion reached makes it unnecessary to determine whether all the defendants or the Ford Motor Company alone are before us now.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

117 Cal.App. 117

NIELSEN v. FRANK.

Civ. 7833.

istrict Court of Appeal, First District, Division 1, California.

Sept. 25, 1931.

1. Appeal and error ⇨996, 1010(1).

Judgment will not be reversed when substantial evidence supports finding, or different inferences might rationally be drawn therefrom (*Code Civ. Proc.* §§ 1847, 2061).

2. Appeal and error ⇨1010(1).

Trial court's findings regarding mental capacity are conclusive, except when totally unsupported by substantial evidence.

3. Insane persons ⇨98.

In action to recover money paid by incompetent under contract for attorney's services, evidence sustained finding that contract was fair and beneficial and plaintiff was not incompetent when he made payments, precluding recovery.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Mads Nielsen, an incompetent person, by W. E. Most, as guardian, against H. A. Frank. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. E. Most, of Oakland, for appellant.

H. A. Frank, of Oakland, for respondent.

PER CURIAM.

The above action was brought by an incompetent, represented by his guardian, to recover the sum of \$3,097.69, alleged to have been received by defendant for the use of plaintiff.

The plaintiff was adjudged to be incompetent on December 6, 1927, and letters of guardianship of his estate issued. The complaint alleged that two amounts were received by defendant, namely, \$2,847.69 on June 10, 1926, and \$250 on July 7, 1926. Defendant, who is an attorney, denied the receipt of the first amount but admitted the receipt on that date of the sum of \$939.72, and also the second amount, and alleged that both were paid by Nielsen and accepted for professional services rendered.

The evidence shows that plaintiff and his wife accumulated about \$14,000 in cash and certain real property. Mrs. Nielsen died in May, 1925, and the above amount was then on deposit in her name in two Oakland banks, namely, the Oakland National Bank and the Central National Bank. The real property, which also stood in her name, was of the appraised value of \$3,300. Some days before her death she executed a will, in which she claimed all the above to be her separate property, and bequeathed the whole to W. L. Emerson, in trust, to pay the income therefrom to plaintiff during his lifetime, and directed that upon his death her whole estate be divided between Emerson and her brother. The will was admitted to probate and letters testamentary thereon issued to Emerson. According to the findings in the case at bar the plaintiff, about the month of May, 1926, by written contract employed Clinton Dodge, an attorney, to recover the above property, claiming it to be community property, and agreed to pay a contingent fee of 25 per cent. for the attorney's services. Dodge filed on behalf of plaintiff two actions, claiming the ownership of the two deposits mentioned, one action being against Emerson, as executor, and the Oakland National Bank, and the other against the executor and the Central National Bank. Issues were joined in both actions but neither was tried, and Dodge died on March 15, 1926. In May, 1926, plaintiff entered into another contract with defendant and Ralph W. Arnot, who was also an attorney, by which he agreed to pay them 25 per cent. of all they might recover of the above property, they agreeing, however, to satisfy therefrom any claims of the estate of Dodge by reason of his contract with plaintiff. The attorneys last employed filed a contest of the will of Mrs. Nielsen, and after negotiations with the executor and with the knowledge and consent of plaintiff a compromise was effected by the terms of which the sum of \$11,276.99 was to be paid by the estate and received by plain-

tiff in full settlement of his claim to the property. The proposed compromise was reported to the court in the estate proceeding and approved. It was also found that the above amount was received by plaintiff, and that he in turn paid therefrom to the executor of the estate of Dodge \$1,427.59, to Arnot \$480.36, and to defendant Frank \$939.72, a total of \$2,847.67; and that it was not true that the above total was received by defendant. Further, that on the date of these payments plaintiff was not incompetent or incapable of handling his business affairs or of managing his property; that the \$250 sought to be recovered was an agreed attorney's fee paid by plaintiff to defendant pursuant to a contract made July 7, 1926, whereby the latter prosecuted an action for the plaintiff; that the service was rendered before the plaintiff was declared incompetent and at a time when he understood the effect of the contract and the purpose of the employment for which payment was made. Further, that the contract was fair in its terms and resulted in material advantage to plaintiff.

The court entered judgment for defendant upon its findings, and plaintiff has appealed therefrom, the grounds therefor being that the findings are unsupported, and that the court erred in ruling upon the admissibility of certain evidence.

A physician who treated plaintiff for a period of six days during July, 1926, testified that due to undernourishment and auto-intoxication plaintiff was then in a serious physical and mental condition, further stating that the mental condition might have been caused by his physical condition, but that the former following treatment must have improved. The witness refused to testify that plaintiff was of unsound mind during this period, stating that although "he had a mentality of ten or twelve years apparently he was sound." In September, 1927, this witness, who was about to testify in another action as to plaintiff's condition, recommended an examination by Dr. Chamberlain. The latter testified that after an examination, using the Stanford-Binet test, and from plaintiff's history, he found him to be mentally deficient, unable unassisted to manage his affairs, and that his mental condition was probably the same in April and June, 1926. The plaintiff was called and examined by the trial judge. He recalled the material facts of the transaction between himself and Dodge and defendant, and expressed himself satisfied with the Dodge contract. The cashier of the Central

Savings Bank of Oakland testified that the payments in question were made in his presence by plaintiff, and that the latter appeared to understand the transaction. In addition, defendant testified in detail as to his dealings with plaintiff, stating that the latter, while not a bright man, "knew exactly what he was doing."

[1, 2] A judgment will not be reversed when there is substantial evidence supporting the findings (2 Cal. Jur., Appeal and Error, § 543, p. 921), or where different inferences might rationally be drawn therefrom (*MacDermot v. Hayes*, 175 Cal. 95, 170 P. 616), even though there might be an honest difference of opinion as to the effect of the evidence. In *re Estate of Presho*, 196 Cal. 639, 238 P. 944. The same rules apply to the determination of the question of mental capacity; and the findings of the trial court can be overthrown only when they totally lack the support of substantial evidence. *Dunphy v. Dunphy*, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230.

[3] The credibility of the witnesses and the weight to be given to their testimony are questions for the trial court (Code Civ. Proc. §§ 1847, 2061); and although opinions might differ as to the weight and effect to be given the evidence, there is sufficient substantial evidence to support the court's conclusions in the present case. It has been held that mere weakmindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if a person has sufficient intelligence to understand the nature of the transaction and is left to his own free will, is not sufficient to defeat a contract or set aside an executed agreement or conveyance. *Hemenway v. Abbott*, 8 Cal. App. 450, 97 P. 190.

The court sustained objections to the form of certain questions asked a physician regarding plaintiff's mental condition. While we are of the opinion that the rulings were correct, nevertheless the errors, if any, were not prejudicial as both witnesses testified fully in this respect.

What we have said applies to the other rulings complained of, none of which affect material matters or can reasonably be said to have been prejudicial to plaintiff's case.

The findings were fully supported, and no error has been shown which warrants the conclusion that the result was a miscarriage of justice.

The judgment is affirmed.

117 Cal.App. 317

NORTH v. EVANS.

Civ. 875.

District Court of Appeal, Fourth District,
California.

Oct. 2, 1931.

1. Pleading ⚡345(1).

If answer puts in issue material allegation of complaint or sets up affirmative defense, judgment on pleadings cannot be given for plaintiff.

2. Bills and notes ⚡467(3).

Under allegation of complaint that plaintiff purchased notes before suing, presumption existed that, if plaintiff had purchased notes as holder in due course, she would have so stated.

3. Bills and notes ⚡467(3).

Under allegation that plaintiff purchased notes before suing, notes *held* subject to defenses available against payee.

4. Pleading ⚡121(1).

Denial, based on lack of knowledge or information only, is insufficient to tender issue (Code Civ. Proc. § 437).

Denial is insufficient, it being based on lack of knowledge or information only, and not on a lack of information and belief, as required by Code Civ. Proc. § 437, permitting defendant to base answer on ground that he has no information or belief on subject sufficient to enable him to answer allegation of complaint.

5. Pleading ⚡126.

Allegation that notes were never sold nor assigned to plaintiff prior to maturity, and had not been assigned at any time for other purposes than for collection, *held* negative pregnant.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by C. C. North against Lillian E. Evans. Judgment for plaintiff, and defendant appeals.

Reversed and remanded for a new trial.

See, also, 300 P. 893.

Titus & Macomber, of San Diego, for appellant.

S. G. North, of San Diego, for respondent.

ALLISON, Justice pro tem.

In this action judgment in favor of the plaintiff was granted on the pleadings, from which the defendant appeals upon a bill of exceptions.

The complaint was filed on the 3d day of October, 1930, and declares on two promissory notes. One of said notes is dated the 13th day of December, 1927, payable to E. D. Wilkinson, for the sum of \$700, due 180 days after date thereof. The other note, for \$787.50, is dated March 28, 1928, due on or before September 1st after date. It is alleged that no part of the principal or interest on either of said notes has been paid, and "that prior to the commencement of this action for a valuable consideration the said note was sold and delivered to the plaintiff herein and that the said plaintiff is now the owner and holder thereof." The complaint is in two counts, and the allegation above quoted is identical in each count.

The answer admits the execution of the notes in question and that no part of the principal or interest has been paid, but denies that said notes were ever delivered except as in the special defenses therein set out. The answer in each count sets out certain transactions between defendant and E. D. Wilkinson, the payee named in said notes, out of which grew an indebtedness from the defendant to the said Wilkinson in the respective amounts named in the notes; admits the execution and delivery of said notes to Wilkinson and further alleges in each of said special defenses that, at the time of making said notes, it was agreed between them that the making, execution, and delivery of the notes should be ineffective for any purpose whatever, and should constitute no binding agreement between the parties thereto, until the happening of a certain condition named in said special defense, and that, upon the happening of said condition, the notes should immediately take effect, and be and become binding agreements between the parties thereto. It is alleged that the condition upon which the notes were delivered has not occurred. The answer also denies that the notes are now due and payable.

Respondent insists that the special defenses would not, if true, make the delivery of the notes conditional; that they are to be regarded merely as matters of evidence, and, as such, would be inadmissible as an attempt to vary the terms of the written contract. It was held in the case of Billings v. Everett, 52 Cal. 661, that, where an answer sets up as a defense an oral agreement between the defendant and the payee named in the note, made at the time when the note was executed, to the effect that the note should not be paid unless a certain canal was constructed across the lands of the defendant, so that a certain number of acres of land could be irrigated therefrom before the maturity of the note, and that the payee had failed to complete the canal in accordance with said agreement, if this averment be true, the con-

sideration of the note has failed in full or in part, and, as the plaintiff took the note after maturity, the defense is available as against the note in his hands. See, also, *Richardson v. Lamp*, 209 Cal. 668, 290 P. 14; *Jefferson v. Hewitt*, 103 Cal. 624, 37 P. 638.

[1-3] If the answer puts in issue a material allegation of the complaint or sets up affirmative matter which constitutes a defense to the cause of action therein set forth, a judgment on the pleadings cannot be given in favor of the plaintiff. *Cass v. Richmond Rochester*, 174 Cal. 358, 163 P. 212; *Neale v. Morrow*, 174 Cal. 49, 161 P. 1165. Under the allegation of the complaint that the plaintiff purchased said notes prior to the commencement of this action, it must be presumed that, if the plaintiff had purchased the notes under such circumstances as would make her the holder thereof in due course, she would have so stated in her complaint. Under the state of the pleadings, the notes are subject to any defense against the holder, which could have been interposed against the payee. *San Jose Ranch Co. v. San Jose L. & W. Co.*, 132 Cal. 582, 64 P. 1097; 19 Cal. Jur., p. 999.

[4] It is alleged in paragraph III of defendant's answer to count I of said complaint that "concerning the matters set out in paragraph III of count I of said complaint this defendant has not sufficient knowledge or information to answer the same and therefore denies the allegations of said paragraph III." The same paragraph is contained in the answer to count II of said complaint. Under section 437, Code of Civil Procedure, the defendant, if he has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, may so state, and base his answer on that ground.

It will be observed that in the allegation in question the denial is based upon a lack of knowledge or information only, and not upon a lack of information and belief. A denial in that form is clearly insufficient. *Turner v. Watkins*, 36 Cal. App. 503, 172 P. 620; *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191; *Davidson Investment Co. v. Dabney*, 103 Cal. App. 392, 284 P. 673. This attempted denial, as a pleading, tenders no issue.

[5] It is also alleged that the promissory notes sued on were never sold nor assigned to respondent prior to the expressed date of maturity therein, and have never been assigned at any time for other purposes than for collection.

Appellant insists that this denial of the assignment of the notes to the plaintiff is sufficient to present an issue, and in support of her contention cites the case of *Cuneo v.*

Lawson, 203 Cal. 190, 263 P. 530, in which case the court held that the answer denied the right of plaintiff, from any standpoint, to bring the suit, and that a mere ambiguity was without significance in the situation before the court. The court apparently had in mind the defective denial upon information and belief, coupled with the two denials following, as curing the ambiguity, and that therefore the plaintiff in the case was not entitled to a judgment on the pleadings.

The attempted denials of the sale and delivery of the notes in question are not aided by the allegation of said answer that the promissory notes sued upon were never sold nor assigned to respondent prior to the expressed date of maturity therein, and had never been assigned at any time for purposes other than for collection. This allegation is clearly a negative pregnant, and is insufficient to tender an issue. 21 Cal. Jur. 154.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 303
MASTEN v. FOX WEST COAST THEATRES
et al.
Civ. No. 882.

District Court of Appeal, Fourth District,
California.
Oct. 1, 1931.

As Corrected on Denial of Rehearing. Oct. 23,
1931. Hearing Denied by Supreme Court
Nov. 30, 1931.

1. Appeal and error ⇐1078(3).

Grounds of special demurrer to complaint, not presented or argued on appeal, are abandoned.

2. Fraud ⇐27.

Promise of theater to award \$5,000 equity in home as prize in popularity contest, if made without intention of performing, constituted actionable fraud, where property offered had only \$500 equity (Civ. Code, §§ 1572, 1709, 1710).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Neilson Masten, by Annette Van R. Masten, his guardian ad litem, against the Fox West Coast Theatres and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Edward J. Kelly, of San Diego, for appellant.

Alfred Wright and Albert W. Leeds, both of Los Angeles, and John B. Bertero, of San Diego, for respondent Fox West Coast Theatres.

Shreve & Shreve, of San Diego, for respondent Guardian Western Co.

MARKS, J.

[1] This appeal is taken from a judgment entered in favor of respondents after the sustaining of demurrers to appellant's second amended complaint without leave to amend. The Fox West Coast Theatres filed a general demurrer, and the Guardian Western Company a general and special demurrer to the amended complaint. The second named respondent has not filed any brief on this appeal, but it is stipulated that the brief filed on behalf of the Fox West Coast Theatres may be assumed and considered the brief of the Guardian Western Company. As the grounds of special demurrer urged in the court below are not presented or argued on this appeal, we may consider them abandoned and confine our attention entirely to the merits of the trial court's order sustaining the general demurrers to the amended complaint.

It appears from the record that Nellson Masten, at the time this suit was instituted, was a minor of the age of twenty years, and that Annette Van R. Masten, his mother, was appointed his guardian ad litem for the purpose of prosecuting this action.

It is alleged in the amended complaint that the respondents, and each of them, caused to be published in the daily papers of San Diego, an advertisement reading as follows: "\$5,000 Equity on Prize List. This is the beautiful \$10,500 Point Loma home at 3936 Centraloma drive, in which a \$5,000 equity will be given by the Guardian Western Company as one of the prizes for winning contestants in the Fox Theatre popularity contest, which will start tomorrow. Fox Popularity Competition to Open Tomorrow. Thousands of Dollars in prizes await the winners; read story for directions. Tomorrow is the day! For tomorrow the Fox Theatre starts the greatest popularity contest ever held in California. The idea is to select the most popular boy and girl between the ages of 14 and 25. It isn't a new stunt, but the manner in which this is to be carried out places it in a class by itself. The prizes are enough to stimulate interest in a wooden Indian, and the best is yet to come, but will be divulged later through these columns. Here's the Idea. Here is the idea in a nutshell. With every ticket purchased in any San Diego Fox Theatre, beginning tomorrow, 10 votes will be awarded the purchaser. With every \$5 script book bought, 200 votes are awarded. In order to become

a contestant it is necessary to secure and present 1000 votes. A large board carrying the names of the contestants will be erected in the foyer of the Fox Theatres. This will be operated in much the same manner as a stock exchange board, with the record of every contestant kept up to the minute, and open to inspection by anyone attending the Fox Theatre. Following are a few of the prizes to be offered to winning contestants. A \$5,000 equity in a home will be given by the Guardian Western Company. It is a beautiful \$10,500 Point Loma home at 3936 Centraloma drive. A new 1930 Chevrolet sport roadster, fully equipped, will be awarded by the Bay City and Campbell Chevrolet companies. This car will be seen on display in the window on the corner of Seventh and B streets. Other Major Prizes. An airplane trip covering the entire Western Air Mail Express line over a distance of more than 3000 miles is being given by the Western Air Express. The Fox Theatre will furnish all incidental expenses of this trip. A complete ground school course will be awarded by the Pacific Technical University located at 2157 India street. Mrs. John P. Mills of the Point Loma Riding Academy is giving a beautiful riding horse. These are but a few of the major prizes. Others will be announced later through these columns." This advertisement was accompanied in the papers by a picture of the house.

It is further alleged that the respondents, and each of them, promised and agreed that the \$5,000 equity in the real property described would be given to any one complying with the terms of, and accepting the offer, and that in making the offer each of the respondents was the duly authorized and acting agent of the other.

It is further alleged that appellant was advised of the offer and relied thereon, and, for the purpose of securing one of the prizes mentioned, sold script books and tickets in and around San Diego for the Fox West Coast Theatres, procured the votes of the purchasers, and in every respect complied with each and all of the terms of the published offer; that he ranked third in the number of votes awarded in the contest, and chose the Point Loma home as his prize; that he relied upon the representations contained in the offer that such home was of the value of \$10,500, and that the equity therein to be conveyed to him was of the value of \$5,000, and that he demanded of respondents that a \$5,000 equity in the home be conveyed to him; that the Point Loma home was not of the value of \$10,500, but was worth no more than \$6,000; that respondents tendered to him a deed to the property upon condition that he give back a deed of trust on the property in the sum of \$5,500 so that appellant would receive an equity in the home of not more than \$500 instead of \$5,000 as set forth in the advertisement; that

these facts were well known to both respondents, and that their representations in the advertisements were false and untrue, and known to them and each of them to be false and untrue, and were made for the purpose of defrauding appellant and the others engaged in the contest; that appellant relied upon such false and fraudulent representations, and was thereby caused by them to contribute his labor, time, and services in selling the script books of the Fox Theatres to his damage in the sum of \$5,000; that the representations made by respondents in the offer were made fraudulently and with malice, and that neither respondent intended to perform the same, and that each of them intended to defraud and deceive by the promises which they made without any intent to perform them. In addition to the actual damage of \$5,000, appellant sought to recover punitive damages.

Both parties agree that the term "equity," as used in the advertisement, has a well-defined and well-understood meaning in the sense in which it was there used. They agree that by universal custom this word, when used in connection with real estate value, means a clear market value in excess of the incumbrances upon a parcel of property. By demurring to the amended complaint respondents have admitted the truth of all its material allegations.

[2] Respondents strenuously maintain that, although the advertisement contained a statement that the Point Loma property was of the value of \$10,500, they could not thereby be held for damages, because statements of the value of property about to be sold have been held to be statements of opinion and not statements of a fact upon which the other party can rely where the means of investigation and of ascertaining the true value are open and available to such party. They cite many cases in support of this doctrine. While we may assume, but not concede, the correctness of this rule, we conclude that it is not controlling in the instant case.

An analysis of the advertisement which we have quoted discloses that the portion of it relating to the Point Loma property contains three separate representations: First, there is the statement that this property was of the value of \$10,500; second, there is the statement that the equity to be given as one of the prizes was of the value of \$5,000; and, third, by inference, that the incumbrances upon the property would be \$5,500. The advertisement contained the following phrases: "\$5000.00 equity on prize list," "a \$5000.00 equity will be given," "\$5000.00 equity in a home will be given." These phrases can be construed into nothing less than a promise to give a successful prize winner a \$5,000 equity in this home. The phrase "\$5000.00 equity" means nothing more nor less than a clear market value in the property of \$5,000 over and above

incumbrances. This advertisement contained the direct promise to give such equity to one of the successful contestants.

Actual fraud is defined by section 1572 of the Civil Code as follows: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; or, 5. Any other act fitted to deceive."

Section 1709 of the Civil Code is as follows: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Section 1710 of the Civil Code is as follows: "A deceit, within the meaning of the last section, is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, 4. A promise, made without any intention of performing it."

In 12 California Jurisprudence 738, it is said: "The code provides that 'a promise made without any intention of performing it' constitutes actual fraud or deceit, if by means of it a party has been induced to alter his position to his injury. It is, therefore, firmly established that where, in bad faith and without intent to perform, one makes a promise touching a substantive part of the consideration moving to the party with whom he is dealing, it constitutes fraud. The essence of the fraud in such cases is not the breach of a promise, but the fraudulent intent not to perform; and such fraudulent intent must exist at the time of the making of the promise. Subsequent conduct may be sufficient to show that there was no intention of performing at the time of the promise. Thus there is a decision that, where a cashier and manager of a bank promises to return a note, the subsequent attempt of the bank to collect the note is sufficient to show a fraudulent intent. Where the circumstances were such at the time of the making of a promise that it would be impossible to perform, the promise will be held to be fraudulent." The cases cited amply bear out the text.

In the case of *Mazuran v. Stefanich*, 95 Cal. App. 327, 272 P. 772, 774, the court said: "The court found, as we have seen, that appellant orally agreed to perform seven distinct legal services for respondents and fraudulently induced respondents to execute a writing which they believed provided for all seven services, but which in fact provided for only one. It is clear from this that appellant in no event intended to perform, or to endeavor to perform, the six services which he caused to be omitted from the written agreement prepared by himself. A promise made with no intention of performing it is actual fraud. Civ. Code, § 1572, subd. 4. The gist of appellant's fraud in this case was not that he promised to do something which he could not do, but that he promised to do something which he did not intend to do."

In the case of *Lundblade v. Boyes*, 101 Cal. App. 741, 282 P. 399, 400, it was said: "The promise made by defendants without any intention of performing the same constituted under the circumstances shown willful deceit (Civ. Code, § 1710), for which they were liable for any damage thereby suffered by the plaintiff (Civ. Code, § 1709)."

This same question was considered in the case of *Bouey v. Porterfield*, 96 Cal. App. 674, 274 P. 766, 767, where the following was said: "The trial court found that the statements and representations of Deyot and Porterfield that they would each purchase one-third of the capital stock of said corporation and pay \$8,333.33 therefor, that they had \$400,000 of the bonds of the Imperial Gypsum Company to sell, \$150,000 to finance the erection of a terminal warehouse, or were going to finance the Whitewater Cement Company, and that respondent's investment would be returned to him within 90 days were all untrue, false, and fraudulent, were known to said Deyot and Porterfield to be false and untrue; that their said promises were made without any intention on their part of performance, and were made for the purpose and with the intent of causing and inducing respondent to pay the \$3,500 in cash; and that, relying upon the said representations and believing them to be true, respondent paid over to said Deyot and Porterfield the said sum of \$3,500; and all of these findings are supported by the evidence. * * * Mere failure to perform a promise made in good faith does not constitute actionable fraud. However, a promise made without any intention of performing it is actionable fraud. Subdivision 4, § 1572, Civ. Code; *Rheingans v. Smith*, 161 Cal. 362, Ann. Cas. 1913B, 1140, 119 P. 494; *California Credit Corp. v. Carpenter*, 77 Cal. App. 18, 246 P. 126. And the intention not to perform a promise is a matter of inference from the facts proven. *Holiday v. Tolosano*, 39 Cal. App. 151, 178 P. 170. In the case of *Henry v. Continental Building, etc., Ass'n*, 156

Cal. 680, 105 P. 960, 965, the court said: 'A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion.' Appellant claims that respondent had the opportunity of discovering, and should have known and discovered, the falsity of the representations of Deyot and Porterfield, if, in fact, the said representations were untrue. There is no evidence that respondent had such opportunity. The contract was drawn up and the money paid over immediately after the false representations and the false promises were made to respondent. Even though opportunity for investigation was open to respondent, this, of itself, would not prevent his recovery in this action. Bigelow, in his work on Fraud, vol. 1. § 523, says: 'The proposition has now become very widely accepted at law, as well as in equity, that a man may act upon positive representations of fact, notwithstanding the fact that the means of knowledge were specifically open to him.' And Pomeroy's Equity Jurisprudence, § 896, also lays down the rule that the mere existence of opportunities for examination are not sufficient to prevent reliance upon fraudulent representations assumed to be within the knowledge of the party making them. In the case of *Teague v. Hall*, 171 Cal. 668, 154 P. 851, the Supreme Court of this state said: 'This view of the law has been repeatedly declared in the decisions in this state'—and, among the numerous cases cited in support thereof, calls attention to the case of *Ruhl v. Mott*, 120 Cal. 668, 53 P. 304, wherein the court said: 'It is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him.'"

The case of *Blodgett v. Trumbull*, 83 Cal. App. 566, 257 P. 199, 202, is particularly illuminating upon the question we are considering. The defendant Grace Sherwood Trumbull owned various lots in the Casitas tract in Santa Barbara, Cal. She sold one of these lots to the plaintiff for a valuable consideration. The deed conveying the property contained a number of restrictions which were declared to be conditions running with the land. Later Mrs. Trumbull sold other lots in the same tract without similar restrictions being set forth in the deeds. The amended complaint of the plaintiff alleged a promise on the part of Mrs. Trumbull that she would insert similar restrictions in all other deeds to all the lots in this tract. Her failure so to do was also alleged, together with the allegation that the promise to the plaintiff was made without any intent to perform on the part of Mrs. Trumbull and with intent to defraud the plaintiff and induce her to accept title

to her lot subject to these restrictions. The trial court sustained a demurrer to the amended complaint which, on appeal, was held error. The Appellate Court said: "Her demurrer admits not only that the promises alleged were made in order to induce plaintiff to buy lot 7, but that they were made without intent to perform; and the deed to McFadden shows that, in conveying to him lots 1 to 6, defendant Trumbull did not keep her promises. Hence the second count does state a cause of action for damages against her."

In the instant case the demurrers of respondents admit their promise to give and convey to appellant a \$5,000 equity in the Point Loma property. They admit that this promise was made without any intention on their part to perform, and admit that they failed and refused to perform their agreement. They further admit that, instead of conveying to appellant a \$5,000 equity in the property, they only offered to convey him a \$500 equity in it. They admit that the appellant accepted their offer and relied upon it as true and spent his time and energy in performing his part of the obligation. They admit that they received the benefits of appellant's effort, for which they have paid him nothing. They should not be permitted to escape the liability of their promise and keep the results of the time and energy expended by appellant because of a refinement in their reasoning as to their representations of the value of the Point Loma property. As appears from the allegations of the amended complaint, they made a definite promise to appellant which they should have performed or be required to respond in damages for their failure so to do. The parties should be put upon their proof as to the truth or falsity of these representations.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 259

BOWERS v. UNION TRUST CO. OF SAN DIEGO.

Civ. 473.

District Court of Appeal, Fourth District, California.

Sept. 29, 1931.

Rehearing Denied Oct. 21, 1931. Hearing Denied by Supreme Court Nov. 27, 1931.

1. Appeal and error ⇨907(3).

Where appeal is taken on judgment roll alone, reviewing court must assume findings are fully supported.

2. Appeal and error ⇨907(3).

In absence of bill of exceptions or reporter's transcript, reviewing court assumes that failure to find facts favorable to appellant's contention was due to absence of evidence warranting such finding.

3. Appeal and error ⇨907(3).

All intendments are made in support of judgment, and regularity of proceedings is presumed when appeal is upon judgment roll alone.

4. Trial ⇨397(1).

Specific findings as to each material issue may be unnecessary where findings as whole clearly show court's conclusion.

5. Appeal and error ⇨1071(5).

Reviewing court will disregard other findings if there is one clear, sustained, and sufficient finding upon which judgment may rest.

6. Corporations ⇨479.

In action by bondholder against trustee for breach of trust, findings respecting claim of trustee's surrender of collateral held sufficient to support judgment for defendant.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Bessie M. Bowers against the Union Trust Company of San Diego. Judgment for defendant, and plaintiff appeals.

Affirmed.

William H. Wylie, of San Diego, for appellant.

Albert J. Lee, Edgar A. Luce, and Stearns, Luce & Forward, all of San Diego, for respondent.

ALLISON, Justice pro tem.

The plaintiff appeals from the judgment on the judgment roll alone. The action was brought to recover from defendant the sum of \$3,000 with interest. The basis of plaintiff's claims is an alleged breach of trust on the part of the defendant, the trustee under a certain indenture of trust dated August 1, 1921, executed by Stephens & Company, a corporation, as security for certain bonds which were to be issued and sold by Stephens & Company. Said bonds were to be secured as to principal and interest by certain collateral securities which had been sold and assigned by Stephens & Company to the defendant as trustee, pursuant to the provisions of said indenture of trust.

It is alleged that certain collateral securities were from time to time delivered by Stephens & Company to the respondent, to secure the payment of the obligations issued by

Stephens & Company under said indenture of trust, and that said respondent did from time to time certify and deliver to Stephens & Company the written obligations of the said Stephens & Company in accordance with the terms and provisions of said indenture. Appellant was the owner of three of the bonds so issued and certified by the respondent.

It was provided in said trust agreement that should Stephens & Company be adjudged bankrupt that the trustee might declare the principal of all outstanding bonds to be due and payable forthwith. On the 29th day of December, 1926, Stephens & Company was adjudged bankrupt and the respondent, in accordance with the provisions of said trust agreement, declared all outstanding bonds to be due and payable forthwith, and at the time of the trial of the action the estate of said bankrupt had not been fully administered or closed.

It was stated in said trust agreement that the objects and purposes of said declaration of trust were to provide "a convenient form of investment" in certain securities owned by Stephens & Company, the securities being divided into classes. It was proposed that the securities of the respective classes would from time to time be deposited with the respondent and that such securities as were then in the possession and ownership of Stephens & Company were pledged to the trustee. The trust agreement contemplated that, with the securities of the kinds and classes described in said agreement and of the values as fixed therein, in the hands of the trustee, Stephens & Company was to issue its own trust notes denominated "collateral trust 7 per cent. serial gold bonds," which it was to sell to the general public, the trustee being required to first certify that the bonds as issued, were bonds "described in the trust agreement therein mentioned."

By the provisions of said trust agreement the trustee might certify bonds when Stephens & Company had delivered to the trustee, and the trustee held bonds or mortgages of the market value of \$1,100 for each \$1,000 face value of bonds certified, or when Stephens & Company had delivered to the trustee stocks of the kind and character described in the trust agreement, of the market value of \$1,200 for each \$1,000 face value of the bonds certified. In ascertaining the market value of the securities of both classes so delivered to the trustee, it was provided that the trustee should take the average market value thereof as shown by three affidavits to be filed with the trustee by Stephens & Company at the time the trustee was requested to issue and certify to such bonds. It was provided that one of the affidavits should be by the president or vice president of Stephens & Company and that the other two affidavits should be by independent appraisers previously approved by the corporation commissioner of the state of

California. It was also provided in said trust agreement: "Section 3. The Company may, at any time, withdraw from the trustee any or all of the securities deposited as collateral hereunder, by replacing them with cash in amounts equal to 80% of the market value of the stock and 90% of the market value of the bonds or mortgages so withdrawn, or by replacing them with stocks, bonds or mortgages of an equal market value or with retired bonds secured thereby."

Appellant charges in her complaint that the respondent received and accepted from Stephens & Company, pursuant to the terms of said trust agreement, certain bonds, certificates of stock, and other evidence of indebtedness, of the appraised market value of \$467,562.32, and certified and delivered to said Stephens & Company the written obligations of Stephens & Company, secured as to principal and interest under said agreement of trust, aggregating an indebtedness of \$424,500, and that while said obligations were outstanding and unpaid the trust company, without the consent or knowledge of the appellant, delivered all of said securities to Stephens & Company or to persons unknown to appellant and that no part or portion of said securities or the proceeds derived therefrom were in the possession or under the control of the said respondent; and that by reason thereof, the said respondent was unable to make sale thereof, in order that the proceeds derived therefrom might be applied to the payment of the bonds owned and held by the appellant, and that by reason of said act of the respondent in permitting said securities to be withdrawn from its actual possession and from under its control, the said respondent lost all power over said collateral to subject it to the payment due on the bonds held by appellant, to her damage in the sum of \$3,000, and interest.

The answer admits the due incorporation of Stephens & Company and of the respondent Union Trust Company of San Diego, and that Exhibit B attached to the complaint is a true and correct copy of the trust indenture; admits the adjudication in bankruptcy of Stephens & Company; and alleges that the estate of said bankrupt is still in the process of administration, that respondent did, on behalf of appellant, file a claim and proof of debt in said estate, that the same was allowed and that no claims have been paid; that there is in the hands of the trustee sufficient funds to pay a part of said claim, and that the trustee is prosecuting proceedings for the collections of assets of the estate which, when collected, will be sufficient to pay said claim in full. The answer denied each and every allegation contained in the complaint, except those matters which were specifically admitted.

Appellant attacks the judgment, claiming that it is based upon conclusions of law, or

findings of ultimate fact inconsistent with, and repugnant to, the other findings which comprise all the probative facts in the case.

It is conceded by appellant that the only breach of the agreement of trust, and the only breach of duty the respondent owed appellant as owner of the bonds secured under said agreement of trust, is the alleged failure of the trust company to keep and retain possession and control of the collateral deposited with it by Stephens & Company to secure such payment, and the only damage claimed by appellant is that occasioned by the alleged failure of the trust company to keep and retain such collateral so that the same could be sold and the proceeds derived therefrom applied to the payment of the bonds which appellant owns.

Appellant insists that the judgment is without support in the findings as made by the court and that the judgment must find its support, if any it has, upon purported findings which in their nature are conclusions of law.

The court found that the respondent did, from time to time, certify and deliver to Stephens & Company the written obligations of Stephens & Company, in accordance with the terms and provisions of said trust indenture, and that the respondent had not violated the terms and provisions of the trust agreement, nor had it violated the obligation and duty which it owed to the appellant as the holder of bonds of Stephens & Company; that it had not violated any of the terms or provisions of said agreement to keep and retain possession and control of the bonds and certificates of stock; that it was not true that the respondent, without the consent or knowledge of the appellant, delivered all of said bonds and certificates of stock, theretofore sold and transferred to the respondent, to Stephens & Company, or to other persons unknown to appellant; and that it was not true that no part or portion of the bonds or certificates or the property represented thereby or the proceeds derived therefrom, was then in the possession and under the control of the respondent; that the respondent had not lost the control or possession of said securities; also that appellant had not been damaged.

The court further found that on the 15th day of June, 1927, the respondent had in its possession the stocks and bonds in said findings described, and at a public sale held on said day, sold said securities and received therefrom the sum of \$1,100 for the entire parcel, and that the securities sold on said day were all the certificates of stock and bonds in the possession of respondent or under its control, on the date of the adjudication in bankruptcy of Stephens & Company and at all times subsequent thereto held and retained by the trust company to secure the payment of the principal and interest on outstanding bonds which had been issued under

the provisions of the trust agreement; that at no time subsequent to the 29th day of December, 1926 (the date of said adjudication), had the respondent held in its possession any other or further securities than those enumerated in said finding No. XV.

[1-3] This appeal is upon the judgment roll alone, there being no bill of exceptions or reporter's transcript of the evidence. An examination of the foregoing findings convinces us that the same are not inconsistent with the judgment appealed from, and we are required to assume that they are fully supported by the evidence. The facts found would not support a judgment in favor of the appellant, and we are required to assume, in the absence of a bill of exceptions or reporter's transcript of the testimony, that the failure of the trial court to find other facts favorable to appellant's contention was due to the fact that no evidence was produced which would justify such finding. *Ouzoonian v. Vaughan*, 194 Cal. 139, 228 P. 8. When an appeal is to be determined upon the judgment roll alone, all intendments will be made in support of the judgment and all proceedings necessary to its validity will be presumed to have been regularly taken. 2 Cal. Jur. 521.

[4, 5] It is not always necessary to make specific findings as to each of several material issues when the findings, taken as a whole, or construed together, clearly show that they include the court's conclusion upon the material issues. *Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 P. 201. If, in any case, there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest the judgment upon that finding or those findings, and others may and will be disregarded. *Brown v. Schroeder*, 88 Cal. App. 192, 263 P. 325.

[6] In the case of *Kendis v. Cohn*, 90 Cal. App. 41, 265 P. 844, 854, the court had under consideration a finding to the effect "that plaintiff has not sustained monetary damage by reason of any matters or things set forth in the second or third cause of action pleaded in the complaint herein," and from the judgment on such findings plaintiff appealed. In disposing of said matter the court said: "It may be said that this appeal is taken on the judgment roll alone, and there is therefore a total absence of any transcript of the evidence or bill of exceptions. Under such circumstances it will be presumed that the evidence offered in support of the findings was sufficient to support the facts found. [Citing cases.] It is a well-settled rule that findings of fact made by the trial court are to receive such construction as will uphold rather than defeat its judgment thereon. [Citing cases.] And, if different inferences may be drawn from the facts as found,

this court will not upon an appeal from the judgment on the judgment roll alone draw an inference contrary to that drawn by the trial court or which will have the effect to defeat the judgment. [Citing cases.]”

We are of the opinion that the judgment appealed from finds ample support in the findings. In view of this conclusion it is unnecessary to discuss the other contentions made by the appellant.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 208

JOHNSTON v. PEAIRS et al.
Civ. 477.

District Court of Appeal, Fourth District,
California.
Sept. 28, 1931.

Rehearing Denied Oct. 15, 1931. Hearing
Denied by Supreme Court Nov. 25, 1931.

1. Appeal and error ⇨1050(1).

Admission of witness' opinion that car which struck plaintiff was forced forward by blow from appellant's automobile *held* not to warrant reversal.

The admission of the opinion evidence did not warrant reversal because the record contained ample evidence of negligence and plaintiff's recovery did not depend upon the theory that the crossing of the sidewalk by car which struck plaintiff was caused solely by propulsive force given by appellant's car.

2. Appeal and error ⇨880(1).

Appellant may not complain of errors as between himself and joint defendant, if not materially affecting relations with plaintiff.

3. Evidence ⇨514(2).

Automobile mechanics of many years experience in examining and repairing wrecked cars *held* not entitled to testify as to circumstances of accident as indicated by condition and location of cars since subject was not matter for expert testimony.

4. Evidence ⇨509.

Admission of testimony of graduate chiropractor, corroborated by physicians, as to result of examination of injured person, *held* not abuse of discretion.

5. Evidence ⇨546.

Qualification of expert is in first instance question largely within trial court's discretion.

6. Evidence ⇨195.

Admission of elastic hose similar to one worn by plaintiff *held* not error in action for injuries.

7. Appeal and error ⇨1004(1).

Verdict may be set aside as excessive only when so grossly disproportionate to injury as to shock sense of justice and indicate passion and prejudice.

8. Damages ⇨132(2).

\$15,000 to 65 year old woman for breaking of legs, injuries to back and chest of probable permanent nature, impairing hearing and eyesight, breathing, and ability to walk, *held* not excessive.

9. Appeal and error ⇨929.

Trial court's reprimanding spectators for making signals to jury must be assumed to have adequately protected parties, where record failed to show situation and no objection was made during trial.

10. Trial ⇨18.

Considerable discretion must be allowed trial court in handling situations incident to presence of spectators in courtroom.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Helene A. Johnston, also known as Mrs. R. C. Johnston, against J. E. Peairs and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Edward J. Kelly, of San Diego, for appellant.

Harry William Elliott and Vernon W. Hunt, both of Los Angeles, for respondent Johnston.

BARNARD, P. J.

This is an action by a pedestrian to recover for injuries claimed to have been received due to the collision of two automobiles, and to have been caused by the negligence of both drivers. The collision occurred at the corner of Third and Laurel streets in the city of San Diego, just before noon on April 24, 1929. The plaintiff, a lady of the age of 65 years, had just left a hall some half block from the intersection in question, where she had been exercising. She was proceeding along the sidewalk and had just reached the street corner when an automobile jumped the curb and struck her down, rendering her unconscious, breaking both legs, and causing other serious injuries. It appears from the evidence that immediately before the plaintiff was struck, the defendant Mrs. W. S. Whiteside was driving a Buick roadster in a westerly direction

along Laurel street; that the defendant J. E. Peairs, who is a physician, was driving a Buick touring car in a northerly direction along Third street; and that the two cars came together near the center of this intersection. Just before they collided, Mrs. Whiteside swerved slightly to her right and Peairs swerved slightly to his left. Dr. Peairs' car struck the Whiteside car near the center of its left side, the side of the car and the running board being smashed and caved in, and the door knocked off its hinges. The force of the impact threw Mrs. Whiteside forward against the steering wheel, rendering her unconscious. Following the impact the Whiteside car proceeded to the northwest corner of the intersection, jumped the curb, struck the plaintiff, crashed into a building, and rebounded to the curb, where it came to a stop. The machine driven by Peairs stopped within a few feet of the point of collision. The action was tried before a jury and a verdict for \$15,000 was returned against all of the defendants. From the judgment which followed the defendant Peairs alone has appealed.

As is not unusual in such cases, the principal dispute seems to have been between the respective defendants, each of whom endeavored to place the blame upon the other. While there are many conflicts in the evidence, most of these relate to this dispute between the defendants and few affect the situation as regards the plaintiff. It may be said here, as was said in *Crabbe v. Rhoades*, 101 Cal. App. 503, 282 P. 10, 18: " * * * It is clear that the liability of appellant * * * depended entirely upon the answer to the questions whether he himself was or was not negligent, and whether or not such negligence, if it existed, proximately caused or contributed to the injuries complained of. These questions are wholly independent of the question as to whether or not his codefendant * * * was also liable."

The record contains ample evidence to show that appellant was guilty of negligence which contributed to the injuries sustained by the plaintiff. There was evidence that Mrs. Whiteside entered the intersection at a speed of fifteen miles an hour, and that when she entered the intersection she saw Dr. Peairs' car twenty feet south of the intersection. There was also evidence that Dr. Peairs' car entered the intersection at about thirty miles an hour and that he did not lessen his speed appreciably; that the Whiteside car turned slightly to the right and the Peairs car slightly to the left; that the Peairs car struck the Whiteside car a glancing blow at an acute angle; and that the Whiteside car immediately shot forward and went over the sidewalk. Appellant does not seriously contend that there is no evidence showing negligence on his part, but relies rather upon alleged errors of law.

[1, 2] The first point raised is that the court erred in permitting witness Dr. Yale to state his conclusions as to the cause of the accident. This witness testified that he was standing about one hundred thirty feet from the intersection in question and saw the collision; that appellant's car was going about thirty miles an hour and did not slacken its speed appreciably as it entered the intersection; that Mrs. Whiteside had come into the intersection at not more than twenty miles an hour; that as appellant's car approached, Mrs. Whiteside turned slightly, came almost to a stop, and was struck a glancing blow at an acute angle; and that her car immediately shot forward and hit the building on the corner. The record then shows the following:

"You mean that is the angle that the two cars collided? A. The two cars collided. His car was going this way and her car was coming this way; and it was an acute angle. And that forced her car forward. She got the force of the blow in such a direction that it forced her car directly forward.

"Mr. Kelly: I ask that that be stricken out as a conclusion and argumentative.

"The Court: The motion is denied. I think he can testify on that question."

Appellant argues that it is apparent from this that the plaintiff's theory as to the liability of the appellant is that her being struck by the Whiteside car was caused solely by the propulsive force given to the Whiteside car by appellant's car. It is then insisted that the answer of the witness just quoted contained, not statements of fact, but the conclusions of the witness as to the cause of the accident, and that its admission was prejudicial error. It is also urged that this error was accentuated by the subsequent refusal of the court to admit the conclusions of other witnesses, claimed to have been experts, upon the question as to whether the crossing of the sidewalk by the Whiteside car was caused solely by the propulsive force of the appellant's car. It may first be observed that the language here complained of was used while the witness was describing what he had seen. While there is an element of conclusion in what the witness said, the statement of a witness that he sees one car push another forward contains also an element of fact that is somewhat different from the ordinary case of a witness stating conclusions not connected with the recital of things seen by him. Assuming, but not holding, that the admission of this statement would have been error, as affecting the controversy between the drivers of the two automobiles, a somewhat different situation is presented in this action brought by an innocent third party against both drivers. In *Crabbe v. Rhoades*, supra, in commenting upon an erroneous instruction, the court said: "Had this been an action brought by Mrs.

Gaston against Rhoades, undoubtedly the giving of the instructions criticized herein would have constituted reversible error, but, being an action by an innocent third party against both, the situation is entirely different."

The question with which we are here concerned depends entirely upon whether or not the appellant was negligent, and, if so, whether or not such negligence proximately caused or contributed to the injuries suffered by the plaintiff. As we have pointed out, the record contains ample evidence of such negligence, and that it either caused or contributed to the injuries sustained. So far as this plaintiff is concerned the important facts are that the Whiteside car came upon the sidewalk, where she had a right to be, and that some act was done by the appellant which caused or contributed to that result. Plaintiff's recovery does not depend upon the theory that the crossing of the sidewalk by the Whiteside car was caused solely by a propulsive force given to it by appellant's car. It makes no difference whether this unusual situation was caused by such a propulsive force as referred to, whether it was caused by a pressing down of the accelerator when Mrs. Whiteside was thrown forward by the impact, or whether it was caused by something she did in her confusion upon being struck by appellant's car. The matter of opinion complained of, if assumed to be prejudicial as between the respective drivers, is not of sufficient importance in relation to the questions at issue between the plaintiff and the appellant, to justify a reversal. It is well settled that an appellant may not complain of errors as between himself and such a joint defendant, if they are not such as to affect in an important manner his relations to the plaintiff.

[3] Twelve points are raised by appellant, in which it is claimed that the court erred in excluding the testimony of experts, which testimony was offered for the purpose of impeaching the testimony of plaintiff's witnesses as to the movement of the automobiles after the collision. The first of these witnesses was an automobile mechanic, who, by way of qualification, testified that he had had many years' experience in repairing automobiles; that he had examined and analyzed the wrecks of cars on the ground where the wrecks had occurred; and that he had examined, studied, and analyzed the effects of collisions quite generally. Error is alleged in that the court refused to permit this witness to answer four questions, of which the following are typical:

"Now, Mr. Spencer, assuming that this map may represent the intersection of Third and Laurel streets, up being north, down south, to my right east, and towards you west; this is Laurel, as indicated, and this Third; and, assuming that an automobile enters the intersection, traveling west on

Laurel street, turns at an angle of approximately thirty-seven and one-half degrees north of west, as indicated in this line here, and comes to a stop about forty feet from the corner of the property line here, and while practically stopped is struck by an automobile, traveling north and turning approximately forty-five degrees west, what would be the effect upon the car struck, if you know?"

"Can you, from your experience as a repair man of automobiles, tell at what speed an automobile would have to travel to scale that curb?"

Another witness, by way of qualification, testified that he was an automobile mechanic of fourteen years' experience; that he arrived on the scene a few moments after the collision and removed appellant's car; and that he saw the condition of the cars and the marks upon the pavement. Also, that he had witnessed a great many collisions of automobiles and had repaired many cars involved in such occurrences. Error is alleged in that the court refused to permit him to answer seven questions, of which the following are typical:

"Q. Could you tell, from your experience and knowledge of automobiles, how fast that Buick touring car was traveling at the time of the collision at Third and Laurel?"

"Q. Could you tell from an examination of these cars and the entire circumstances, as you viewed them upon the ground, which automobile was traveling the faster?"

"Q. If an automobile traveling in the direction in which I am now indicating, that is, west thirty-seven and one-half degrees north and coming practically to a standstill, is struck by an automobile traveling west forty-five degrees north, as indicated here, at about the middle of the automobile traveling thirty-seven and one-half degrees north, what would be the effect upon the automobile thus struck?"

Again, in the absence of the jury, appellant's counsel offered to prove by the testimony of these mechanics that in the event of a collision between two automobiles of the type involved here, while going at any of the speeds within the range disclosed by the evidence in this case, and striking at the angles shown by the evidence for the plaintiff, the roadster would be either upset or stopped, and tied to the touring car in such a manner that it would be a physical and mechanical impossibility for it to travel forty-five feet or any appreciable part of that distance.

The refusal of the court to admit such testimony is assigned as error. It is appellant's contention that expert testimony was admissible to prove that these cars could not, if struck in the manner and under the circumstances testified to by plaintiff's witnesses, have moved or come to rest in the manner

also testified to. Such a contention is well answered in the case of *Fishman v. Silva* (Cal. App.) 2 P. (2d) 473, 474, in which the court said: "It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact."

In that case the court further said: "With this background it was sought by this appellant to qualify the witness as an expert to testify as to his opinion concerning the probable course the respective cars would take after the impact. The court sustained the objections of all other parties to the action on the grounds that it was not a proper subject for expert testimony; that no proper foundation had been laid; and that the hypothetical question sought to be propounded did not embrace an accurate statement either of the facts as adduced or any appropriate or possible theory that might be sustained from the facts in evidence. The fact that the witness had dragged in wrecks off the highway in no way qualified him. The questions under investigation were not the subject of expert testimony, as it is obvious that no expert outside of the so-called psychiatrist can even venture an opinion as to what two different people might do in the management of a car in an emergency. Having before it all of the evidence as to the location of the cars after the accident and before, and having likewise before it photographic exhibits showing the condition of each car after the accident, it would seem strange if the power or duty of the court to determine the issues presented must be supplanted by the opinion of some gentleman whose sole qualification appears to be that he had towed wrecks off the highway for nine years."

In our opinion the case before the court was not one justifying the admission of such expert evidence as was offered, and the rulings complained of were properly made. We think

this is peculiarly true in such a case as this, where the essential question is not the precise manner in which the automobile was propelled across the sidewalk, but whether the appellant was guilty of any negligence which proximately contributed to that happening.

[4, 5] In a number of points appellant contends that the court erred in admitting the testimony of a witness, a chiropractor, who testified that he treated the plaintiff following her accident and testified as to the result of his examination of the plaintiff, and as to her condition at the time of the trial, including his opinion as to the cause of certain conditions and whether or not certain conditions were likely to be permanent. Objection was made to this testimony on the ground that the witness had not properly qualified as an expert. The witness testified that he was a graduate of a chiropractic college; that he had been practicing since 1922 and was licensed in California; that he had put in 2,900 hours in studying anatomy, physiology, symptomatology, bacteriology, chemistry, histology, obstetrics, etc.; and that he had practiced eight years in San Diego. The question as to the qualification of an expert witness is, in the first instance, one largely within the sound discretion of the trial court. *Burns v. Osborne-Fitzpatrick Finance Co.*, 101 Cal. App. 680, 282 P. 419. We think the evidence here is sufficient to show that this discretion was not abused, and that certain alleged weaknesses in the testimony affect its weight and not its admissibility. In this connection it may be added that several physicians testified to the same conditions and gave similar opinions, and no harm or injury is shown.

[6] A further objection is made that an elastic hose was admitted in evidence, being one that had not been actually worn by Mrs. Johnston. It is insisted that this was not admissible and that it was introduced solely for the purpose of exciting the passion and prejudice of the jury. One of the plaintiff's physicians had testified that he had recommended an elastic stocking for her knee, and the plaintiff testified that she was wearing an elastic hose like the one introduced in evidence. We see no harm in this, nor in the fact that the one actually worn by the plaintiff was not removed for the purpose of exhibition.

[7, 8] It is next urged that the verdict is so excessive as to indicate passion and prejudice on the part of the jurors. It is well settled that a verdict may be set aside upon this ground only when it is so grossly disproportionate to the injury suffered as to shock the sense of justice and indicate that it is based upon passion or prejudice upon the part of the jury. *Von Stetten v. Yellow-Checker Cab Co.*, 100 Cal. App. 775, 281 P. 95. While certain conflicts and weaknesses in the evidence are pointed out by appellant, there is ample

evidence of serious injury, including the following: The plaintiff was unconscious for a considerable time after the accident and remained in the hospital for ten days, following which she had a trained nurse at home; she had several physicians, was treated at home for three or four weeks and later at the doctor's office; and later she had four periods of treatment at a sanitarium. Both of her legs were broken; her back was hurt; she was unable to turn her head; her chest was so injured as to interfere with her breathing; and she was injured in many parts of her body and suffered great pain for a considerable time. She was unable to sign checks for four months and unable to perform her ordinary duties up to the time of the trial. She still wore a surgical corset and elastic hose at the time of the trial, and she testified that her hearing and eyesight had been permanently impaired. Whereas she had previously been able to walk long distances, at the time of the trial she could only walk two blocks, and then only by sitting down in the middle of every block. At the time of the trial she could still feel a bone slipping when she walked and was still awakened at night by intense pain. Her testimony was corroborated by several doctors, one of whom testified that she would have to wear a support for her knee as long as she lived, and that certain of her injuries would probably be permanent. She was taking treatments at the time of the trial. Without further analyzing the evidence, we may say it is of such a nature that under the well-established rules we cannot reverse the judgment as excessive.

[9, 10] One more point remains to be considered. The record shows that during the course of the trial the court made the following remarks: "Let me interrupt a moment. There are some indications, there is some interested party who is sort of indicating to the jury, apparently in some way, making signals backwards and forwards. I am calling attention to some of the ladies in the front part of the courtroom who have apparently been giving signals, and so on, backwards and forwards, between one or two of the jurors and one or two of these women who sit in the front part of the courtroom. That must be stopped now, looking at one another of the jurors and looking at the other sitting beside them and snickering and smiling and so on. Some people think there is nothing harmful about that at all. It is apparently being done without realizing its significance. I do not want any communication, even by signs or expressions of the countenance, or anything of that kind. I am calling attention to that, not only on account of one or two members of the jury, but one or two of the people sitting in the body of the courtroom. As I say, you probably don't

realize the significance of all that; but I am observing it, and I shouldn't permit it to go by without giving it some attention. You may proceed."

Counsel for appellant argues that during the trial a large number of women friends and associates of the plaintiff were present in the courtroom and that "with true feminine ardor they constantly made criticisms of witnesses, expressed in audible tones their appraisal of testimony, and by signs, and otherwise, indicated to the jury their views as to the weight of the evidence and the credibility of witnesses." Counsel describes these women as "rooters" and argues that while the judge criticized one or two of them, it is apparent that those one or two were acting as delegates or mouthpieces for a much larger gathering. Counsel then goes on to insist that it is apparent that these "rooters" discussed the case with the female members of the jury in the ladies' rest room. Other than the admonition given by the court as above set forth, there is absolutely nothing in the record to indicate that any one with feminine ardor or otherwise, constantly or at all, made criticisms of witnesses or expressed their appraisal of testimony in audible tones, or indicated to the jury their views as to the weight of evidence or the credibility of witnesses. There is no evidence that anything done by one or two, whatever it was, was done by them as representatives of a larger number. Neither is there any evidence of any discussion between any members of the jury and others outside of the courtroom. This entire argument is based upon the incident referred to by the court, which incident counsel admits he did not see and which he does not claim to have heard. The record is silent as to what was referred to by the court other than as disclosed in the court's statement. The record shows no complaint or motion made in respect to the matter by the appellant, and we must assume that the court's warning was both heeded by the audience and accepted by the appellant as sufficient. Of necessity, considerable discretion must be allowed a trial court in handling situations that arise incident to the presence of spectators in a courtroom. In the instant case the trial judge was in a much better position to judge the nature and effect of any irregularity he observed than any appellate court. In the absence of anything more than is shown by this record, and in the absence of any objection or complaint on the part of the appellant during the course of the trial, we must assume that the trial court's handling of the situation adequately protected the interests of the appellant.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

117 Cal.App. 139

BEZERA v. ASSOCIATED OIL CO. et al.

Civ. 7836.

District Court of Appeal, First District, Division 1, California.

Sept. 26, 1931.

Rehearing Denied Oct. 26, 1931. Hearing Denied by Supreme Court Nov. 23, 1931.

1. Appeal and error ⇨1002.

Verdict upon conflicting evidence as to whether truck driver was negligent and negligence caused collision *held* conclusive.

2. Appeal and error ⇨880(3).

In action for death of taxicab passenger in collision between taxicab and truck, defendant taxicab company and driver could not complain of judgment exonerating defendant truck driver and employer, since defendants' liability was joint and several.

3. Carriers ⇨235, 280(1), 316(1).

Taxicab company is "common carrier" held to highest degree of care, and *res ipsa loquitur* doctrine applies in action by passenger.

[Ed. Note.—For other definitions of "Common carrier," see Words and Phrases.]

4. Carriers ⇨321(2).

Instruction, imposing upon taxicab company which admitted, by failure to deny, it was carrier for reward, statutory duty of carrier for reward, was not prejudicially erroneous because it described carrier as "common" (Civ. Code, §§ 2100, 2168).

5. Carriers ⇨280(1).

Taxicab driver had primary duty to exercise highest degree of care for passenger's safety.

6. Carriers ⇨321(21).

Instruction that taxicab passenger's death in collision raised inference of negligence, which "throws upon the common carrier burden of showing" it was not at fault, *held* not erroneous as shifting burden of proof.

Instruction did not tell the jury that burden of proof as to negligence shifted from plaintiff to the taxicab company, but correctly stated that proof of death raised an inference of negligence, which the taxicab company could only overcome by showing that it was not at fault.

7. Carriers ⇨321(3).

Taxicab company's failure to request definition of "highest degree of care and diligence" required of carrier precluded complaint of absence of definition, since jury presumably understood meaning.

8. Appeal and error ⇨877(5).

Defendants could not complain that certain instructions unduly favored codefendants.

9. Trial ⇨194(16).

Instruction that fact that truck driver might have performed or omitted "certain acts" which would have avoided collision did not prove negligence or proximate cause *held* not erroneous as charging facts (Const. art. 6, § 19).

10. Trial ⇨191(1).

Instruction asserting abstract legal proposition is not objectionable as assuming facts (Const. art. 6, § 19).

11. Appeal and error ⇨901.

Person claiming that instruction assumes facts must sustain charge affirmatively (Const. art. 6, § 19).

Appeals from Superior Court, City and County of San Francisco; Louis H. Ward. Judge.

Action by Anna Veronica Bezera, as administratrix of the estate of Joseph L. Bezera, sometimes known as Joseph L. Lial, deceased, against the Associated Oil Company, John Doe Gay, Red Top Cab Company, and William Chene. From the judgment, the two last-named defendants appeal, and from the portion of the judgment which was in favor of the two first-named defendants, plaintiff appeals.

Affirmed.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, for appellants.

James F. Brennan, of San Francisco, for respondent and appellant Anna Veronica Bezera.

Hadsell, Sweet & Ingalls, of San Francisco, for respondents Associated Oil Co. and John Doe Gay.

GRAY, Justice pro tem.

Joseph L. Bezera, while riding as a passenger for hire in a taxicab, received fatal injuries in a collision between such taxicab and an oil truck; the collision occurring at the intersection of Fifteenth and Howard streets, in the city of San Francisco. His widow, as administratrix of his estate, brought this action to recover damages for his death against the Associated Oil Company (hereinafter called the oil company), the owner of the oil truck, and its employee W. T. Gay, the truck driver; and also against Red Top Cab Company (hereinafter called the cab company), the owner of the taxicab, and its employee

William Chene, the taxicab driver. After trial, the jury returned its verdict awarding damages against the cab company and its employee, but absolving the oil company and its employee from liability. The cab company and its employee appeal from the entire judgment rendered on such verdict, and the administratrix appeals from that portion of such judgment which absolves the oil company and its employee from liability.

[1, 2] The cab company and its employee argue: (1) That quoted portions of the testimony conclusively establish that the truck driver, in making a left turn at the intersection, was negligent per se because it conclusively shows that he drove on the wrong side of Howard street, failed to yield the right of way to the taxicab, cut the corner and a traffic button, in violation respectively of sections 122, 131, and 129 of the California Vehicle Act (as amended by St. 1929, pp. 540, 541, §§ 50, 54, 55), and sections 14 and 15 of Traffic Ordinance No. 8492, new series, of the city and county of San Francisco. (2) That such testimony further conclusively shows that such negligence was a proximate cause of the accident. (3) That therefore the verdict, by absolving the oil company and its employee from liability, is contrary to law and the evidence. However, other portions of the testimony quoted by the other parties raised a conflict on these issues, as to which the verdict is conclusive. *Dougherty v. Ellingson*, 97 Cal. App. 87, 275 P. 456. Furthermore, even if it is conceded that the jury wrongfully exonerated the oil company and its employee, the cab company and its employee were not aggrieved thereby, because the liability of the defendants was joint and several and hence they cannot complain. *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999; *Blackwell v. American Film Co.*, 48 Cal. App. 681, 192 P. 189; *Crabbe v. Rhoades*, 101 Cal. App. 503, 282 P. 10.

[3, 4] The court instructed the jury "that a common carrier of passengers for hire is required to exercise the highest degree of care and diligence in their safe transportation and is responsible for the death of a passenger, without fault on his part, which death might have been avoided by the exercise of such care. Hence, when it is shown that the death of a passenger for hire was caused by the act of the common carrier in operating the instrumentalities employed in its business, there is an inference of negligence, which throws upon the common carrier the burden of showing that the injury was sustained without negligence on its part." The cab company contends that this instruction is legally erroneous: (1) Because it is not a common carrier. (2) Because this instruction, in connection with others, advised the jury it was an insurer of the passenger's safety. (3) Because it applied the

doctrine of *res ipsa loquitur*. (4) Because it is deficient in failing to define the "highest degree of care and diligence." A taxicab company, holding itself out to serve those who apply for transportation, is a common carrier and as such is held to the highest degree of care, and the doctrine of *res ipsa loquitur* is applicable in an action by the passenger. See extended notes in 4 A. L. R. 1501; 31 A. L. R. 1206; 45 A. L. R. 303; 69 A. L. R. 992. The answer of the cab company, by failure to deny, admits that it was engaged in the business of carrying passengers for hire within and about San Francisco and that decedent was riding as a passenger for hire. This admission would seem to bring the cab company within the definition of a common carrier found in section 2168 of the Civil Code. Even if it does not go so far, it clearly admits it was a carrier for reward and therefore, since the instruction merely imposed the duty prescribed by section 2100 of the same Code as to a carrier for reward, the inclusion of the adjective "common" was not prejudicially erroneous.

[5-8] It was the primary duty of the taxicab driver to exercise, with respect to decedent's safety, the highest degree of care, and the court properly instructed that the doctrine of *res ipsa loquitur* was applicable. *Dowd v. Atlas T. & A. Service*, 187 Cal. 523, 202 P. 870. The last sentence of the instruction did not tell the jury that the burden of proof as to negligence shifted from the administratrix to the cab company, but correctly stated that the proof of death raised an inference of negligence, which the cab company could only overcome by showing that it was not at fault. Compare approved instruction in *Dowd v. Atlas T. & A. Service*, *supra*; *Scarborough v. Urgo*, 191 Cal. 341, 216 P. 584. Any doubt on the matter was removed by other instructions that plaintiff affirmatively alleged that the cab company was negligent, that the burden of proof as to affirmative allegations of the complaint rested upon plaintiff, and that if the evidence was equally balanced, the verdict should be against the party upon whom rested the burden of proof. It was not necessary to define the phrase "highest degree of care and diligence" because the jury is presumed to understand its meaning. 24 Cal. Jur. 824. In the absence of a request for its definition, the cab company cannot complain. 24 Cal. Jur. 797. The cab company and its employee cannot complain that certain instructions unduly favored their co-defendants. *Crabbe v. Rhoades*, *supra*.

[9-11] At the request of the oil company and its employee, the court gave the following instruction: "The fact that the truck driver W. T. Gay might have performed or omitted *certain acts* which would have avoided the collision does not prove that his failure to do so was negligence, and neither does it

establish that any such acts or omissions would constitute a proximate cause of the injury and death of the deceased." (Italics ours.) With the addition of the truck driver's name, this instruction is an excerpt taken from *Sharkey v. Sheets*, 87 Cal. App. 99, 102, 261 P. 1049. The administratrix does not question the correctness of the legal principle therein stated, but seeks a reversal of the judgment in favor of the oil company and its employee upon the sole ground that the italicized words make it an instruction with respect to matters of fact, which article 6, § 19, of the State Constitution prohibits. To support this contention, she argues that, while it is not clear what "certain acts" are referred to, yet since the court might have referred to the truck driver's failure to have his headlights lit and to see that the left-hand turn could be made in safety (as to which the testimony was conflicting), it, by instructing the jury that such acts could not be negligence or the proximate cause, invaded the jury's exclusive province of passing on the facts. This argument, based on conjecture and speculation, clearly demonstrates that the charge did not assume the existence or non-existence of any disputed fact. An instruction is not open to the objection that it assumes facts proven or not proven, when it merely asserts an abstract legal proposition without attempting to apply it to the facts of the particular case. *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193. A careful reading shows the instruction to be an abstract statement of law, wholly impersonal, and not assuming any fact. "The courts do not lightly adopt the conclusion that instructions are subject to the attack under consideration. The charge must be sustained affirmatively by the person making it. We cannot say, in this instance, that the charge is sustained." *Garrison v. Pearlstein*, 68 Cal. App. 326, 332, 229 P. 348, 350.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 186

MCGREGOR v. WRIGHT et al.

Civ. 456.

District Court of Appeal, Fourth District, California.

Sept. 28, 1931.

Rehearing Denied Oct. 21, 1931. Hearing Denied by Supreme Court Nov. 25, 1931.

1. Attorney and client ☞129(2).

Bankruptcy trustee's complaint against attorneys held to seek damages for negligent

advice causing removal as trustee, producing nervous shock, disgrace, and financial loss, and injuring credit and reputation for honesty.

Certain parts of complaint in question sounded in malicious prosecution, fraud, conspiracy, and negligence, alleging, among other things, that attorneys for certain creditors induced plaintiff as bankruptcy trustee to employ them and negligently gave him erroneous advice; that attorneys fraudulently colluded to injure plaintiff and cause his removal as trustee for purpose of destroying his reputation for honesty and discrediting him in his business and among his friends; that they prepared petition for his removal, which court granted; and that by reason of erroneous advice, fraud, and treachery of attorneys, plaintiff suffered great nervous shock, suffered in his reputation for honesty, was humiliated and disgraced, and suffered financial loss and impairment of credit.

2. Attorney and client ☞129(2).

Alleged client suing for negligent advice must prove attorney-client relationship, giving of advice, and reliance thereon, causing damage as direct and proximate result.

Alleged client suing attorney for negligent advice must allege and prove that there existed relationship of attorney and client; that in connection with such relationship advice was given; that he relied upon such advice and as result thereof did things that he would not otherwise have done; and that, as direct and proximate result of such advice and doing of such acts, he suffered loss and was damaged thereby.

3. Attorney and client ☞129(2).

Evidence showed attorneys were not employed by bankruptcy trustee, except for special purposes about which trustee made no complaint, and gave him no advice precluding recovery for alleged negligence.

4. Attorney and client ☞20.

Attorneys for bankrupt and for some of creditors are not eligible to be trustee's attorneys.

5. Attorney and client ☞129(1).

Client suing attorney for negligence must prove loss caused solely by attorney's negligence.

6. Attorney and client ☞129(4).

Alleged damages involving financial loss, together with impaired credit and reputation for honesty, caused by plaintiff's removal as bankruptcy trustee on defendant attorneys'

petition, *held* too speculative in character and amount.

7. Bankruptcy ⇨368.

Bankruptcy trustee's fees are not definitely designed by law, but rest in court's discretion.

8. Bankruptcy ⇨132.

In removing trustee, such as bankruptcy trustee, court's principal concern is safety of trust.

9. Negligence ⇨134(1).

Mere probability that event would have happened, on which claim for damages is based, will not support such claim or action for damages.

10. Damages ⇨18.

Proximate cause is a condition in actions both *ex delicto* and *ex contractu*.

11. Damages ⇨18.

Damages to health, reputation, or feeling are not clearly ascertainable in nature or origin, and damages for remote causes and effects cannot be recovered.

12. Damages ⇨206(2).

Court will not allow examination of physical condition of plaintiff and cause thereof to determine how much his health was impaired by removal as bankruptcy trustee on defendant attorneys' petition, or estimate such damage in money.

Court will not allow such examination to determine how much health of plaintiff was impaired by his removal as bankruptcy trustee, independent of his constitution, habits, or chronic condition.

13. Trial ⇨165.

On motion for nonsuit at close of plaintiff's case, evidence is interpreted most favorably to plaintiff, without passing on sufficiency thereof.

14. Jury ⇨14(2).

Alleged client suing attorneys for damages for negligence was entitled to jury trial unless waived (Code Civ. Proc. § 1013, and § 631, subd. 4; Judicial Council Rules 1, 5).

15. Jury ⇨25(6).

Failure to demand jury within five days after service of memorandum for setting of case for trial, or to be present at setting thereof, *held* waiver of jury (Code Civ. Proc. § 1013, and § 631, subd. 4; Judicial Council Rules 1, 5).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by John Gordon McGregor against Le Roy A. Wright and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for appellant.

Charles C. Crouch and Hamilton, Lindley & Higgins, all of San Diego, for respondents.

ALLEN, Justice pro tem.

The plaintiff appeals from a judgment of nonsuit as to both causes of action set out in the complaint.

[1] It is alleged in the complaint that plaintiff was a resident of San Diego county and was highly respected and of high standing in the community, occupied a high position in and had the confidence of the business world, and was generally recognized in the community as a business man of the highest integrity and capability. That defendants were attorneys at law duly admitted to practice in the courts of California and the United States courts sitting in California; that such defendants were and are engaged in the practice of law as partners under the firm name of Wright, McKee & C. M. Monroe. On the 26th day of January, 1927, plaintiff was elected trustee in the matter of the bankruptcy of Stephens & Company, a bankrupt, then pending in the United States District Court for the Southern District of California. Such appointment was obtained by and on the recommendation of the defendants to the creditors of the bankrupt estate. Plaintiff duly qualified and entered upon the duties pertaining to such trust. Defendants, while attorneys for certain creditors of said bankrupt estate, represented to plaintiff that there would be no conflicting interests between these claimants and the bankrupt estate; that there would be no contest as to such claims; and that defendants were free to accept employment from and to act as attorney for plaintiff in his capacity as trustee. Believing such representations, plaintiff employed the defendants in connection with another firm, who were regularly appointed as attorneys for the trustee under proper order of court. Defendants accepted and entered upon such employment and advised plaintiff pertaining to his duties as such trustee until a petition was filed in the United States District Court praying for the removal of plaintiff as such trustee, and that plaintiff believed the advice of said defendants and acted thereon. That during his term as such trustee, plaintiff was almost daily in conference with the defendants concerning the administration of said estate and his duties relating to such trusteeship and that defendants appeared as attorneys for plaintiff as trustee in certain litigated cases.

That in the administration of said estate it became necessary for plaintiff to make certain trips to Los Angeles, San Francisco, and other places, thereby incurring expenses which were charged to the bankrupt estate. That plaintiff was advised by defendants that it was not necessary for plaintiff to keep an exact and detailed account of each item of such expense, but that in lieu thereof it would be sufficient to charge plaintiff's actual expenses thereof in a lump sum, all of which plaintiff did. That defendants advised plaintiff that he was lawfully entitled to draw an allowance of \$500 per month out of said estate to be applied upon his services. That plaintiff did, with the approval of the referee in bankruptcy, draw such sum each month. That the bankrupt estate was the owner of shares of stock in the Occidental Properties, Inc. That defendants advised plaintiff that he was lawfully entitled to advance certain moneys belonging to the bankrupt estate to said corporation and, acting upon such advice, plaintiff did advance a considerable amount of the money belonging to the bankrupt estate to carry on the business of the said Occidental Properties, Inc. That plaintiff undertook, as the special agent of said last-named company, to manage its business, believing it to be to the best interests of the bankrupt estate. That under such arrangement plaintiff was paid \$250 per month as such special agent, all of which was done under the direction and advice of defendants. That defendants advised plaintiff that it would be lawful for plaintiff to purchase from the bankrupt estate certain personal property which the plaintiff had been unable to sell. Acting thereon, plaintiff did purchase the same, paying therefor the reasonable market value. That all of such advice was erroneous, contrary to law, and was carelessly and negligently given.

That subsequent to all of the above acts it is alleged that defendants, disregarding their obligations as attorneys for plaintiff, fraudulently and perfidiously colluded and connived to injure plaintiff and to cause his removal as trustee and to inflict upon plaintiff punishment and injury, and for the purpose of destroying plaintiff's reputation for honesty and integrity and to belittle and discredit plaintiff in his business and among his friends, prepared a petition for the removal of plaintiff as such trustee and procured the same to be signed and prosecuted by one Clarence W. Morris, an attorney at law. That defendants, in preparing such petition, alleged as causes therefor the acts herein complained of, together with other acts which defendants had advised plaintiff were lawful for him to do, which acts were unlawful and contrary to law in the administration of the bankrupt estate and that on the hearing of said petition plaintiff was removed as such

trustee by reason of his acts performed under said advice.

That subsequent to such removal plaintiff made and filed a report of his accounts and doings as trustee, and upon the hearing thereof by the referee the defendants, disregarding their obligations and in violation of their duties as attorneys for plaintiff, appeared by and through the defendant C. M. Monroe and contested the allowance of credits for various items claimed by plaintiff set out therein.

Plaintiff further alleges that by reason of the erroneous advice, fraud, double dealing, and treachery of defendants he suffered a great nervous shock, was made sick and unable to attend to his business for many months; that he suffered greatly in his reputation for honesty and integrity; that he has been humiliated and disgraced, suffered financial loss, and his credit has been impaired, to his damage in the sum of \$100,000.

The second cause of action is the same as the first, except that it is alleged the advice was given willfully and with knowledge that it was wrong.

The answer of defendants admits that they are attorneys at law, admitted to practice as alleged. They admit that as attorneys, they represented certain creditors against the bankrupt estate; that the law firm of Gray, Cary, Ames & Driscoll was appointed and acted as attorneys for the trustee in bankruptcy in the administration of said estate; admit that plaintiff as trustee frequently conferred with defendants concerning certain features of the administration of the bankrupt estate such as the collection of assets. Deny that they acted as attorneys for plaintiff except in two cases, or advised him, except as to matters relating to collection of assets. That in conferring and advising with plaintiff, defendants were acting as attorneys for the bankrupt and not as attorneys for said trustee. They admit plaintiff took various trips to Los Angeles and San Francisco in connection with the administration of said estate; allege that if plaintiff charged his traveling expenses in a lump sum upon his account it was his own independent act and not by reason of any advice given by the defendants.

They admit plaintiff drew from the funds of said estate the sum of \$500 per month for approximately 10 months; admit such withdrawal was improper and unlawful. They admit plaintiff collected \$250 per month from the Occidental Properties, Inc.; that such acts were unlawful and improper. They also admit plaintiff purchased certain articles of personal property from the bankrupt estate and that such acts were unlawful and improper. Defendants admit and allege that they assisted in the drafting of the petition filed for removal of plaintiff as trustee on behalf of certain creditors of the bankrupt

estate, including the petition filed by Clarence W. Morris in the United States District Court for the Southern Division of California; that hearing was had thereon in which it was determined by said court that plaintiff was an improper person to act as trustee of said bankrupt estate; that in its determination said court found that plaintiff, as trustee, had been guilty of misconduct and mismanagement in the course of the administration of said estate; that the court found plaintiff had been guilty of various acts of mismanagement and misconduct, other than those alleged in plaintiff's complaint, all of which acts were the independent and voluntary acts of plaintiff, and none of which were done or performed by plaintiff by reason of any advice, suggestion, or statement of defendants.

Defendants admit that C. M. Monroe appeared on behalf of certain creditors of the bankrupt estate at the hearing had on the final account filed by plaintiff after his removal.

All other allegations of the complaint are denied. Further answering, defendants expressly allege that plaintiff was removed as trustee by reason of his own fault, misconduct, and mismanagement in the course of the administration of the bankrupt estate. That the court found his removal was for the best interest of said estate and that plaintiff was not a proper person to act as trustee thereof. Defendants further pleaded the one and two year statute of limitations as provided in section 339, subdivision 1, and section 340, subdivision 3, of the Code of Civil Procedure.

The answer to the second cause of action is the same, except it denies the willfulness and knowledge of the wrong on the part of the defendants.

The main complaint made on appeal is that the trial court erred in granting a nonsuit at the close of plaintiff's testimony.

We are somewhat at a loss to determine plaintiff's theory of this action, whether he intends it to be one for malicious prosecution, fraud, conspiracy, or negligence. Certain parts of the complaint sound in each. A fair construction seems to us to be that plaintiff is seeking damages, if any, from the fact that he was removed as trustee of the bankrupt estate by reason of the advice of defendants negligently given, such removal causing him to suffer from nervous shock and injuring his reputation for honesty and integrity. That said removal disgraced him, causing him severe financial loss and impairing his credit.

[2-4] Treating it then as a case of negligence, it is necessary for plaintiff to allege and prove four things: first, that there existed the relationship of attorney and client; second, that in connection with such relation-

ship advice was given; third, that he relied upon such advice and as a result thereof did things that he would not otherwise have done; fourth, that as a direct and proximate result of such advice and the doing of such acts, he suffered loss and was damaged thereby. In looking for the proof under this alignment, some form of employment, either expressed or implied, must be shown. There can be no recovery unless such employment is shown or the evidence of some duty which has been negligently performed. In *Jacobson v. Northwestern Pac. R. Co.*, 175 Cal. 468, 166 P. 3, 5, it is said: "To warrant the maintenance of an action by one for an injury due to negligence, there must exist some obligation towards the plaintiff which defendant has left undischarged. *Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580." See, also, *Towne v. United Electric Gas & Power Co.*, 146 Cal. 766, 81 P. 124, 70 L. R. A. 214, 2 Ann. Cas. 905. Plaintiff testified that within a few days after he was appointed trustee he had a consultation with defendants McKee and Monroe in their office in the presence of Mr. Gray, of the firm of Gray, Cary, Ames & Driscoll, with relation to the employment of an attorney to act for the trustee. Regarding this consultation plaintiff testified:

"I wanted to know who would become my attorney; and Mr. Monroe and Mr. McKee both told me that I had better have Cary, Driscoll—or Gray, Cary, Ames & Driscoll represent me in certain matters and they would represent me on other matters. * * *

"Q. And Gray, Cary, Ames & Driscoll were appointed officially as your attorneys? A. Yes, sir, but Gray, Cary, Ames & Driscoll were taking care of the litigated matters, and they (referring to the defendants) were doing the other work. * * * This was a previous conference to what I testified to before. And either one or both of them suggested that I would have Gray, Cary, Driscoll and Ames as my counsel. I said I did not know either of those gentlemen, and Mr. Monroe said, 'We can get them here this afternoon and you will meet them,' and I said, 'Well, what about you fellows,' and they said they were—that they had filed the bankruptcy papers but they had never gone into the case only for the purpose of putting them in bankruptcy and that that would be all over immediately and that there was nothing to prevent me from having them as my attorneys, and later on they would make a petition for it."

Later defendants did file a petition for appointment as special counsel for the trustee for certain specific purposes set out in the petition. The appointment was made, but plaintiff makes no complaint as to defendants' services rendered under this special appointment. From the testimony it is conclusively shown that defendants were not attorneys for plaintiff except for the special purposes named in the application, of which plaintiff

makes no complaint. It is true plaintiff talked over his transactions in the bankrupt estate with different members of the defendants' firm, and from his own statement of these conversations, we fail to find any evidence that they advised him to do any of the acts complained of, or in any way apprised him what to do. When plaintiff desired the advance payment of \$500 per month he was told by Monroe or McKee, "Lannon (the referee) can fix it. We can fix that with Ted all right." Plaintiff's testimony relative to the allegation that Wright told him how to keep account of his petty expenditures, presents a similar incident. No advice was ever given and plaintiff's statement as to what was said consists of remarks concerning what he told Wright in a casual conversation. Under such statement, defendants cannot be charged with giving plaintiff advice, any more than had plaintiff told them what he had already done. Likewise a close examination of the testimony fails to disclose any advice as to plaintiff's right to purchase the personal property from the estate. Plaintiff testified that defendants drew many petitions and orders made by the referee. This was admitted by defendants. Strictly, these were matters for the appointed attorneys for the trustee to do, but the attorneys for the bankrupt were equally interested, so long as they had to do with the assets of the estate. There was no charge made for services, and it cannot be said that defendants were acting as attorneys for plaintiff. The failure of the evidence to support plaintiff's contention as to employment is a complete answer as to whether or not plaintiff has complied with the second duty cast upon him to show that defendants gave him advice. A complete reading of the transcript of the evidence will disclose that defendants were placed in a position where they had the opportunity to and could have advised plaintiff. They did not, however, advise him concerning the business pertaining to the trust estate, and no employment was ever had, save in the special matters hereinbefore mentioned. Plaintiff was aware that whoever his attorneys might be it would be necessary to secure an order of the referee to make the appointment. Gray, Cary, Ames & Driscoll had been appointed as such attorneys, while defendants had not. In the present action plaintiff is not suing defendants as his personal attorneys but as attorneys for him as trustee. He also knew they represented certain creditors of the estate as well as the bankrupt, and so were not eligible to be his attorneys. Appellant claims he acted on the advice given him by defendants and that his reliance upon such advice was the cause of his removal. The record discloses that at one time while plaintiff was in conversation with defendant Wright relative to his accounts, Wright said: "You have got your hands full managing that estate without

watching the nickels and dimes; it is a big estate and if you use the money for the estate charge it accordingly." Even if this could be considered advice, there certainly could be no error in it. Wright simply told the plaintiff that he had his hands full handling it, and that "if you use the money for it, charge it." He was not told not to charge it nor to use it for any other purpose than for the estate. In one conversation plaintiff claimed Wright told him to charge his expenses in a lump sum. Conceding this point, yet plaintiff did not act thereon, as in his final account he filed an itemized statement containing each item of expenditure. Other matters relied upon, such as taking his wife with him to San Francisco, the purchase of some of the personal property of the estate, obtaining the salary of \$500 per month, and the salary of \$250 per month from the Occidental Properties, Inc., are in the same category. No definite advice was given by defendants and plaintiff acted on such matters on his own instance. There was no evidence tending to show plaintiff relied on the advice he claimed was given, or what damages he claimed he suffered as the proximate result of the alleged negligence, except the removal of his trust.

[5] It is incumbent upon plaintiff to show some loss by reason of negligence. Plaintiff's contention is that advice was given on certain specific subjects, that he relied and acted upon such advice, and that as a result of so acting he was removed from his position as trustee. Under the laws of negligence, it became necessary for plaintiff to prove, not merely that his action upon the advice of the defendants contributed to his removal, but it must be established that the reliance upon erroneous advice was the sole and proximate cause of such removal and the loss sustained. *Frost v. Hanscome*, 198 Cal. 550, 246 P. 53. It is likewise established that before a client can recover for alleged negligence of his attorneys he must establish that any loss suffered was caused solely by the negligence of the attorney. *Cochrane v. Little et al.*, 71 Md. 323, 18 A. 698, 702; *Flynn v. Judge*, 149 App. Div. 278, 133 N. Y. S. 794; *Maryland Casualty Co. v. Price et al.* (C. C. A.) 231 F. 397, Ann. Cas. 1917B, 50.

[6, 7] What damages has plaintiff sustained? None is shown concerning the matters alleged, except the allegation that by reason of all these things he was removed from office. The ultimate fact, then, was his removal and its attending results. The damage is the result of the act complained of, the result being his removal as trustee and its effect on plaintiff's financial and business reputation. So far as the damages which relate to plaintiff's financial loss, both past and prospective, are concerned, they are too uncertain and speculative, not only as to amount,

but as to character, to entitle plaintiff to recover. It is not so much an uncertainty as to the amount of benefit to be derived from the performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. Even if the professional advice of defendants had been beyond criticism, and plaintiff had continued in his trust capacity, there was no certainty that he would not be deprived of the emoluments of his office or of some portion thereof, for reasons entirely foreign to the advice given by counsel. Trustees' fees are not definitely designed by law, but rest in the sound discretion of the court. Again it might not be possible to lay the revocation and removal entirely at the door of defendants.

[8] The chief concern of the court in the removal of a trustee is the safety of the trust. This was so expressed in the opinion of removal in the bankruptcy case. In its order the court stated, after setting out some of the circumstances and irregularities shown at the hearing, some of which were other acts than those mentioned in the complaint: "The fact that a trustee does not regard such a transaction as improper is a strong indication that he has not the required mental makeup and attitude to qualify him to act as a trustee of a bankrupt estate, and that the best interests of the estate and of its creditors will not be conserved by his retention. * * * These acts are inimical and detrimental to the proper administration of a bankrupt estate and cannot be countenanced by the court." In re Stephens & Co. (D. C.) 30 F.(2d) 725, 726.

[9, 10] The courts of this state have held strictly to the rule that the mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. *McQuilkin v. Postal Telegraph Cable Co.*, 27 Cal. App. 698, 151 P. 21; *Kenyon v. Western Union Telegraph Co.*, 100 Cal. 454, 35 P. 75. 8 Cal. Jur. 757. The case of *Westwater v. Rector, etc., of Grace Church*, 140 Cal. 339, 73 P. 1055, 1056, was a suit for damages plaintiff sustained to her health and reputation, for being discharged as contralto vocalist in defendant choir and while the suit was on a contract, yet the court, in discussing a proximate cause, which is a condition in both *ex delicto* and *ex contractu* actions, says: "Proximately caused thereby,"—that is, such damages as must immediately follow and are produced by the act complained of—are the damages for which the statute provides this measure, or such damages as, in the ordinary course of things would be likely to result from the act."

[11-13] Damages to health, reputation, or feeling are not clearly ascertainable, either in their nature or origin. Who could say

how much in dollars and cents the injured feeling should be compensated; how much money shall be received for the injured reputation? The court will not allow damages for remote causes and effects, nor will they allow the examination of the physical condition of plaintiff and the cause which brought it about, to determine how much his health has been impaired by his dismissal as trustee, independent of his constitution, habits, or chronic condition, or to ascertain the damage to his health caused by defendants, and estimate it in dollars and cents. Certainly such damages are too remote for recovery. Under the record in this case the damages are too uncertain and speculative and recovery cannot be had. 8 Cal. Jur. 757-759, inc. The evidence is to the effect that the matters complained of were not the sole proximate cause of the damages and are too remote and speculative to permit the plaintiff herein to recover. This ruling is made with the principle in mind that on a motion for nonsuit at the close of plaintiff's case, the evidence is interpreted most favorably to the plaintiff, without passing upon the sufficiency thereof. *Marchetti v. Southern Pacific Co.*, 204 Cal. 679, at page 684, 269 P. 529; *Bush v. Weed Lumber Co.*, 55 Cal. App. 588, 204 P. 24; *Oles v. Kahn Bros.*, 81 Cal. App. 76, 253 P. 158.

[14, 15] The next error complained of is that the trial court erred in denying plaintiff a trial by jury. This being a suit for damages, plaintiff was entitled to a trial by jury unless waived. Section 631, Code of Civil Procedure, subdivision 4, provides that a jury may be waived "by failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation."

Rule 5 of the Rules of the Judicial Council relating to superior courts provides that, "In all counties having more than two (2) and less than nine (9) judges [of which San Diego is one] on the first Monday, or on the next succeeding Tuesday, of each calendar month, there shall be set for trial * * * during the period extending from the third Monday of the current month to the first Monday or the next succeeding Tuesday * * * of the next succeeding month, as many civil cases as can reasonably be disposed of by the court during said period. * * * The cases thus set shall be taken from the 'Civil Active List.' * * * Said last mentioned list shall be known as the 'Civil Trial List.'"

Rule 1 of the above-mentioned rules of the Judicial Council provides for the service and filing of a memorandum for setting a civil case for trial. Prior to the filing of such memorandum, a copy thereof shall be served upon the attorneys for all parties, and unless

admission of service is indorsed on the memorandum and filed, the same shall be accompanied by an affidavit showing such service, and it is provided in cases where such cause is set on stipulation it must be accompanied by a corresponding memorandum. In case a jury is not demanded by the party filing such memorandum, any other party to the cause desiring a jury trial shall have five days after service of such memorandum within which to file and serve his written demand for a trial by jury subject to the provisions of section 1013 of the Code of Civil Procedure, relating to service by mail.

In the case before us the memorandum for setting was in the form contemplated by said rule 1, with proof of service on attorneys for plaintiff on October 1, 1929, and filed by defendants with the clerk on October 2, 1929. Thereafter on February 17, 1930, the cause was set for trial for March 14, 1930, and notice of such setting was received by plaintiff's attorneys on February 18th. Thereafter, on February 19, demand for jury was mailed to the clerk and on March 3 the jury fees were deposited with the clerk.

Subdivision 4 of said section 631, Code of Civil Procedure, provides two ways in which it shall be deemed a jury is waived: First, by failing to announce that the jury is required at the time the cause is first set for trial if set upon notice; and, second, by failing to announce within five days after notice of setting that a jury is required, if set without notice or stipulation.

When a cause is at issue it is ready to be placed on the "Civil Active List" by the service of the memorandum as provided for. This is notice to the opposite party that the same will be set on the next setting day, or as soon thereafter as the same can be reached by the court. If a jury is demanded, such party must be present at the setting thereof, or must have filed the necessary demand. In case the attorney does not desire to be present or does not know just when the cause will be set for trial, he must, within five days after the service of such memorandum, serve and file his demand for a trial by jury. When a case is set for trial without notice or stipulation, the party demanding the jury shall have five days after notice of setting to so demand a jury. Failure to be present at the time the case is set for trial or within five days after the service of the memorandum to place the case on the active list, to serve and file a demand for a jury constitutes a waiver of the right to a trial by jury. In the instant case no demand for a jury was made, served, nor filed within the five days after the service of the memorandum to place said cause on the active list, and therefore it must be deemed the party waived a trial by jury.

Because of the conclusions we have already reached in this case, it will be unnecessary for us to consider the issues raised by the defendants, whereby they plead various statutes of limitations barring plaintiff's right of recovery.

For the reasons herein expressed the judgment of the trial court is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

214 Cal. 50

In re SMITH'S ESTATE.

McKENNA v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.

L. A. 12481.

Supreme Court of California.

Sept. 29, 1931.

1. Prohibition ☞5(3).

Prohibition should be granted to restrain contest of will filed more than year after will was probated (Code Civ. Proc. § 1333).

2. Wills ☞260.

Contest of will filed after time permitted by Code is invalid, and court in which it is filed has no jurisdiction to hear it (Code Civ. Proc. § 1333).

In Bank.

Petition by Catherine A. McKenna for the writ of prohibition to restrain the Superior Court in and for Los Angeles County and others from proceeding with the contest of will of J. H. Smith, deceased, after probate.

Writ granted.

Superseding opinion of District Court of Appeal in 295 P. 75.

J. Everett Brown, of Los Angeles, for petitioner McKenna.

H. L. Pratt and Woodruff, Musick & Hartke, all of Los Angeles, for respondents.

CURTIS, J.

J. H. Smith, a resident of the county of Los Angeles, died on August 9, 1925, leaving real and personal property therein. On May 6, 1926, after proceedings duly had, a document purporting to be the last will and testament of said deceased and dated July 26, 1924, was admitted to probate as his last will and testament. In this will J. Truitt (now J. Truitt Bustemante) and Annie Dupea were named as devisees. An unsuccessful attempt had been made to set aside said will by a contest instituted by the children of said deceased. On October 26, 1928, petitioner, Catherine A. McKenna, filed a petition to probate a document purporting to be an olographic will of said deceased. This document was dated September 22, 1924. On November 20, 1928, said Bustemante and Dupea filed a contest and objections to the probate of said olographic will. The result of this proceeding was that the court before which said proceeding was pending, on February 8, 1929, revoked the order admitting to probate the first will, and further ordered that the document filed by the petitioner, Catherine A. McKenna, be admitted to probate as the last will and testament of said deceased, and ordered

letters testamentary to issue to the said petitioner, and said letters were issued as ordered on February 9, 1929. Following this order admitting the olographic will to probate, a number of motions and orders were made in the matter of said estate and in the following order: On April 24, 1929, on the motion of the contestants, Bustemante and Dupea, the court set aside the order of February 8, 1929, admitting to probate the olographic will. On November 19, 1929, the court, on the motion of the proponent, Catherine A. McKenna, vacated the order of April 24, 1929, and restored all orders made on February 8, 1929, including the order admitting to probate the olographic will.

The proceedings were in this condition when the contestants on February 7, 1930, being just one year from the date of the order admitting the olographic will to probate, filed a contest of the olographic will. On March 3, 1930, the court struck out this contest. No appeal was taken from this order or from any of the orders made by the court involving the probate of said olographic will.

On May 14, 1930, over fifteen months after the date of the order admitting the olographic will to probate, the contestants filed a second contest to the probate of said will. A motion was made by the proponent to strike out this contest, but the court denied said motion and fixed a date for the hearing of said contest. Whereupon the petitioner instituted this proceeding for a writ of prohibition directed to said Superior Court to refrain from hearing said contest.

[1] It seems clear to us that the writ should be granted as prayed for. Section 1333 of the Code of Civil Procedure provides: "If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive: saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed."

The contest of the will filed May 14, 1930, was not filed within one year after the probate of said will. The order admitting the will to probate is therefore conclusive, except as against infants and insane persons. In re Maxwell, 74 Cal. 384, 16 P. 206; Estate of Davis, 136 Cal. 590, 594, 69 P. 412; Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049; Estate of Parsons, 159 Cal. 425, 428, 114 P. 570; Estate of Parsons, 196 Cal. 294, 298, 237 P. 744; Estate of Sbarboro, 63 Cal. 5.

[2] A contest filed after the time permitted by the Code section is of no validity, and the court in which it is filed has no jurisdiction to hear the same. Estate of Sbarboro, supra. In this case the court declares the law in language as follows: "As the petition [to revoke the will] had not been, in fact, filed in

the court within the 'year,' it was too late to file it at all; and the court could not legally, after the expiration of the time, by order, relieve the petitioners from the legal consequences of their own laches or delay. Time was of the essence of the proceedings commenced by the petitioners. The provisions of the law directing the proceedings to be had and the time within which they might be commenced were, in that regard, imperative, not directory, for the law declared the effect of not commencing them in time—it made the thing which the proceedings were intended to assail conclusive and unassailable; and the court in which the proceedings were begun had no authority by order or otherwise to direct that to be done, which had not, in fact, been done, or to adjudge that which the law pronounced conclusive to be invalid and void."

There is nothing at variance with these authorities to be found in the cases of *Spencer v. Troutt*, 133 Cal. 605, 608, 65 P. 1083, and *De Leonis v. Walsh*, 140 Cal. 175, 178, 73 P. 813.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

214 Cal. 94

WOOD v. PETERSON FARMS CO. et al.
(two cases).

L. A. 13021, 13022.

Supreme Court of California.

Oct. 15, 1931.

As Amended Oct. 21, 1931.

1. Appeal and error ⇨370.

Showing that delay in payment of fee for filing transcript actually deposited in Supreme Court within time was occasioned by illness of counsel justified denial of motion to dismiss appeal (Supreme Court Rule 1).

2. Appeal and error ⇨635(3).

Reporter's transcript is not indispensable part of appeal, which may be prosecuted on judgment roll alone.

3. Appeal and error ⇨82(1).

Order terminating proceedings for record to be used on appeal held to "affect" judgment appealed from, within statute; hence, such order was appealable (Code Civ. Proc. § 963, subd. 2).

Code Civ. Proc. § 963, subd. 2, authorizes an appeal from any special order made after final judgment.

[Ed. Note.—For other definitions of "Affect," see Words and Phrases.]

4. Appeal and error ⇨82(1).

Order refusing to relieve appellant from default in preparation of record to be used on appeal held appealable (Code Civ. Proc. § 963, subd. 2).

In Bank.

Appeals from Superior Court, Kings County; Frank Lamberson, Judge.

Separate actions by Louisa G. Wood against the Peterson Farms Company, Cora Van Aernam Peters, and others. From an adverse judgment, and from orders granting motion to terminate proceedings for a record and refusing to relieve defendant from default in preparation of transcript, Cora Van Aernam Peters appeals. On motion to dismiss appeal.

Motion denied.

Charles M. Johnson, of Los Angeles, for appellant.

Harry W. Chase, of Glendale, for respondent.

WASTE, C. J.

Respondent separately moves to dismiss the appeal in each of the above-entitled causes. The cause numbered L. A. No. 13021 was instituted by respondent to foreclose a real estate mortgage. All of the defendants but the appellant Peters defaulted. Judgment was entered for respondent on December 29, 1930. On January 2, 1931, the appellant filed her notice of appeal and her request for a transcript. The clerk's transcript was certified by that officer on January 31, 1931. Subsequently, the respondent moved to terminate the proceedings for a record, which motion was granted by the trial court on March 16, 1931. On the same day the reporter's transcript, certified by him, was filed in the court below, but the trial judge refused and still refuses to authenticate it. Under rule 1 of this court, the appellant was required to file her record here not later than forty days after the termination of the proceedings in the court below, or on April 25, 1931. It appears from the various papers filed in connection with the motion to dismiss, and from the notations of our clerk, that the clerk's transcript, duly certified, was in fact deposited in this court for filing prior to the expiration of the forty-day period and on or about April 2, 1931, but was withheld from actual filing until the required fee should be paid. The fee was not paid nor the transcript filed until June 1, 1931, which was after the expiration

of the forty-day period and subsequent to the filing of respondent's notice of motion to dismiss for failure to file transcript within time. It is therefore apparent that the appellant was technically in default in the filing of the clerk's transcript and, in the absence of a satisfactory showing in explanation and mitigation of such default, respondent's motion to dismiss would have to be granted. But, in opposition to the motion, appellant has presented affidavits from which it appears that ten days prior to the expiration of the forty-day period within which the transcript should have been filed, her counsel was stricken with an illness which completely incapacitated him, and precluded him from carrying on any business until June 1, 1931, at which time he promptly attended to the payment of the filing fee and had the transcript filed. It also appears that prior to the expiration of the forty-day period, and prior to his illness, counsel had communicated with appellant by letter, requesting that she call on him and pay the fee for the filing of the transcript; that upon calling at counsel's office with the necessary fee, affiant was informed of his illness and inability to carry on any business; and that affiant was thereafter unable to see counsel until shortly prior to June 1, 1931, when she paid him the filing fee.

[1, 2] Hearings on the merits have always been favored by this court. Under the circumstances of this case, we are inclined to relieve the appellant from her default in the filing of the record. The rules having to do with the filing of transcripts and briefs within prescribed periods were promulgated and adopted with the primary intention of expediting the preparation of records and facilitating the disposition of causes on appeal. From the circumstances above narrated, it is apparent that appellant did not sleep on her rights, for she filed her notice of appeal and request for a transcript within four days after the entry of judgment, and the transcript was in fact deposited in this court for filing some three weeks prior to the expiration of the forty-day period prescribed therefor. The only delay was in the payment of the filing fee, which delay necessarily retarded the filing of the transcript. This delay, which has in no way impeded the disposition of this or any other cause, has been satisfactorily explained, and appellant should not be penalized because of the illness of her counsel. With a duly certified clerk's transcript before us, the respondent's motion to dismiss the appeal (L. A. No. 13021) for want of a record must, of necessity, be denied. A reporter's transcript is not an indispensable part of an appeal, which may be prosecuted on the judgment roll alone.

What has been said makes it unnecessary to discuss the unauthenticated reporter's transcript except in connection with the ap-

peal numbered L. A. No. 13022. The proceedings for a record (reporter's transcript) to be used on the appeal from the judgment in L. A. No. 13021, supra, were terminated on March 16, 1931. On March 23, the trial court declined to relieve the appellant from default in the preparation of the transcript. Thereupon, and on March 26, 1931, the appellant filed her notice of appeal (L. A. No. 13022) from these two orders, and requested that a transcript of those proceedings be made up and prepared. A clerk's transcript to be used on this second appeal was duly certified on March 30, 1931, and deposited in the court, along with the transcript in L. A. No. 13021, supra, within three days thereafter, or well within the period prescribed by our rules. This transcript, like the one in L. A. No. 13021, and for the same reason, was not actually filed until June 1, 1931, when the filing fee was paid. For the reasons already stated, we are of the view that appellant should be relieved of default in the filing of the record on the second appeal, and the motion to dismiss must therefore be denied.

[3, 4] As a further ground for the dismissal of the second appeal (L. A. No. 13022), the respondent contends that the orders terminating the proceedings for a record and refusing to relieve the appellant from default in the preparation of such record are, and each is, nonappealable. Subdivision 2 of section 963 of the Code of Civil Procedure authorizes an appeal from "any special order made after final judgment." While the quoted language is rather general, it has been held to include within its scope only such "special orders" as "affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution." *Lake v. Harris*, 198 Cal. 85, 89, 243 P. 417, 419. We are satisfied that an order terminating proceedings for a record to be used on appeal "affects" the judgment appealed from within the meaning of the Code section. Such an order, indirectly at least, tends to an affirmation of the judgment, for without a record an appeal will be dismissed. Rule 5. We need no better evidence of this than the present motion. Our research has disclosed the case of *O'Banion v. California, etc., Growers* (Cal. App.) 292 P. 975, wherein an appeal was allowed from an order terminating proceedings for a record.

The question of the appealability of an order denying the appellant's motion to be relieved from default in the preparation of the reporter's transcript does not appear to have been decided by this court. It has been held that an order denying relief from default in the preparation of a statement or bill of exceptions is appealable. *Murphy v. Stelling*, 138 Cal. 641, 643, 72 P. 176; *Brode v. Goslin*, 158 Cal. 699, 701, 112 P. 280. We can perceive of no material distinction between the order here involved and those involved in the two

cases cited. Each has the effect of precluding an appellant from presenting his case on appeal, and results in a virtual affirmance of the judgment or order appealed from. If one is appealable, the other is appealable. However, a distinction must be drawn between an order granting relief from default and one denying such relief. The latter is necessarily a final determination of the matter, and may result in the termination of the original or main appeal unless it is open to attack by separate appeal.

We are not to be understood as expressing any opinion as to the propriety of the two orders involved in L. A. No. 13022. That is a matter to be considered when the appeal is reached on the merits.

The motions, both as to appeal numbered L. A. 13021 and appeal numbered L. A. No. 13022, must be, and each is, denied.

We concur: PRESTON, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.

SIBERELL v. SIBERELL *
L. A. 11347.

Supreme Court of California,
Sept. 28, 1931.

Rehearing Granted Oct. 26, 1931.

1. Husband and wife ⇨262(1).

Joint tenancy deed to husband and wife, unless different intention is expressed, presumptively vests in wife, as her separate property, joint tenancy interest, but interest standing in husband's name is presumptively community property (Civ. Code, § 164).

2. Husband and wife ⇨262(1).

Presumptions that wife's interest under joint tenancy deed to husband and wife is her separate property and interest standing in husband's name is community property are not conclusive (Civ. Code, § 164).

3. Husband and wife ⇨264.

That property standing in wife's name was purchased with community funds is not alone sufficient to establish community character thereof.

4. Husband and wife ⇨49½(7).

Presumption exists that conveyance to wife was intended as gift, in absence of evidence to contrary.

5. Husband and wife ⇨264.

Finding that property conveyed to husband and wife by joint tenancy deed was community property *held* supported (Civ. Code, § 164).

6. Appeal and error ⇨1010(1).

Finding supported by evidence could not be disturbed on appeal.

7. Husband and wife ⇨273(1).

Where husband and wife intend to avoid probate proceeding through device of joint tenancy deed without changing community character of property, property retains its character as community, and on death of one spouse community property law applies.

8. Husband and wife ⇨262(1).

Where deed from husband to wife did not purport to convey property as wife's separate property, presumption that property became wife's separate property *held* rebuttable (Civ. Code, § 164).

9. Husband and wife ⇨264.

Finding that deed of property by husband to wife was not intended to change community character of property *held* supported.

10. Divorce ⇨252.

Discretion in awarding wife obtaining divorce undivided one-half interest in community property *held* not abused.

There was no abuse of discretion, as the husband was required to discharge a mortgage on the property, and the wife was permitted to occupy property without payment of rent so long as the allowance for the support of herself and a minor child, whose custody was awarded to her, did not exceed sum of \$50 per month awarded by the decree.

In Bank.

Appeal from Superior Court, Los Angeles County; H. G. Ames, Judge.

Action for divorce by Minnie V. Siberell against Harvey P. Siberell. From the portion of an interlocutory decree determining property rights, plaintiff appeals.

Affirmed.

Superseding opinion of District Court of Appeal in 295 P. 385.

Barker & Keithly, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

SEAWELL, J.

Plaintiff, Minnie V. Siberell, appeals from that portion of an interlocutory decree en-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 1003.

tered in her favor in an action for divorce which determined that certain real property in the city of Glendale, found by the court to be of the value of \$40,000, was the community property of herself and defendant, Harvey P. Siberell, and adjudged that she be awarded an undivided one-half interest therein.

Plaintiff claims title to said real property as her separate estate under a deed executed in her favor by defendant on January 19, 1918, and recorded January 21, 1918. Said property was acquired by purchase with community funds in 1913, the deed conveying the property to both parties as joint tenants. Plaintiff further contends that if the 1918 deed was ineffectual to transfer all interest in the property to her, she holds one-half of said property as her separate estate under the joint tenancy deed of 1913, and that the other one-half is community property. It follows, she argues, since the court granted her a divorce on the ground of cruelty, that she is entitled to more than one-half of said half which constituted community property.

The case is here upon hearing granted by us after decision by the District Court of Appeal, Second District, Division 1 (Mr. Justice Houser, dissenting), which upheld the finding of the trial court that the deed of 1918 did not vest the property in plaintiff as her separate estate, but sustained the contention of plaintiff as to the effect of the joint tenancy deed, and directed the trial court to amend the decree by awarding plaintiff not less than one-half of the one-half of the property determined by the appellate court to be community in character. She held the other one-half as her separate property under said joint tenancy deed.

Plaintiff relies on the presumption declared in section 164, Civil Code, to establish the effect of both deeds. The pertinent portion of said section provided at the times said deeds were executed that: "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument."

The question as to the effect of a deed conveying property to husband and wife, without further reference to the tenure by which they were to hold, was recently before this court in *Dunn v. Mullan*, 296 P. 604. See, also, *Miller v. Brode*, 186 Cal. 409, 199 P. 531; *In re Estate of Regnart*, 102 Cal. App. 643, 283 P. 860, in which a petition for hearing was denied by this court. The court there states that the presumptive effect of such a deed is no longer open to controversy. A

deed naming as grantees both husband and wife, unless a different intention is expressed in the instrument, presumptively vests the property in the spouses as tenants in common; the interest conveyed to the wife being presumed, under section 164, Civil Code, to be her separate property, and that conveyed to her husband the community property of the marriage. In thus holding the court rejected the contention made by the heirs of the husband that if it is to be presumed that the wife holds an undivided one-half interest as her separate property as a tenant in common, it must be presumed that the husband holds the other undivided one-half interest as his separate property.

[1, 2] Plaintiff seeks to apply the rule followed in *Dunn v. Mullan*, supra, to a joint tenancy deed. We are of the view that such must be the law. The section contains no express provision to cover the case of a joint tenancy deed. Under a deed to husband and wife, the wife takes the part conveyed to her as a tenant in common "unless a different intention is expressed in the instrument." Section 164, Civ. Code. The words of joint tenancy constitute the expression of a different intention—that the wife shall take the part conveyed to her as a joint tenant with her husband. By virtue of the provision of section 164 which provides that whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is vested in her as her separate property, the wife presumptively takes as her separate property a joint tenancy interest. As in the case of a tenancy in common, the other half interest, title to which stands in the name of the husband, is presumptively community property.

These presumptions are not conclusive. The presumption that the wife takes a separate interest may be overcome by proof which the law regards as legally sufficient to establish the community character of the property. The husband may offer proof of an understanding that the interest standing in his name should constitute his separate property. In the instant case the respondent husband contends that the presumption of a separate interest in the wife was overcome by evidence of facts establishing the community character of the entire property. The court found in accordance with his contention. The appellant challenges the sufficiency of the evidence to support the findings.

Before considering the evidence adduced upon the trial, it should be noted that in her complaint plaintiff alleged that the property was her separate property by virtue of defendant having conveyed it to her after an automobile accident for which he expected to be held liable. She claims title exclusively under the deed of 1918, and thereby admits that no separate interest vested in her un-

der the joint tenancy deed. This circumstance accounts for the fact that upon the trial the evidence was directed to the situation existing at the time of the execution of the 1918 deed, and no attempt was made to show the facts and circumstances attending the execution of the earlier deed. Neither did plaintiff contend in her motion for a new trial that she had any separate interest under the joint tenancy deed. Although the parties did not undertake to show the situation existing at the time of the execution of the earlier deed, certain facts incidentally appear, which, with the inferences that may properly be drawn from them, support the trial court's finding that the property conveyed by the joint tenancy deed was community.

[3-6] Said property was acquired in 1913. It is conceded that it was purchased with community funds. The law is well settled that this fact alone is not sufficient to establish the community character of the property, it being presumed that a gift to the wife was intended in the absence of evidence negating the intent to make a gift. *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 P. 657; *Kimbro v. Kimbro*, 199 Cal. 344, 249 P. 180.

The court below was of the view that the evidence rebutted the presumption of gift, and its finding must be sustained. Within two years after the acquisition of the property a dwelling was built upon it, which was thereafter occupied by the parties with their six children. They were still residing upon said property at the commencement of the action. The wife testified that she had paid taxes on the property from her earnings as a real estate agent for two years preceding her action, and that she had also made several interest payments during that period on a mortgage indebtedness incurred to secure the payment of moneys borrowed and used by defendant. Otherwise, it is to be inferred that such payments were made by defendant, who was a building contractor. Defendant's testimony indicates that he never intended to give his wife a separate interest in the property either under the joint tenancy deed or under the later deed. The wife testified that the first time she ever thought about the title was when she was informed by the bank that the title was in her name. This was at the time her husband was attempting to borrow money on the property, and was some years after the execution of the 1918 deed. It may be inferred from this testimony that the wife had no knowledge of a gift having been made to her. This circumstance and the fact that the property was dealt with in a manner which is usual in the case of community property, and the further fact that the wife advanced her contention that a separate interest vested in her under the joint tenancy deed for the first time on appeal, taken with the testimony of the defend-

ant and certain inferences, sustains the finding that the property was community. The trial court's finding cannot be disturbed on appeal.

[7] In arriving at its conclusion, that court may have taken notice of the theory frequently found among laymen that the expense and delay of probate proceedings may be avoided lawfully through the device of a joint tenancy deed without changing the community character of the property. Where such is the intention of the parties, the property retains its character as community, and upon the death of one spouse the provisions of law governing community property in general apply. Only where a joint tenancy is in fact created do the incidents of that tenure, including survivorship, attach.

[8, 9] We pass to a consideration of the effect of the deed executed by the husband in 1918 in favor of his wife. Said deed did not purport by express terms to convey said property to the wife "as her separate property," in which event the presumption of separate property would have been conclusive. *Miller v. Brode*, 186 Cal. 409, 199 P. 531; *Donze v. Donze*, 88 Cal. App. 769, 264 P. 294. The trial court found that the presumption in the wife's favor had been overcome by evidence that title was placed in her name "solely for the convenience of plaintiff and defendant, and not with the purpose or intent that its community character should be changed so as to make it the separate property of plaintiff." Defendant emphatically denied an intention to make a gift of the property to his wife. His testimony supports the finding that said deed did not change the character of the property. The testimony referred to above shows that the wife did not learn of the deed until long after its execution. Property conveyed by the husband to the wife may be shown to be community property just as it may be shown that the property is community where title is originally taken in the name of the wife.

[10] Although the divorce was granted for cruelty, in which case the court was authorized to award all community property to the innocent party, it does not appear that the court abused its discretion in awarding the wife an undivided one-half interest. As between the parties, defendant is required to discharge the mortgage for \$6,000 upon the property, and it is provided that plaintiff shall have the right to occupy the property without payment of rent so long as the allowance for the support of herself and a minor son, whose custody was awarded to her, does not exceed the sum of \$50 a month awarded by the decree. The custody of the three minor daughters, 12, 13, and 17 years of age, all older than the son, was awarded to the father in accordance with the prefer-

ence of the daughters. We feel that the wife was very liberally dealt with by the decree of the trial court.

The decree is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.



213 Cal. 683

RICHARDSON et al. v. CALLAHAN et al.
L. A. 12925.

Supreme Court of California.
Sept. 25, 1931.

1. Mines and minerals ⇨73.

Ordinary "oil and gas lease" is more than mere usufructory lease, being in nature of servitude or chattel real (Civ. Code, § 819).

The so-called ordinary oil and gas lease authorizing exploration for and production, if found, of oil and gas on demised lands, is more than mere usufructory lease; it is a property right in nature of a servitude or chattel real at common law, which may be held and enjoyed as an estate for years or perpetually during production.

[Ed. Note.—For other definitions of "Oil and Gas Lease," see Words and Phrases.]

2. Mines and minerals ⇨74.

Where commercial oil had been found and wells were producing under lease, privity of estate existed between lessee's assignee and lessors' successors (Civ. Code, § 819).

3. Action ⇨36.

Lessors' successors' action against lessee's assignee, although seeking damages for breach of covenant to keep premises free from mechanics' liens, could be treated as action to compel redemption from foreclosure sale, or for reimbursement, if successors redeemed.

4. Mines and minerals ⇨74.

Covenant in oil and gas lease to keep premises free from liens *held* binding on lessee's assignee (Civ. Code, §§ 819, 1461-1463).

Lease in question provided that lessee should not permit laborers' or materialmen's or similar liens to arise or exist against premises by reason of operations under lease, and that all covenants should run with land and be binding on heirs, successors, and assigns of parties. It appeared that indebtedness for certain material arose under original lessee, but me-

chanic's lien therefor did not arise until over a month after assignee had received assignment of lease and entered into possession of property, and it appeared also that under lease assignment released original lessee from all liability.

5. Mines and minerals ⇨74.

As against lessee's assignee, equity will enforce covenant in oil and gas lease to keep premises free from mechanics' liens; whether covenant runs with land being immaterial (Civ. Code, §§ 819, 1461-1463).

6. Mines and minerals ⇨74.

Covenant in oil and gas lease to keep premises free from mechanics' liens *held* to run with land (Civ. Code, §§ 1461-1463).

7. Mines and minerals ⇨74.

Covenants to insure, repair, deliver up possession, renew lease, exercise option to purchase, restrict alienation, and to develop mineral resources on royalty basis, run with land (Civ. Code, §§ 1461-1463).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by John M. Richardson and another against H. S. Callahan, W. J. Colter, and others. A demurrer by defendant last named was sustained, and plaintiffs appeal.

Reversed with directions.

Superseding opinion of the District Court of Appeal in 295 P. 1084.

William W. Fry, of Los Angeles, for appellants.

McAdoo, Neblett, O'Connor & Clagett, McAdoo, Neblett & Clagett, and J. F. T. O'Connor, all of Los Angeles, for respondent.

PRESTON, J.

Action by plaintiffs, as successors in interest of certain lessors in a conveyance known as an oil and gas lease, to compel the assignee of the lessee thereunder to comply with a covenant therein to keep the premises free from liens arising from drilling and producing operations under said instrument. The question arose by the sustaining of respondent's demurrer to the complaint without leave to amend. The facts, therefore, are not in dispute, and the single proposition is presented as to whether the rules of equity will authorize relief. The prayer of the complaint is for damages, it is true, but the complaint itself will support equitable relief.

[1] The lease in question is but the so-called ordinary oil and gas indenture authorizing the exploration for and the production, if found, of oil and gas upon the demised lands.

Under the provisions of the Civil Code and the decisions of this court, such an instrument is more than a mere usufructory lease; it is a property right in the nature of a servitude or chattel real at common law, which may be held and enjoyed as an estate for years or perpetually during production. Civ. Code, § 819; *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; *Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co.*, 156 Cal. 211, 103 P. 927; *Mohawk Oil Co. v. Hopkins*, 196 Cal. 148, 236 P. 133; *County of Ventura v. Barry*, 207 Cal. 189, 277 P. 333; *People v. Associated Oil Co.* (Cal. Sup.) 294 P. 717. For a recent learned discussion of the nature and characteristics of such a lease, see the opinion of Mr. Justice Marks of the District Court of Appeal in *Stone v. City of Los Angeles*, 299 P. 838.

[2] It should be noted also that here oil in commercial quantities had been found, and the well or wells were at the times in question on production. It is plain, therefore, that there is a privity of estate between the plaintiff herein and the assignee of the lessee. Moreover, this particular lease was made outright to the "lessee, his successors and assigns," and it provided in this connection: "The lessee shall have the right, without the consent of the owner, to assign this lease, in whole or in part, or sub-let any part of the leased land. In which event the lessee shall be automatically released from all obligations thereafter accruing under this indenture."

Coming to the immediate basis for this controversy, the lease provided: "The lessee shall not suffer or permit any laborer or materialmen's lien, or liens of like nature, to arise or exist upon or against the leased land, by reason of his operation under this indenture, and shall hold the owner harmless against any and all such liens. * * * All provisions, covenants, agreements and stipulations contained in this indenture, by which either of the parties hereto are bound, shall in like manner be binding upon the heirs, successors and assigns, of the parties so bound; and those which are for the benefit of either of the parties, shall in like manner inure to the benefit of the heirs, successors and assigns of the parties so benefited; and all of such provisions, covenants, agreements and stipulations shall run with the land."

[3] The lease was executed November 14, 1925. In December, 1925, one Playter, the original lessee, became indebted to the Union Tank & Pipe Company in the sum of \$3,529.50 for oil well casing used in drilling on said property. On May 4, 1926, said claim became a mechanic's lien upon the property, after having been duly filed as such. On May 5, 1926, the original lessors executed a deed to these plaintiffs, which was delivered on May 24th following. On April 2, 1926, however,

and prior to the filing of said claim of lien, said Playter assigned the lease to respondent W. J. Colter. Later said lien claim was reduced to a judgment which the real property was sold to satisfy. But prior to the expiration of the period for redemption this action was initiated, and, as above noted, we may treat it as an action to compel redemption from said lien or for reimbursement, if plaintiffs should themselves redeem the land.

[4] The matter is now reduced to the sole question of whether or not respondent, Colter, must respect the covenant above noted to protect the property from liens. It is true that the indebtedness arose under Playter, but it is also a fact that the lien did not arise until a month or more after Colter had received the assignment and entered into possession of the property thereunder. It is also noticeable that, under the terms of the lease, Playter, following the assignment, was released from all liability, so that the obligation became one for Colter to comply with, or else plaintiffs are without redress.

We entertain no doubt that the covenant to keep the premises free from liens of their own making binds not only the lessee but his assignees as well. Respondent's position, however, in this connection is: "That said complaint does not state facts sufficient to constitute a cause of action against the defendant W. J. Colter, in that the said W. J. Colter, in accepting a naked assignment of the lease set forth in the complaint, did not thereby become bound by the terms of said written lease." This contention he attempts to support by a reliance upon sections 1461, 1462, and 1463 of the Civil Code, which read in part as follows (section 1461): "The only covenants which run with the land are those specified in this title, and those which are incidental thereto." Title 3 of said Code (sections 1457-1468). Section 1462 describes generally such covenants as follows: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Section 1463 provides: "The last section [1462] includes covenants 'of warranty,' 'for quiet enjoyment,' or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee." From these statutes respondent deduces the conclusion that the covenant to keep the servient tenement free from liens is a mere personal covenant not running with the land, and hence not binding upon the assignee, unless specially covenanted for by him, citing in that connection *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 569, 194 P. 1024, 1026, as follows: "An occupant of real property who holds by virtue of a bare assignment of the lease and without entering into any contract, either with his assignor or the lessor, affirmatively bind-

ing himself to fulfill the covenants of the lease, is subject only to such obligations as he impliedly assumes by entry and taking possession of the leased premises."

[5] We are of the opinion that two successful and effective answers may be made to this contention: First, that the covenant in question does run with the land; and, second, that, whether it does or not, equity will enforce it against respondent under well-settled and repeated holdings of this court.

The marked tendency of our decisions seems to be to disregard the question of whether the covenant does or does not run with the land and to place the conclusion upon the broad ground that the assignee took with knowledge of the covenant and it was of such a nature that, when the intention of the parties, coupled with the result of a failure to enforce it, was considered, equity could not in conscience withhold relief. To this class of holding belong the following, among many other cases: *Hunt v. Jones*, 149 Cal. 297, 86 P. 686; *Bryan v. Grosse*, 155 Cal. 132, 99 P. 499; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359; *Henrice v. South Feather, etc. Co.*, 177 Cal. 442, 170 P. 1135; *Wayt v. Patee*, 205 Cal. 46, 269 P. 660; *Relovich v. Stuart* (Cal. Sup.) 295 P. 819. These cases rest largely upon the doctrine stated by Mr. Pomeroy (*Pomeroy's Eq. Jur.* [2d Ed.] §§ 688, 689), as follows: "On the same principle, if the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to easements or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenants, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it; and it makes no difference whatever with respect to this liability in equity whether the covenant is or is not one which 'in law runs with the land.'" The doctrine is stated in *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715, as follows: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." These citations are quite sufficient to direct the course and result of this appeal.

[6] But we think, where it is clear that the covenant does run with the land, it is better that it be so declared. Under section 1462 a covenant to run with the land must be of

"direct benefit of the property." Where a servitude only is created by the instrument in question, any covenant that will protect the title of the servient tenement would seem clearly to be a direct benefit to it. We are at a loss to know why a covenant to protect it from liens of the owner of the servitude is not for the direct benefit of the property out of which it is carved.

[7] The illustrations given in section 1463 of three instances of such covenants on the part of the grantor and two on the part of the grantee are by no means intended to be exclusive or all-inclusive, but within the definition in section 1462 of said Civil Code many others may and do exist. For example, covenants to insure, to repair, to deliver up possession, to renew a lease, to exercise an option to purchase, to restrict alienation, to develop mineral resources on a royalty basis, are all such as run with the land. 7 R. C. L. p. 1106, § 22; Supp. vol. 3, p. 2139; 1931 Supp. p. 327. In California as early as *Laffan v. Naglee*, 9 Cal. 662, 675, 70 Am. Dec. 678, a covenant was held to run with the land, which read in substance: "If lessor chooses, at any time hereafter, to sell, and should offer the property for sale, on such terms as she may choose, lessee may have the liberty of buying it, in preference to any one else."

In *Coburn v. Goodall*, 72 Cal. 498, 14 P. 190, 193, 1 Am. St. Rep. 75, an action for damages for breach of a covenant to surrender demised premises with improvements thereon at the expiration of the term, the court, in holding the covenant to be one running with the land, said: "It is claimed that these four defendants, if liable at all under the covenant to surrender (which is denied), are liable only in respect of their privity of estate, and that such liability is several and proportionate to the interest acquired by each of them. To this proposition we cannot assent. There are some authorities to that effect, but the weight of opinion, we believe, is contrary thereto; and with better reason it is held that, while assignees of a leasehold as tenants in common, they are jointly and severally liable on covenants to repair and to deliver up at the end of the term. These covenants which are connected with the estate run with the land, and vest in point of benefit and liability in the assignee, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer. [Citing many cases.]"

In *Standard Oil Co. v. Slye*, 164 Cal. 435, 442, 129 P. 589, 591, a covenant for a renewal of an oil lease was held to run with the land, and the court there said: "Plaintiff's position is that such a covenant as the one here considered is not made for the benefit of the property, but, on the contrary, is an injurious limitation upon the lessor's power of repossession. Even if this position were correct, the plaintiff would be bound in conscience to

fulfill the covenant. *Bryan v. Grosse*, 155 Cal. 135, 99 P. 499. But it was a covenant running with the land, and by purchasing the interest of the Independence Oil Company and accepting rent from the claimants under the Harper lease plaintiff placed itself in privity of estate with them. This covenant, running as it did with the land, was binding upon one holding in privity of estate with the assignee of the lessor."

The more recent case of *Sacramento S. F. L. Co. v. Whaley*, 50 Cal. App. 125, 130, 194 P. 1054, 1056, seems to be exactly in point. There a mortgagor exacted a covenant from a mortgagee to release from the operation of the lien of the mortgage subdivisions of property amounting to as much as ten acres or more upon the payment on the mortgage of \$125 per acre for each acre sought to be released. This agreement was held binding upon subsequent incumbrancers of the property, on the ground that such covenant was a direct benefit to the owner of the property mortgaged and ran with it. In construing the above-quoted sections of the code, the court said: "We do not understand that that phrase or expression, as it is used in section 1462, was intended to be or is restricted in its meaning to such physical benefit only as may directly accrue to the land from the covenant, but that it means also any covenant which affects the title to real property or any interest or estate therein of the covenantee. A covenant made for the direct benefit of the land is one which is intended to restore to the covenantee or the owner of the land some right with respect thereto which he has parted with pro re nata or for a special purpose. It is, in other words, a covenant for the direct benefit of the estate or interest of the covenantee in the land mortgaged. *Standard Oil Co. v. Slye*, 164 Cal. 435, 442, 129 P. 589. While under the statutory law of this state a mortgage does not vest in the mortgagee an estate or interest in the mortgaged land, yet the mortgage affects the mortgagor's title. A covenant in a mortgage providing for the removal of the lien of the mortgage from certain specified portions of the land mortgaged is a covenant for the unfettering pro tanto of the title, and is therefore for the direct benefit of the land."

Finally, Mr. Washburn, in his work on Real Property, volume 2, § 1205, states the rule as follows: "Such covenants, and such only, run with the land as concern the land itself, in whosoever hands it may be, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, between the covenantor and covenantee."

Basing our conclusion upon a deduction from the definitions given in said statutes, supported by the above authority, we hold a covenant by the lessee in an ordinary oil and

gas lease, to keep the property free from liens due to operations on the property demised, is binding upon his assignee, and this is particularly true where, as here, the operations have resulted in the discovery of oil, and the lien is allowed to accrue during the period of production.

The judgment is reversed, with directions to overrule the demurrer, and to permit, if thought advisable, amended or supplemented pleadings.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; RICHARDS, J.

214 Cal. 53

In re TROY'S ESTATE.

L. A. 11987.

Supreme Court of California.

Sept. 29, 1931.

1. Trusts ⇨140(1).

Beneficiary of trust takes no estate in property itself, title vesting in trustee, with beneficiary having right to enforce performance of trust.

2. Perpetuities ⇨6(10).

Devise in trust for minorities of grandchildren born after testator's death held void as possibly suspending alienability beyond lives in being at testator's death (Civ. Code, §§ 715, 716).

Devise in trust for wife during her life, and, on wife's death, trust property was to be divided into equal shares, corresponding to number of children then living and then deceased leaving issue then living, and, if at that time any child had reached age of 21, he was to receive share free from trusts, and likewise for issue of deceased child if all had reached age of 21, and further provided for the retention of undistributed shares in trust until children or all issue of child then deceased should reach age of 21.

3. Perpetuities ⇨6(10).

Mere possibility of illegal suspension of alienability invalidates limitation when created (Civ. Code, §§ 715, 716).

4. Perpetuities ⇨6(10).

Statute requiring testator's intent to be effected as far as possible does not apply to limitation possibly suspending alienability illegally (Civ. Code, §§ 715, 716, 1317).

5. Wills ⚡473.

Trust provisions for valid term are separable from those for invalid period, where will shows testator would have preferred separation to total invalidation, or where invalid provisions only incidentally affect main scheme (Civ. Code, § 1317).

6. Wills ⚡473.

In determining separability of illegal provisions suspending alienability, conditions existing at testator's death could be considered (Civ. Code, §§ 715, 716, 1317).

7. Wills ⚡473.

Invalid provision for continuation of trust during minorities of after-born descendants held separable from valid provisions for trust for widow's life, contingent trust for children's minority, and contingent remainders (Civ. Code, §§ 715, 716, 1317).

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

In the matter of the estate of John James Troy, deceased. David H. Howie and others, executors of the last will and testament of John James Troy, deceased, filed a petition for an order settling their final account and for distribution, and Helen Troy, individually and as guardian of the person and estate of James Storror Troy, a minor, filed exceptions to the account and to the distribution of the estate as prayed. From that portion of the judgment ordering the residue of the estate distributed under the intestacy laws, separate appeals were perfected by Helen Troy and others, as executors, by David H. Howie and another, as trustees, and by the Trustees of Dartmouth College, residuary legatee under the will.

Reversed, with directions.

Superseding opinion in 295 P. 848.

Lawler & Degnan, of Los Angeles, and Seller & Seiler, of Long Beach, for appellants.

Farrand & Slosson, of Los Angeles, for respondents.

SHENK, J.

Appeal by David H. Howie, V. H. Rossetti, and Helen Troy, as executors of the will of John James Troy, deceased, by David H. Howie and V. H. Rossetti, as trustees named in said will, and by the Trustees of Dartmouth College, from that portion of the decree of distribution which provides for the distribution of the residue of the decedent's estate to Helen Troy, the decedent's widow, and James Storror Troy, his minor son, as heirs at law, in accordance with the intestacy laws of this state.

The decedent was a resident of Los Angeles county, and died testate in Boston, Mass., on October 17, 1927. On November 6, 1924, he executed a last will and testament by which, after making certain specific legacies, he attempted to create a trust in the following manner:

"Third: All the rest, residue and remainder of the property of every nature and description which may belong to me at my death I give, devise and bequeath to the trustees hereinafter named, in trust, to have and to hold to them and their successors in trust for the following purposes:

"(a) If my wife survive me, to pay to her, at least as often as semiannually, the entire net income of the trust fund during her lifetime.

"(b) On the death of my wife, or upon my death if my said wife shall not survive me, if there are children of mine then living or then deceased leaving issue then living, to divide the trust property into as many equal shares as there are children of mine then living and then deceased leaving issue then living, the issue of any deceased child of mine to stand in the place of such deceased child by right of representation.

"(c) If at that time any child of mine shall have reached the age of 21, to pay over to such child one of such shares free from all trusts. If at that time all of the issue of a child of mine then deceased shall have reached the age of 21, to pay over to such issue in equal shares one of such shares.

"(d) To retain the shares not so distributed in trust, and to expend all or so much of the net income of each of such shares as the trustees in their uncontrolled discretion shall deem best for the comfortable maintenance, support and education of each of such children or the issue of any child of mine then deceased until such child or all of the issue of any child of mine then deceased shall reach the age of 21. When and as any child of mine shall reach the age of 21, and when and as all of the issue of any child of mine then deceased leaving issue shall have reached the age of 21, to pay over to such child or the issue of any child of mine then deceased leaving issue one of such shares free from all trusts.

"(e) If any child of mine surviving both my wife and me shall die before reaching the age of 21 leaving issue, the issue of such child shall take the share such child would have taken if such child had reached the age of 21. If any child of mine surviving both my wife and me shall die before reaching the age of 21 leaving no issue then surviving, the share such child would have taken if he had reached the age of 21 shall be distributed in equal shares among the children of mine then living or then deceased leaving issue,

such issue to take in equal shares by right of representation.

"(f) Upon the death of my wife or upon my death, if my wife shall not survive me, if there are no children of mine then living or then deceased leaving issue then living, to pay over to David H. Howie, of Cambridge, Massachusetts, if he be then living, two-thirds of the trust property then held by them free from all trusts, and to pay over to the Trustees of Dartmouth College located at Hanover, New Hampshire, the remaining one-third of the trust property, or if said David H. Howie be not then living, all of the trust property then held by them free from all trusts, to be held by said Trustees of Dartmouth College as a separate fund to be known as the 'John J. Troy Fund.' * * *

The decedent left as his only heirs at law his widow, Helen Troy, and one son, James Storrow Troy, a minor. The testator appointed his wife, Helen Troy, David H. Howie, and V. H. Rossetti as executors of his will, and the two last named as trustees thereunder. Upon the filing of the executors' petition for an order settling their final account and for distribution in accordance with the terms of the will, Helen Troy individually and as guardian of the estate of the minor son filed exceptions to the account and to the distribution of the estate as prayed, and sought distribution to herself and the minor son as heirs at law of the decedent on the ground that said attempted trust was in violation of the provisions of sections 715 and 716 of the Civil Code. The court sustained the exceptions and decreed distribution accordingly.

The questions to be determined on this appeal are: (1) Do the provisions of the will hereinabove quoted violate the provisions of sections 715 and 716 of the Civil Code? and (2) If some only of those provisions be void, may the valid provisions of the will be separated from the void provisions and be given effect?

[1, 2] It may be taken as settled by the decisions in this state that the beneficiary of a trust takes no estate in the property itself, and that title vests in the trustee with the right in the beneficiary to enforce performance of the trust; and therefore that subdivision (d) of paragraph third of the decedent's will provides for a contingency which, if it occur, will suspend the power of alienation for a period beyond the continuance of lives in being at the time of the testator's death. The creation of a trust of property for the minorities of grandchildren born after the testator's death, under said subdivision (d), therefore, since title vests in the trustee, may suspend the power of alienation for the period of lives not in being at the decedent's death. Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97;

Estate of Cavarly, 119 Cal. 406, 51 P. 629; In re Steele's Estate, 124 Cal. 533, 57 P. 564; Estate of Whitney, 176 Cal. 12, 167 P. 399; Estate of Van Wyck, 185 Cal. 49, 196 P. 50; Estate of Maltman, 195 Cal. 643, 234 P. 898.

The respondents urge that the provisions of subdivision (e) violate the same sections of the Civil Code. It is argued, and we think the plain and proper construction of this subdivision, reading it in conjunction with subdivisions (c) and (d) of the will, is, that the testator intended that his grandchildren should be divided into two classes, and only the shares of those who were in existence at the time and with the status as designated in subdivision (d) should be included in the trust provisions.

[3] The first contention made by the appellants is that, inasmuch as the testator left surviving him his widow and but one son, the contingency upon the happening of which hinges the prohibited suspension of the power of alienation, viz. the death of the son prior to that of the widow leaving issue, all of whom shall not have attained the age of 21 years at the widow's death, may never happen. In connection with this argument, the appellants refer to section 1317 of the Civil Code (now section 101 of the Probate Code), providing that, where the intention of a testator cannot have effect to its full extent, it must be given effect as far as possible. It has frequently been stated that the provisions of section 716 of the Civil Code do not permit us to wait and see what happens in order to determine the validity or invalidity of the limitation. It is the possibility of the event that will suspend unlawfully the power of alienation which serves to void the limitation at the time of its creation. The recognition of this mandate of our Code is expressed thus in *In re Steele's Estate*, supra, at page 537 of 124 Cal., 57 P. 564, 565: "The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results; but if, under the terms of the deed or will creating the trust, when properly construed, the instrument, 'by any possibility, may suspend' the absolute power of alienation beyond the continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created, nor any estate vested in the trustee. * * * It must be apparent that appellants' present rights depend upon the present invalidity of the will, and not upon future contingencies which are not within the prohibition of the statute." See, also, *Estate of Whitney*, supra; *Estate of Maltman*, supra.

In *Estate of Whitney* the effect of the limitation created by the will is claimed to be so similar to the effect of the trust provisions in the present case that the statement of the court in that case appearing at page 18 of 176 Cal., 167 P. 399, 401, may be adopt-

ed here, viz.: "If the effect of these provisions, in the possible event that a child shall die leaving a minor child or children, is that the title to the share is to be held by the trustees thereafter until the youngest child is of age, and shall at that time, and not before, become vested in those of the issue that may then be living and the children, if any, of any deceased child, then it would constitute a gift to a class of persons, not in being at the death of the testator, and neither the number of the class nor the persons who are to compose the class could be known or ascertained until the youngest surviving child became of age. * * * Such remainder would be a future contingent interest which could not be aliened, until the child became of age. * * * Then, for the first time, the persons who are to own it would become known. That event must occur after the termination of the life of the child [here the widow] of the testator. From the death of such child [here the widow], until the youngest of such issue became of age the power of alienation would be suspended, contrary to section 715, aforesaid. *Estate of Cavarly*, 119 Cal. 409, 51 P. 629. Under section 716, such limitation would be void in its creation."

[4] The provisions of section 716 of the Civil Code and the holdings in the above-cited cases indicate clearly that section 1317 of the Civil Code (section 101, Prob. Code), invoked by the appellants, has no application when the limitation created by any possibility may operate to suspend the power of alienation beyond the period allowed by said section 715. See *Estate of Van Wyck*, 185 Cal. 49, 61, 196 P. 50. But the question is, What is the limitation? In *Estate of Van Wyck*, supra, the provision for the continuation of the trust during the period of the lives of the children and grandchildren was held to be but one limitation, and, since the estate there created might vest at some future time which would be subsequent to the death of persons in being at the time of the creation of the limitation, the limitation necessarily was declared void at its creation.

[5] The answer to the question must depend upon whether a provision for the continuation of the trust for the minority of the son may be separated from a provision for the trust in favor of grandchildren. The provisions of section 1317 of the Civil Code also compel a consideration of the question whether the valid trust for the life of the widow, the valid contingent remainders provided in subdivisions (c) and (e), and the valid contingent remainder to David H. Howie and the trustees of Dartmouth College, may stand in spite of the invalidity of the provision for the continuation of the trust during the minorities of after-born descendants. The question manifestly is one of separability. May the invalid provisions be cut from the will and the balance stand as the will of the

testator, or will such an operation have the effect of making a provision for the testator which is contrary to his intent or which will destroy his general plan or scheme? The answer must be obtained from a consideration of the terms and provisions of the will itself. That trust provisions for a valid term may be separated from those providing a trust for an invalid period was decided in *Nellis v. Kickard*, 133 Cal. 617, 66 P. 32, 85 Am. St. Rep. 227. Where there is established more than one trust, and it is clear that they are established for separate and independent purposes, no difficulty arises, as in the case where a testator has provided for a valid trust of a portion of his estate in favor of a sister, together with an invalid trust of the residue in favor of his descendants. In such a case, the trust for the sister, being for an independent object and purpose, will be enforced. Such a situation is illustrated by the provisions of the will in *Estate of Van Wyck*, 185 Cal. 49, at pages 63, 64, 196 P. 50, 57, where as to a trust for the sister of the testator it was said: "The provision for her benefit is not a part of the testator's general scheme for the disposition of his estate, and is very evidently a provision the making of which would not have been affected had the testator known of the illegality of the provision he was making for his children and their descendants." Such a result depends upon the clarity with which the testator has shown by the provisions of his will an intent that the valid trust would nevertheless have been his will had he known of the invalidity of the other trust or trusts, or upon the fact that the cutting off only of the invalid provisions will but incidentally affect his scheme or plan which otherwise should be enforced in accord with his intent.

The difficulty is in the application of the principles involved to the facts of each particular case. In *Estate of Pichoir*, 139 Cal. 682, 685, 73 P. 606, 607, it was said: "There is little difference of opinion as to the general rules which obtain in determining the questions here involved. They are that, 'where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator.' *Estate of Fair*, 136 Cal. 79, 68 P. 306." "It is an application of rule stated in section 1317 of the Civil Code that where the intention of the testator cannot have effect to its full extent it must have effect as far as possible." *Estate of Phelps*, 182 Cal. 752, 763, 190 P. 17, 21. In *Estate of Pichoir*, supra, trusts as to real and personal property were held separable as not in violation of the intent of the testator, but in accord therewith. In *Estate of Phelps*, supra, it was concluded that an invalid trust provid-

ing for annuities to the brothers and sisters temporarily until the accumulation of the fund involved was separable as being but a minor part of the main scheme, and not essential to the main plan, nor so interwoven with it that the two must stand or fall together. In *Estate of Whitney*, 176 Cal. 12, at page 19, 167 P. 399, 402, the principles are stated thus: "Where a will or deed disposes of property upon trusts for several purposes, some of which are valid and some void, the 'valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries.' *Estate of Willey*, 128 Cal. 11, 60 P. 471. If the elimination of the void trust causes no important practical change in the testator's general scheme, if such void trust is not essential thereto, and does not impair the validity of the other dispositions of the will, it may be cut off and the other dispositions allowed to stand. *Manice v. Manice*, 43 N. Y. 381. If the trust created 'is of such a nature as to make it indivisible, and incapable of being carried out as to that trust which is clearly legal, because of the * * * invalidity of the other trust,' the whole trust must be held void. *Nellis v. Rickard*, 133 Cal. 620, 85 Am. St. Rep. 227, 66 P. 32." In that case a provision for the payment from income of a certain sum per month to the widow during her lifetime was held to be inseparable from invalid provisions for the testator's children, and was also void.

In *Estate of Van Wyck*, supra, at page 62 of 185 Cal., 196 P. 50, 56, it was said: "The real question presented where a will contains both valid and invalid provisions is whether the two are so parts of a single plan or scheme or otherwise so dependent one upon the other that by avoiding the invalid provisions and allowing the valid to stand there will result a disposition of the estate so different from what the testator contemplated or so unreasonable that it must be presumed that the testator would not have made the valid provisions if he had been aware of the invalidity of the others." There a valid trust for the lives of the son and daughter was held inseparable from an invalid continuation of the trust, for the reason that the son and daughter otherwise would be in the anomalous situation wherein the same people own both the beneficial life estate in the property and the remainder over in fee after the termination of the life estate, but with the life estate and the remainder in fee kept from merging by the interposition of a trust. The court's consideration of the will in that case led it to state: "There can be no presumption that if the testator had known of the invalidity of the portion of the trust which

offends the statute, he would yet have wished the trust to stand for the lives of his son and daughter, futile and unreasonable as long as it should stand, and upon its termination resulting in the property very possibly going to others than those to whom he desired it should go. The presumption is quite the contrary. In other words, it appears that the valid and invalid portions of the trust which the testator attempted to create are so intimately connected and so dependent one upon the other that the invalid portions cannot be taken away without the whole scheme and plan of the testator falling. The trust must therefore be declared invalid in toto. This conclusion is supported by the authority of *Estate of Whitney*, 176 Cal. 12, 167 P. 399, where a trust identical in all material respects with that under consideration was involved and was held both to offend the statute as to the suspension of the power of alienation and to be void in toto, for reasons which we have in effect but repeated here."

The question of separability is commented upon in *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 883, 14 L. R. A. 33, 27 Am. St. Rep. 487, as follows: "This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the purpose of the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property."

In *Estate of Maltman*, supra, a division of the trusts in favor of the son and daughter, the trust in favor of the latter being otherwise valid, was held contrary to the testator's intent, for the reason that his plan or scheme did not contemplate the receipt by the daughter of three-fourths of the estate, one-half as beneficiary and one-quarter as heir at law, and by the son of only one-fourth thereof.

In the present case we are confronted with the question whether the valid trust for the life of the widow, a valid trust for the minority of the son should the widow die during his minority, and the valid contingent remainders provided for in subdivisions (c), (e), and (f) of paragraph third of the will, may be held separable from the void provisions of subdivision (d). That is, whether the limitation for the continuation of the trust during the minorities of children who may be born to James Storrow Troy and who shall survive first their father and then the decedent's widow, which is conceded to be void, may be cut from the testamentary document and the balance allowed to remain as the will of the testator. Will such an operation serve but to cut off only an incidental or insubstantial portion of the testator's express scheme and purpose, and, without working an injustice among the beneficiaries, have the effect of preserving rather than defeating his

main scheme or plan for the disposition of his property? The contestants take the position that the whole will must fall. But "If we can read into a will an intention to preserve any part of it, even with the illegal portions stricken out, the court will do so. In such a case we try to determine whether the maker of the will would have created the trust if all his express purposes could not be accomplished. This is not strictly law; it is a matter of good judgment, the judgment of men who according to our judicial system must in the last analysis determine the question. In declaring a testator's intention, however, the courts are limited to the words which the testator, himself, has used in his will." *Matter of Durand's Will*, 250 N. Y. 45, 53, 54, 164 N. E. 737, 740. In that matter, though the continuation of the trust beyond the life of the widow was held illegal, the trust for the life of the widow, with the remainder over to the son if he survive, was held not to be disturbed, the court saying at page 56 of 250 N. Y., 164 N. E. 737, 741: "If the son survives his mother, the life beneficiary, he takes the remainder under the eleventh clause of the will; if he dies before his mother, the testator has failed to make any provision for such an event. In that case, there is an intestacy, and his property will vest and is vested in his next of kin." In *Nellis v. Rickard*, supra, a valid life estate for the widow was held not to be affected by an illegal limitation for the continuation of the trust thereafter. That result could not obtain in *In re Steele's Estate*, supra, for the reason that the trusts for the widow and children ran concurrently, a certain proportion of the income to be paid to each. In *Matter of Wilcox*, 194 N. Y. 288, 87 N. E. 497, 498, the life estate was held to be severable, but the remainder over was held to fall with the invalidity of the limitation for the continuation of the trust during the minorities of the children of the life tenant. There, however, the remainder over was made to depend upon the death of the daughter, the life tenant, "leaving no issue born to her, which shall attain the age of 21 years," the court intimating that, if the contingency had been that the life tenant die without issue surviving, the gift over unquestionably would have been good.

[6] In *Matter of Trevor's Will*, 239 N. Y. 6, 145 N. E. 66, 69, following the stated principle that, "if a way may be found to preserve what is essential and legal, that which is illegal and of minor consequence must not be permitted to defeat the clear purpose of the testator," the court held that the trust for the benefit of children and their issue may be treated as one entirety, and the contingent trust for the benefit of surviving children in the case of the death of a child without issue should be treated as a separate entirety, with the result that the share of such child vested

immediately on its death, the contingent trust being but a secondary, separable, and alternative purpose of the testator and unessential to his dominant purpose that ownership shall vest in the children who shall live to become entitled to their shares. This conclusion was reached under the New York statute, which provides that every future estate shall be void in its creation, which shall suspend the absolute power of alienation by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. A similar result, based on the principles expounded in *Matter of Trevor's Will*, was reached in *Oliver v. Wells*, 254 N. Y. 451, 173 N. E. 676.

No case has been cited wherein a valid trust of the whole residue for the life of the widow, or other beneficiary, has been held not to be severable, even though there has been limited thereon an invalid continuation of the trust. In the present case, if the son predecease the widow, leaving no issue which shall survive the widow, the remainder over provided in subdivision (f) of paragraph third of the will is valid and enforceable. In construing the will in *Matter of Trevor's Will*, supra, the court stated: "The will is to be read in the light of what has happened, not so much for the purpose of determining its validity, as for the purpose of seeing clearly by such light what is possible in the way of separating the good from the bad." There the question was decided in the light of the facts as they existed at the termination of the first life. No authority or statute has been presented which prohibits a consideration of the questions here presented in the light of conditions as they exist at the time of the creation of the limitation, viz., at the time of the decedent's death. In fact, the application of the statute and of the principles herein stated to existing facts is the burden of all of the cited cases.

[7] Here, then, the testator having left surviving him but one son, it would seem to be rather consonant with good judgment than otherwise, in accord with the principles stated and, without offending the statute, in accord with the mandate of section 1317 of the Civil Code, and without changing any of the major provisions of the testator's disposition of his property, to consider the trust for the minority of the son, should he survive the widow, as one entirety or limitation, and the trust for minor children of the son should he predecease the widow and they survive her, as a separate entirety or limitation. This result could not obtain under the facts in *Estate of Van Wyck*, supra, nor in *Estate of Whitney*, supra, because there the testator left several children surviving, and it would be contrary to his main scheme to provide for a vested title in grandchildren while at the same time postponing enjoyment of possession

in his children. But so to consider the parts here will result in intestacy only in the event that the son predecease the widow, leaving a child or children who shall survive the widow and still be minors at the widow's decease. The contestants do not question that alternative contingent limitations may be created.

We conclude that the only invalid limitation, therefore, under the facts which exist here, is the limitation to minor children of the testator's son should they survive first their father and then the widow during the minority of any one of them, and that such limitation is not so inseparably blended with the valid provisions that it may not be cut off and the balance permitted to stand. We think it is clear that, in view of the invalidity of a continuation of the trust beyond the minority of the son, should he survive the widow, that is, upon the happening of the contingency that the son predecease the widow and leave minor issue which shall survive the widow, the testator has made no provision, and as to that contingency he died intestate. The same result would obtain, by virtue of the fact that no provision is made therefor, in the event that the son survive the widow but die before arriving at the age of 21 years, leaving no issue. To hold otherwise with respect to the invalid and valid provisions of the will would be to defeat, rather than give effect to, the will of the testator and the dominant intent and plan expressed therein. Our conclusion does not result in a disposition of the estate so different from what the testator contemplated nor so unreasonable that it must be presumed that the testator would not have made the valid provisions had he been aware of the invalidity of the others; it does not work injustice among the beneficiaries, nor defeat the dominant scheme and purpose of the testator in the disposition of his property; nor does it cause any important practical change in the testator's general scheme or result in any possibility that the property will go to others than those he intended; but, on the contrary, those whom the testator intended should benefit and whom he cherished will take by the plan which he devised.

The decree of the probate court is reversed, with directions to enter its decree that the residue be distributed to the trustees named in the will for the following purposes: To pay the income to Helen Troy, the widow, during her lifetime, in accordance with subdivision (a) of paragraph third of the decedent's will; on the death of the widow survived by the son, James Storrow Troy, if he be a minor at that time, the trust to continue until he arrive at the age of 21 years, and then to distribute the trust estate to him; if the son survive the widow and at that time shall have arrived at the age of 21 years, to distribute the trust estate to the son; if the

son survive the widow, but die before reaching the age of 21 years, upon his death to distribute the trust estate to his children, if any survive him, in accordance with subdivision (e) of paragraph third of the decedent's will, and, if no children survive him, then to the decedent's heirs at law in accordance with the intestacy laws of this state; if the son predecease the widow, leaving issue who shall survive the widow, upon the latter's death to distribute the trust estate to such issue if all thereof have attained the age of 21 years, in accordance with the provisions of subdivision (c) of paragraph third of the will, otherwise to the decedent's heirs at law in accordance with the intestacy laws of this state; and, if the son predecease the widow, leaving no issue which shall survive the widow, upon the latter's death to distribute the trust estate in accordance with the provisions of subdivision (f) of paragraph third of the will.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.

JOERGER v. MT. SHASTA POWER CORPORATION et al. *

Sac. 4552.

Supreme Court of California,

Sept. 30, 1931.

Rehearing Granted Oct. 30, 1931.

1. Waters and water courses ☞87.

Riparian owner suing power company to restrain diversion of waters *held* to have established prima facie case, excusing neglect in failing to assert riparian rights earlier.

Defendants at all times believed that they owned all riparian rights in creek between point of diversion and power house, and on one trial were able to convince trial court that this was so, and it was only after appeal that it was finally determined that plaintiff's lands were riparian.

2. Appeal and error ☞477.

Writ of supersedeas should issue only when necessary to protect appellate power of reviewing court.

3. Waters and water courses ☞87.

In riparian owner's suit to restrain diversion of water, defendant *held* not to have sufficiently established public use or that plaintiff was estopped from enjoining diversion by inaction.

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P 2d 700.

4. Appeal and error ⇨478.

Petitioners for writ of supersedeas must establish sufficient facts; presumption favoring opposite party.

5. Appeal and error ⇨460(2).

All proceedings on mandatory injunction are stayed by appeal, but prohibitory injunction is not stayed.

6. Injunction ⇨4, 5.

"Prohibitory injunction" is one preserving status quo, while "mandatory injunction" contemplates change in status quo.

"Prohibitory injunction" is one that operates to restrain the commission or continuance of act and to prevent threatened injury, while "mandatory injunction" is one which goes beyond mere restraint and commands acts to be done or undone.

[Ed. Note.—For other definitions of "Mandatory Injunction" and "Prohibitory Injunction," see Words and Phrases.]

7. Waters and water courses ⇨85.

In suit by riparian owner, injunction restraining diversion of water *held* "prohibitory"; diversion to power plant being "non-riparian use."

Since use constituted nonriparian use, it constituted continuing trespass, and injunction restraining such trespass is prohibitory injunction.

8. Injunction ⇨48.

Right based on continuing trespass for less than prescriptive period does not create such status that injunction restraining continuance of trespass becomes "mandatory."

9. Waters and water courses ⇨46.

Diversion of water for power purposes by lower, upper, and opposite riparian owner was not "riparian use."

[Ed. Note.—For other definitions of "Riparian Right," see Words and Phrases.]

10. Waters and water courses ⇨46.

Riparian owner may use water for motive power, subject only to domestic uses of lower riparian owners.

However, this does not mean that the use of such waters for power purposes gives any riparian any greater rights than any other riparian use would give him.

11. Waters and water courses ⇨47.

One owning two tracts of riparian lands on same stream cannot take water by virtue of ownership of one and use it on the other.

One owner owning two adjoining riparian tracts may divert at some point on

upper tract quantity he is entitled to use on lower, for use on lower tract, but, where rights of another riparian intervene, taking from upper tract to lower is as to such intervening owner just as harmful and improper as any diversion to non-riparian lands. The same principles are applicable where lower riparian attempts to divert water for use on his land at a point above an upper riparian.

12. Waters and water courses ⇨46.

Diversion of waters for power purposes by upper, lower, and opposite riparian owner constitutes continuing trespass as to another riparian owner.

13. Appeal and error ⇨458(3).

Supreme Court, to preserve appellate power, can by supersedeas or other appropriate writ suspend effect of prohibitory injunction pending appeal.

14. Appeal and error ⇨458(3).

Prohibitory injunction granted riparian owner restraining diversion of water for power purposes by upper, lower, and opposite riparian owner would not be suspended, pending appeal, under circumstances.

The direct effect of such an action would be to deprive plaintiff of free use and enjoyment of his property, and court must contemplate possibilities of affirmances as well as reversals. In order to entitle defendants to relief prayed for, they must establish that public use attached to waters, or, under facts, they must establish prima facie case, entitling them to relief sought.

15. Waters and water courses ⇨133.

Award of water in creek, based on theory that such quantity had been secured by appropriation, is no bar to subsequent action for more water on theory of riparian ownership.

16. Appeal and error ⇨478.

For purposes of application for supersedeas, suspending, pending appeal, injunction restraining diversion of water, amount previously awarded plaintiff in damages *held* awarded without consideration of infringement of rights as riparian owner.

In Bank.

Suit by Louis P. Joerger against the Mt. Shasta Power Corporation and another, in which a preliminary injunction was awarded, and defendants appealed. On application for writ of supersedeas suspending the operation of the preliminary injunction, pending appeal.

Writ denied.

See, also, 207 Cal. 8, 276 P. 1017.

Thomas J. Straub, of San Francisco, W. R. Dunn, of Sacramento (Orr M. Chenoweth, of Redding, and Garret W. McEnerney, of San Francisco, of counsel), for petitioners.

Jesse W. Carter, of Redding, and Annette Abbott Adams, of San Francisco, for respondent.

PER CURIAM.

Petitioners, hereinafter referred to as defendants, seek an order from this court suspending the operation of a preliminary injunction, pending an appeal from the order granting the injunction.

The controversy between defendants and respondent, hereinafter referred to as plaintiff, is of long standing, and heretofore has been before this court on appeal. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017. The controversy grows out of the operation by defendant Mt. Shasta Power Corporation of a power plant on Hat creek, in Shasta county; said plant being designated as power plant, Hat No. 2. The lands upon which this plant is constructed, and the power plant itself, are owned by the defendant Red River Lumber Company, a private corporation, this company leasing the same to the Mt. Shasta Power Corporation on terms hereafter more fully discussed. This power plant was constructed by defendants during the years 1920 and 1921, and actual operation was commenced on September 28, 1921. So far as now pertinent, said power plant consists of a dam and diversion weir in Hat creek, by means of which substantially all of the waters of said creek are impounded and diverted by means of a flume and aqueduct to defendants' power house, situated some distance lower down on the stream. Plaintiff is the owner of 40 acres of land on one side of Hat creek, which is located between the point of diversion and the power house. The diversion weir of defendants is about one-half mile up stream from plaintiff's 40 acres, and the power house is on the stream a short distance below these particular lands of plaintiff. In the former opinion of this court these 40 acres were held to be riparian to Hat creek. Defendant Red River Lumber Company is the owner of certain lands on both sides of Hat creek below and above plaintiff, and likewise owns certain properties and water rights in the lands opposite to the 40 acres owned by plaintiff. In other words, the Red River Lumber Company, in relation to these 40 acres of plaintiff, is an upper and lower riparian owner on both sides of Hat creek, and likewise is an opposite riparian owner, plaintiff, therefore, being, in relation to defendant, an opposite intervening riparian owner. The lands belonging to the Red River Lumber Company form one continuous unit, so that the dam and diversion weir, flume, aqueduct, and at least part of the power plant, are all located on the ripa-

rian lands of this defendant. It seems conceded that these lands have not always been one unit, and that defendants secured title thereto by means of two separate conveyances from different sources.

Until restrained by the preliminary injunction which defendants seek to suspend, and which became effective February 6, 1931, defendants, since 1921, have been diverting through their diversion works away from its natural channel substantially all of the waters of Hat creek, with the exception of a small quantity of water which seeps through the dam, and with the exception of the designated quantity of water awarded to plaintiff by the former decision of this court. It should here be mentioned that, in addition to the 40 acres of riparian land owned by plaintiff, plaintiff is likewise the owner of some 1,640 acres of other lands in the vicinity of Hat creek, but nonriparian thereto. The quantity of water awarded to plaintiff in the former opinion of this court is used by him on the entire 1,680 acres, including the 40 acres that are riparian to Hat creek. The quantity awarded to plaintiff was based on certain appropriation rights acquired by him, and has no relation to whatever additional rights plaintiff has in the waters of Hat creek by virtue of his riparian ownership of the 40 acres.

In support of their petition, defendants allege that from 1921 to the effective date of the preliminary injunction, February 6, 1931, defendant Mt. Shasta Power Company has been in active control of power plant Hat No. 2, engaged in transmitting and supplying power for the use of the public. It appears, however, although all of the riparian lands owned by defendants, were originally purchased by the defendant power company, that on November 1, 1922, said power company conveyed all of said lands and the entire power plant to the Red River Lumber Company, a private corporation. Immediately the lumber company leased to the power company all of said lands and the entire power plant. This conveyance and lease were entered into with the consent and approval of the Railroad Commission. From the opinion of the commission (22 Opinions and Orders of the Railroad Commission, 342), it appears that the purpose of these transfers was that the power company (a subsidiary of the Pacific Gas & Electric Company) desired to secure certain lands then owned by the lumber company on the Fall and Pit rivers, in connection with certain large power developments there, and the lumber company desired to secure the lands and power plant then owned by the Mt. Shasta Power Company on Hat creek for use in connection with anticipated lumbering operations in that vicinity. As a result, the two parties exchanged their various holdings. The lumber company, at that time, had no need for all of the electric

energy produced at power plant Hat No. 2, so that the entire plant was leased to the power company; that company furnishing to the lumber company, as rental, a designated quantity of electric power. There is no dispute that, by the terms of the lease between these two parties, said lease may be terminated at any time by the lumber company on six months' written notice, in which event the entire plant will pass into private ownership free and clear of any public use. Plaintiff, in his answer to this petition, pleads one clause of the lease between the power company and lumber company, which provides in part:

"* * * Neither said Lessee nor its successors or assigns shall, without the written consent of the Lessor or its successors or assigns, in any manner dedicate or devote to a public use, for any period of time whatsoever beyond the expiration of the term of this lease or its earlier termination, said power plants * * * or any part of the leased premises; that upon the expiration of the term of this lease or its earlier termination, said Lessee shall abandon and cease the use and operation of all of said properties in the service of the public and shall thereupon surrender to the Lessor, its successors or assigns the possession of all of said leased properties, including all power plants located thereon, and their adjuncts and appurtenances, * * * free and clear of any obligation to use, or to permit the use of, the same for the service of the public."

The Railroad Commission, as above stated, approved the conveyance and lease, and by its order declared in part (22 Opinions and Orders of the Railroad Commission, 342, at page 344):

"Mount Shasta Power Corporation be and the same is hereby authorized to use the properties hereby authorized to be leased by it from Red River Lumber Company in the public service as long as said lease shall continue in force and effect."

Plaintiff also alleges in his answer to this petition that defendants have never before in this controversy claimed the right to divert the water for a public use, or that a public use has attached thereto, alleging that such allegation in this petition for supersedeas is the first time this contention has been made.

It thus appears that, although the defendants have been diverting the water and supplying power to the public for the past ten years, the public use that has attached to said waters is a very limited one, and may be terminated at any time, in which event the power plant, land, and water rights will pass into private ownership.

Defendants, in an attempt to allege facts sufficient to constitute an estoppel against plaintiff, and to show that the injunction granted by the trial court disturbs the status

quo, allege in this petition that during the period of construction of the power plant plaintiff "was well aware of the construction from the very beginning thereof, and all of the purposes and objects of the petitioner Power Company." Defendants also allege that at no time during the construction of said power plant, and not until 1923, did plaintiff object to the construction of said power plant on the theory that it invaded his riparian rights; that in his first complaint in this action, filed August 29, 1921 (one month before defendants started the operation of their plant), there is no allegation that the 40 acres or any other land of plaintiff is riparian to Hat creek; that in such complaint plaintiff relied on certain rights gained by appropriation and long-continued use; that in such complaint it was alleged that plaintiff had gained the right to divert a designated quantity of the waters of Hat creek for a beneficial use on the 40 acres, as well as on the other lands of plaintiff, by virtue of such appropriation; that the first time plaintiff claimed any rights in the waters of Hat creek by virtue of his riparian ownership of the 40 acres was in an amended and supplemental complaint filed September 28, 1923, wherein it was alleged that the 40 acres, together with certain other lands of plaintiff, were riparian to Hat creek, and, by virtue of such riparian ownership, prayed for a preliminary injunction against the diversion by defendants. Defendants, on this petition, likewise allege that on November 20, 1924, during the former trial of this action, plaintiff further amended his complaint to allege specifically that the diversion of said waters by defendants constituted an injury to plaintiff's riparian rights in and to the 40 acres, and prayed for a permanent injunction. These facts are alleged by defendants mainly for the purpose of showing that a public use has attached to said waters, and that under the rule enunciated in *Conaway v. Yolo Water & Power Company*, 204 Cal. 125, 266 P. 944, 58 A. L. R. 674, and other cases, plaintiff, by his inaction, is relegated to an action at law for damages, and is estopped by his conduct from enjoining the diversion. The above facts are also alleged for the purpose of showing that the preliminary injunction asked to be suspended disturbs the status quo, and is therefore mandatory. This last point will be discussed later in this opinion.

[1-4] In his answer to this petition, in reply to the above allegations, plaintiff denies that during the entire period of construction of the power plant he was aware of the purposes or objects of the defendant power company, and, in this connection, alleges in part that "the officials, agents and representatives of said Power Company at all times advised respondent that said Power Company did not intend to and would not in any manner trespass upon, injure or damage or otherwise use

or appropriate any of the property or rights of respondent in connection with said power development"; admits that in his original complaint he did not rely on his riparian ownership of the 40 acres, but relied on the interference by defendants of certain water rights belonging to plaintiff by virtue of appropriation; that, when plaintiff commenced said action, he was seeking to restrain the power company from trespassing upon his lands and injuring his ditches and crops; that the bringing of such action was an emergency measure; that plaintiff applied to the Superior Court for a temporary restraining order restraining defendants from interfering with the ditches and water rights of plaintiff; that immediately thereafter the officials, agents, representatives, and attorneys of the power company promised plaintiff that said power company would entirely cease and desist from any further interference with plaintiff's rights and would pay for all damages already suffered; that in reliance on such representations plaintiff was persuaded to cease the further prosecution of said action, and permitted the power company to proceed without objection; that said power company failed to live up to such promises and representations, with the result that plaintiff was forced further to prosecute said action; that at the time of filing the first complaint in 1921, and at the time of filing the amended and supplemental complaint in 1923, plaintiff had not had a survey made of his various properties in the vicinity of Hat creek; that plaintiff started such a survey in 1922, which was not completed until 1924; that upon the completion of such survey plaintiff for the first time discovered and became aware of the fact that 40 acres of said lands were riparian to Hat creek; that, prior to the time defendants first started to divert the waters of Hat creek, plaintiff did not know that said lands were riparian; that the agents, representatives, and attorneys for said power company at all times asserted and claimed and advised plaintiff that it (said power company) was the sole owner of all the riparian rights in and to Hat creek between the point of diversion and the power house, and advised and represented to plaintiff that he had no riparian rights therein. Plaintiff supports this last allegation by affidavits of himself and his attorney to the effect that such representations were made by the superintendent of construction of said power company, and by Mr. Chenoweth, one of its attorneys, at various times to Mr. Joerger directly and to Mr. Carter, one of his attorneys. Both Mr. Chenoweth and the superintendent of construction, Mr. Martin, have filed counter affidavits alleging positively that they made no such representations to plaintiff, and alleging that in all their negotiations with plaintiff and his attorney no mention was ever made of any riparian

rights of plaintiff, but all negotiations prior to 1923 had to do with alleged injuries to plaintiff's appropriation rights, his ditches and crops. We cannot, of course, on this petition, pass upon this disputed question of fact, that being a matter that may become important on the trial on the merits. It should, however, be pointed out that even plaintiff does not contend that such representations were made to him or to his attorney in bad faith. There can be no doubt that defendants at all times believed they owned all the riparian rights in Hat creek between the point of diversion and the power plant, and, in fact, on the trial of this action in 1924 were able to convince the trial court that this was so. It was only after an appeal to this court that it was finally determined that said 40 acres were riparian to Hat creek. See *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017. Assuming that such representations were made to plaintiff and his attorney, it would seem that plaintiff has established a prima facie case excusing him from his neglect in failing to assert his riparian rights at an earlier date. There being a legitimate dispute, both as to the extent of the public use that is alleged to have attached to the waters of Hat creek and as to the facts alleged in order to raise the estoppel, and bearing in mind that this is a petition for a writ of supersedeas addressed to the discretion of this court, which writ should issue only when it is necessary to protect the appellate power of this court, we do not feel that defendants have sufficiently established either that a public use has attached to such waters or that plaintiff is estopped from enjoining the diversion by his inaction and is relegated to an action at law for damages under the rule laid down in *Conaway v. Yolo Water & Power Co.*, 204 Cal. 125, 266 P. 944, 58 A. L. R. 674. On such a petition the petitioners must establish sufficient facts to entitle them to the writ, and, if the basic facts are disputed, all presumptions are in favor of the party against whom the writ is directed.

As already stated, the former trial in this action was held in 1924. The trial court awarded plaintiff \$40,000 damages, a certain designated quantity of water, and, among other things, held that the 40 acres were not riparian to Hat creek. Both sides appealed. Among other things this court affirmed the judgment for \$40,000 and the award of water to plaintiff, and reversed other parts of the judgment, specifically deciding that the 40 acres owned by plaintiff were riparian to Hat creek. This decision on appeal was rendered April 9, 1929; the remittitur being filed in the court below May 14, 1929. On April 16, 1930, plaintiff asked leave to file a supplemental complaint, which permission was granted by the trial court over defendants' objections, and on September 16, 1930, plaintiff filed such a supplemental complaint.

On February 4, 1931, plaintiff, without leave of court, filed another amended supplemental complaint.

In the meantime, on September 15, 1930, the plaintiff filed an affidavit and procured an order to show cause why a preliminary injunction should not be issued. This affidavit states that Joerger is the owner in fee and in possession and entitled to the possession of certain described real property, including the 40 acres; that Hat creek is a natural water course; that the waters of said creek before their diversion by defendants naturally followed over, along, by, upon, and past said lands; that said lands are riparian to Hat creek; that the natural flow of said stream naturally wets and irrigates a portion of said lands, so that without further irrigation said lands would produce valuable crops and would maintain abundant pasturage for stock; that since the commencement of this action (August 28, 1921) defendants have constructed a power plant, and, since its completion in 1922, said defendants have diverted substantially all of the waters of Hat creek out of the natural channel, and by means of a flume and aqueduct have conveyed the same entirely around the lands of plaintiff, and thus have deprived said plaintiff of his right to the natural flow of the stream past and over said riparian lands, and of the right of plaintiff to devote the water to a useful and beneficial purpose on said lands in the exercise of his riparian right; that the Supreme Court has held that said 40 acres are riparian to Hat creek; that said diversion has continued since 1922; and that, unless restrained, said defendants will continue to divert said waters around the lands of plaintiff, thus destroying plaintiff's property rights to his irreparable damage; that pecuniary compensation will not afford plaintiff adequate relief. At the hearing before the trial court on the application for a temporary injunction, plaintiff introduced some evidence that part of said 40 acres could be used advantageously for the maintaining of a summer camp and for power purposes.

On January 29, 1931, the trial court issued its order granting the preliminary injunction, conditioned upon plaintiff filing a bond. Plaintiff filed the required bond on February 5, 1931, and the preliminary injunction was issued. On February 6, 1931, defendants, in obedience to the provisions of the injunction, ceased their diversions and necessarily closed down their power plant. On the same day defendants appealed from the order granting the injunction. That appeal is now pending in this court. On February 10, 1931, defendants applied to the trial court for an order staying the temporary injunction, pending appeal, which request was denied, whereupon the defendants filed this petition.

The preliminary injunction which defend-

ants desire suspended restrains the Mt. Shasta Power Corporation and the Red River Lumber Company, and their agents or representatives, "from continuing to divert any of the waters of Hat creek from the natural channel of said stream, where the same passes through, over, along, by, upon and past" the 40 acres of plaintiff's riparian land.

In addition to the points already discussed, defendants make five major contentions in support of their application. It is contended: (1) That the injunction involved herein is not a prohibitory injunction, but a mandatory injunction, and is therefore automatically stayed by the appeal from the order granting it; (2) that, under the facts in this case, plaintiff was not entitled to an injunction in any event, but was, at most, entitled to an apportionment of the waters of Hat creek; (3) that, even if the injunction be found to be prohibitory, this court, in the exercise of its appellate power, and in order to protect its appellate jurisdiction, has the power to suspend the effect of such an injunction, pending appeal; (4) that this case presents a proper state of facts for the exercise of this power; (5) that the writ should issue, for the reason that there is at least fair color of merit in defendants' contention that the issuance of the injunction in this case was beyond the trial court's authority, for the reason that said injunction violates the prior decision of this court in the case of *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017.

Contentions 1 and 2 will be considered together, as will likewise contentions 3 and 4, while contention 5 will be considered separately.

[5, 6] Defendants contend that the preliminary injunction above quoted compels the surrender of a right in real property, in that said injunction disturbs the status quo as it has existed since 1921, and for the further reason that, since that date, defendants have been in the possession of said waters in the exercise of their riparian rights. If either of these contentions is correct, it is clear that the appeal from the order granting said injunction automatically stayed all proceedings based thereon. It is well settled by the decisions of this court that all proceedings on a mandatory injunction are stayed by an appeal from the order granting the same. It is equally well settled that an injunction which is strictly prohibitive in character is not stayed by an appeal from the order granting it. *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555, and cases cited therein.

The question as to what constitutes a prohibitive and what constitutes a mandatory injunction has been frequently before the appellate tribunals of this state. The following principles appear to be well settled: A prohibitory injunction is one that operates to

restrain the commission or continuance of an act and to prevent a threatened injury. In other words, it is an injunction which has the effect of preserving the status quo. *Washington v. Superior Court*, 39 Wash. 115, 80 P. 1108, 1 L. R. A. (N. S.) 554, 109 Am. St. Rep. 862, 4 Ann. Cas. 229; *Wolf v. Gall*, 174 Cal. 140, 162 P. 115; *Clute v. Superior Court*, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54. A mandatory injunction is one which goes beyond a mere restraint—it commands acts to be done or undone; it compels the performance of some affirmative act. Such an injunction necessarily contemplates a change in the status quo. *Mark v. Superior Court*, 129 Cal. 1, 61 P. 436; *Foster v. Superior Court*, 115 Cal. 279, 47 P. 58; *Stewart v. Superior Court*, 100 Cal. 543, 35 P. 156, 563. In *United Railroads v. Superior Court*, 172 Cal. 80, 155 P. 463, 466, the court defined the "status quo" which is determinative of the character of an injunction as follows: "There is no magic in the phrase 'maintaining the status quo' which transforms an injunction essentially prohibitive into an injunction essentially mandatory. The phrase is commonly employed in discussing mandatory injunctions compelling the surrender of possession of realty by the actual peaceable occupant at the time the injunction has been secured. Indeed, the phrase has been defined to mean 'the last actual peaceable, uncontested status which preceded the pending controversy.'"

The same case also clearly pointed out that the character of a prohibitory injunction is not made mandatory because it incidentally involves the doing of an affirmative act.

In *Jaynes v. Weickman*, 51 Cal. App. 696, at page 699, 197 P. 672, 673, it was stated: "An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden act. An injunction that restrains the continuance of an act or series of acts may be just as much a preventive or prohibitory injunction as one that restrains the commission of an act."

In this last case defendants were enjoined from continuing to use a certain trade-name. In holding that such an injunction was prohibitory, the court said: "The fact that they had for some time been enjoying their asserted right to use that business name does not change the character of the injunction. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had been begun and carried on for any considerable time prior to the commencement of the action."

[7-9] Applying the above general principles to the facts of this case, we have no hesitancy in holding that the injunction involved

herein is prohibitory and not mandatory. The argument of defendants is largely based on the fact that from 1921 to 1923 they were in undisputed possession of all the water, without any objection on the part of the plaintiff on the ground that his riparian rights were being interfered with. It is therefore contended that "the last actual peaceable uncontested status which preceded the pending controversy" was the peaceable and uncontested possession of defendants. It is also contended that the use to which defendants have been putting the water is a riparian use, and that, since the injunction prevents the use of any portion of the water for power purposes by defendants, said injunction compels the surrender of a right in real property, and is therefore mandatory. Both of these arguments are necessarily predicated on the theory that the use to which defendants have been putting the water is, as to plaintiff, a riparian use, and that at most all that defendants have been guilty of is an excessive riparian use. There can be no doubt that, if the facts alleged by plaintiff show that the use is nonriparian, and therefore constitutes, as to plaintiff, a continuing trespass, or that the use, if continued, would ripen ultimately into a right by prescription, any injunction restraining such continuing trespass is prohibitory in character. It is well settled that a right based on a continuing trespass for less than the prescriptive period does not create such a status that an injunction restraining the continuance of such a trespass becomes a mandatory injunction. We have already cited and quoted from the case of *United Railroads v. Superior Court*. In that case "the United Railroads brought its action to enjoin the city and county of San Francisco, operating a municipally owned electric street railway, from using a portion of its tracks, poles, and wires owned in common with the municipality, and of its terminal loops owned by it exclusively, with cars in excess of the number which plaintiff contended defendant was entitled under contract to use." Page 81 of 172 Cal., 155 P. 463. It was contended that the injunction requiring the defendant to desist and refrain from operating this excess number of cars upon the tracks and around the loops was mandatory and not prohibitory, on the ground that, in effect, it compelled defendants to surrender a right in the nature of real property, of which they were then in possession. This court first held that the act enjoined was in the nature of a continuing trespass, and that an injunction restraining such act, although it compels the surrender of such right, was clearly a prohibitory injunction, and then continued: "If this argument were valid [that such an injunction is mandatory], it would put an end to the universally established doctrine that equity enjoins by preventive injunction the commission of repeat-

ed trespasses affecting realty where legal redress would require a multiplicity of actions or where the wrongful use, if permitted to continue, would eventually ripen into a right by prescription. The application for an injunction would be met by the statement that the defendant had been in actual use of the right claimed, that this was equivalent to legal possession thereof, and that injunction will not lie to oust one who is in peaceable possession, since there is an adequate remedy at law by an action to recover possession. That such doctrine cannot be maintained is apparent. The answer is that continual entry without right upon the land of another is not possession thereof. It is nothing more nor less than a series of continuing trespasses, each a wrongful act, and no one nor all of those acts become rightful until by the lapse of time necessary to establish title by prescription the trespasser has become the legal owner of the right to use the way. *Chattanooga Terminal Ry. Co. v. Felton* (C. C.) 69 F. 273, 277; *Coatsworth v. Lehigh Valley Ry. Co.*, 156 N. Y. 451, 454, 51 N. E. 301; *Hooper v. Dora Coal Mining Co.*, 95 Ala. 235, 10 So. 652; *Lake Shore, etc., Ry. Co. v. Felton*, 103 F. 227, 43 C. C. A. 189."

Of particular interest in this case is the reference in the *United Railroads* case to the early case of *Conkling v. Pacific Improvement Co.*, 87 Cal. 296, 25 P. 399. The reference to that case is as follows: "Here in effect it was asserted that the injunction was mandatory, in that at the time of the commencement of the action 'the diversion by the six-inch pipe was complete, and for that reason injunction could not properly issue.' Says this court: 'But, conceding that the six-inch pipe had been put in and the diversion of the water had taken place at the time that the amended complaint was filed, * * * and conceding that the diversion had actually taken place, the act of carrying the water away from its natural channel, if wrongful, was a continuous act, against which an injunction might issue. * * * The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe.'"

It follows that, if the use to which defendants have been putting the water constitutes as to plaintiff a nonriparian use, then such use constitutes a continuing trespass, and an injunction restraining such trespass is a prohibitory injunction. We turn to a discussion of this phase of the problem.

As already pointed out, in relation to plaintiff's 40 acres, defendants are upper and lower riparians on both sides of Hat creek, and are likewise opposite riparian owners, owning the land or water rights in the land abutting Hat creek opposite to the 40 acres owned by plaintiff. Plaintiff's 40 acres, in the former decision of this court, were held to be riparian to Hat creek. Defendants, starting

in 1921, have diverted substantially all of the waters of Hat creek at a point above plaintiff's land, and, by means of a diversion weir, flume, and aqueduct, have artificially conducted the same entirely away from the lands of the plaintiff. Defendants actually use the water at their power plant, which is situated on Hat creek at a point below the lands of plaintiff. At this point defendants return substantially all of the diverted waters back into the natural channel of Hat creek. Defendants do not claim to have gained such right by prescription, but contend that as lower, upper, and opposite riparian owner they have the right to use the entire flow of the stream, provided the intervening owner has no need for the water. At most, it is contended, the use of all of the waters of the stream by defendants constitutes an excessive riparian use, in which event the proper remedy of plaintiff is an action to apportion, and not to enjoin. In this connection it is urged that at all times since 1921 defendants have been in possession, as such upper, lower, and opposite riparian owner, of all their riparian rights, including the right to use the entire stream, and that, since the injunction prevents the diversion of any water by defendants, it necessarily compels the surrender of part of their riparian rights, and must therefore be held to be mandatory in character. These contentions are necessarily predicated on the theory that as such lower, upper, and opposite riparian owner defendants have the right to divert the water above an intervening riparian owner's lands, and artificially convey the same entirely around and away from the lands of plaintiff, for use at a power plant located on the stream below the intervening riparian owner's lands, at which point substantially all of the diverted waters are returned to the natural channel. As the major premise of this theory it is contended that, as opposite riparian owner, defendants have a correlative right with plaintiff to the waters, and, in the absence of any use by plaintiff, as such opposite riparian, defendants have the right to use the entire flow of the stream. Such use, it is contended, cannot be deemed to be adverse, citing such authorities as *Dyer v. Cranston Co.*, 22 R. I. 506, 48 A. 791; *Gould on Waters* (3d Ed.) § 207; *Warren v. Westbrook Mfg. Co.*, 88 Me. 58, 33 A. 665, 35 L. R. A. 388, 51 Am. St. Rep. 372; *Pratt v. Lamson*, 84 Mass. (2 Allen) 275; *Half Moon Bay Land Co. v. Cowell*, 173 Cal. 543, 160 P. 675; *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11; *Oliver v. Robnett*, 190 Cal. 51, 210 P. 408.

We are in accord with the theory of those cases. We think, however, that all that those cases hold is that as between opposite riparians neither owns any specific portion of the waters, and that, if one such owner has no use for any portion of the waters, the op-

posite owner has the right to use the entire flow of the stream for riparian purposes in the proper exercise of his riparian right. However, for this doctrine to apply, it is our opinion that the use to which the water is put must be a riparian use on such opposite riparian lands. We have been cited to no case which holds that an opposite owner may divert all of the water above an intervening owner's lands and artificially convey the same entirely around and away from such lands for use below the lower boundary of such opposite owner, and that such use will be deemed to be a riparian use. We are of the opinion that such use must be deemed to be a nonriparian use, adverse as to any intervening owner.

[10] We do not mean to intimate that the use of water by a riparian for power purposes is a nonriparian use. The courts of this state have recognized from an early date that a riparian owner in the proper exercise of his riparian right may use the water as the motive power for propelling machinery, subject only to domestic uses of those riparians lower on the stream. 25 Cal. Jur. 1122, 1123, §§ 131, 132. However, this does not mean that the use of such waters for power purposes gives any riparian any greater rights than any other riparian use would give him.

[11] We think that the problem involved in this case is governed by well-recognized principles. It is well settled that one who owns two or more tracts of land riparian to the same stream may not take the water which he is entitled to by virtue of his ownership of one tract and use it on the other. Of course, if one owner owns two adjoining riparian tracts, such owner is entitled to divert at some point on the upper tract the quantity that he is entitled to use on his lower tract, for use on such lower tract. But, as was held in *Miller & Lux v. Enterprise Canal Co.*, 169 Cal. 415, 147 P. 567, where the rights of another riparian intervene between the two tracts, the taking of the water from the upper tract to the lower is as to such intervening owner just as harmful and just as improper as any diversion to nonriparian lands. The same principles are applicable to such a situation as are applicable where a lower riparian attempts to divert the water for use on his land at a point above an upper riparian. The ownership of an upper riparian tract gives such owner no more right to divert the water for use on his lower tract than he would have if he did not own the upper tract. In such a case such diversion is in effect the same as a diversion by an appropriator. See *Miller & Lux v. Enterprise Canal Co.*, 169 Cal. 415, 147 P. 567; *California Pastoral & Agricultural Co. v. Enterprise Canal Co.* (C. C.) 127 F. 741; *Drake v. Tucker*, 43 Cal. App. 53, 184 P. 502; see, also, *Turner v. James Canal Co.*, 155 Cal. 82, 99 P. 520, 22 L. R. A.

(N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823; 25 Cal. Jur. 1134, § 146.

[12] Defendants concede, as they must, that this is the rule where A owns a riparian tract and B owns two riparian tracts on the same stream, one above and one below that of A. But defendants contend that where, in addition to the upper and lower tracts, B also owns the riparian tract opposite to A, the rule has no application. But this is not so. We are of the opinion that as against riparians lower on the stream, in relation to defendants, the use by them of the waters in the manner described is a riparian use, but, on the principle of the above cases, we see no escape from the conclusion that a diversion of the entire or any portion of the stream above plaintiff and the conducting of said waters entirely around and away from the lands of plaintiff, and the use of said waters and the return of them to the natural channel below said riparian lands, constitutes, as to such intervening owner, a nonriparian use. Since this is so, it necessarily follows that the diversion of said waters by defendants constitutes, as to plaintiff, a continuing trespass, and, on the authority of the cases above cited, an injunction restraining such continuing trespass is prohibitory and not mandatory. Such injunction does not disturb the status quo, nor does it compel defendants to surrender possession of their riparian rights. This conclusion necessarily disposes, adversely to defendants, of the point that apportionment and not injunction is the proper remedy.

[13, 14] Defendants next contend that, assuming the injunction is prohibitory, this court, in the exercise of its constitutional authority, and in aid of its appellate jurisdiction, has the power to suspend the operation of a prohibitory injunction pending appeal, and have offered to post a bond, in whatever amount this court deems necessary, to indemnify plaintiff in case such appeal results adversely to them. Defendants also contend that this case presents a proper case for the exercise of this power.

We have no doubt that in a proper case this court, in aid of and to preserve its appellate power, can, by supersedeas or some other appropriate writ, suspend the effect of a prohibitory injunction pending appeal. *People v. Associated Oil* (Cal. Sup.) 294 P. 717; *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555. However, we cannot say that this case presents a state of facts sufficient to induce this court to exercise this discretionary power. In so holding we are not unmindful that the defendants' business is a large and important one, and that great loss may result, and probably already has resulted, to such business by the enforcement of the injunction. We are aware of the fact that defendants have alleged that they have already expended over a million and a half dollars in the construc-

tion of their plant, and that the injury to plaintiff by the suspension of the injunction would be slight, as compared to the injury to defendants by its continuance. These considerations, and the other considerations urged by defendants, while important, are not sufficient to warrant this court in granting the defendants the relief prayed for when the direct effect of such action would be to deprive the plaintiff of the free use and enjoyment of his property. *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555. This court must contemplate the possibilities of affirmances as well as reversals. In order to entitle defendants to the relief prayed for, in such a case, they must establish that a public use has attached to said waters, or, under the facts alleged, they must establish a prima facie case entitling them to the relief sought. In the case at bar we cannot say that such a prima facie case has been established. On the facts before us we have already held that the diversion of said waters by defendants constituted as to the plaintiff a diversion for a nonriparian use. In such a case it does not rest with defendants to say that plaintiff will not be injured by the suspension of the injunction and that defendants will be irreparably injured by its continuance. On the showing made by defendants themselves such taking of the water as to plaintiff is a tortious taking.

Defendants' contentions that this is a proper case for the exercise of the power are largely based on the assumption that the trial court, under the guise of protecting plaintiff's water rights, has destroyed the right of defendants to use their own riparian land and riparian rights in a beneficial manner. This contention, as we have already seen, cannot, under the facts here presented, be sustained. The defendants have been restrained only from doing that which, under the facts shown, they have no right to do. They also contend that the decision of the trial court has deprived "the public of the electric energy generated through the exercise of petitioners' riparian rights." However, we are not prepared to hold, on the showing made, that a public use has attached to said waters, and that plaintiff has acquiesced therein. Those issues will be two of the main issues presented to the trial court when this case is tried on its merits, and we do not feel that we should now pass on the merits of these disputed issues. Plaintiff has demonstrated that the alleged public use, if any, is indeed a limited one that may be terminated at any time, and has alleged facts which, if true, would excuse his apparent acquiescence.

[15, 16] Defendants' last main point is that the injunction should be suspended, for the reason that there is at least "fair color of merit" in their contention that the issuance of the injunction in this case was beyond the

trial court's authority, for the reason that said injunction violates the prior decision of this court in *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 276 P. 1017.

It is contended that the injunction violates the prior decision of this court in at least four respects:

(1) It is contended that the prior decision of this court affirmed a judgment for damages in favor of plaintiff for all the damages suffered by all of his land, including the 40 acres, by reason of the past, present, and future maintenance and operation of defendants' diversion works. It is contended that the \$40,000 judgment in favor of plaintiff (which is alleged to have been paid) amounted to an authorization to defendants to continue the maintenance and operation of their diversion works.

(2) That the decision affirmed the trial court's holding that defendants are upper, lower, and opposite riparians, in relation to plaintiff; that the injunction restrains any diversion by defendants in violation of defendants' rights as opposite riparian owner; the plaintiff's proper remedy is to apportion and not to enjoin. This point has heretofore in this opinion been determined adversely to defendants.

(3) That the decision of the trial court, as affirmed, awarded to plaintiff all the water which he could put to a beneficial use upon the 40 acres, and therefore that he is entitled to no more. This contention is predicated on the theory that the use by defendants of the water under the circumstances of this case was a riparian use. This, we have held, is not the fact. A reading of the former opinion will show that the quantity of water awarded plaintiff by the judgment was based entirely on his appropriative rights. He was awarded no water, based on his riparian rights; the trial court holding he had no riparian rights. Obviously, an award of water based on the theory that such quantity has been secured by appropriation is no bar to a subsequent action for more water, based on the theory of riparian ownership.

(4) That the decision of this court holding that the 40 acres were riparian to Hat creek did not increase the amount of water to which plaintiff was entitled, but merely authorized the entry in the lower court of a declaratory judgment adjudging that plaintiff was a riparian as to these 40 acres.

The issues raised by the first and fourth contentions immediately above set forth would seem to require a thorough examination of the record and the effect of the decision on the former appeal. Without further reviewing the points decided on that appeal, it is apparent from a reading of the opinion that no damages were awarded for and on account of the deprivation of the plaintiff's riparian right. This is so for the reason that

the trial court found that the plaintiff was not a riparian owner as to said 40 acres, and it cannot be assumed that damages were awarded for the deprivation of a right which, according to the finding, did not exist. This finding was held to be unsupported by and contrary to the evidence, and the judgment was reversed in so far as it was based on said finding. We do not wish to foreclose the defendants from further urging these points on the appeal from the order, and what has been said with reference thereto is merely for the purpose of indicating that, on this application, the points made, if controversial, should not now be resolved in favor of the defendants. On the other hand, the plaintiff contends that the \$40,000 was received by him for damages entirely apart from the consideration of the infringement of his rights as a riparian owner. For the purposes of this application, we are inclined to agree with the plaintiff.

We are unable to conclude that the showing here made is sufficient to warrant the granting of the relief sought.

The petition is denied.

117 Cal.App. 413

PEOPLE v. ROBERTSON.

Cr. 1628.

District Court of Appeal, First District,
Division 1, California.

Oct. 9, 1931.

Rehearing Denied Oct. 24, 1931. Hearing
Denied by Supreme Court Nov. 6, 1931.

1. Burglary ☞42(3).

Evidence showing recent possession of stolen property, and denial of having taken property to pawnshop or signed fictitious name and address to bill of sale, supported conviction of burglary.

2. Burglary ☞45.

Criminal law ☞739(2).

Soundness of alibi in burglary prosecution and weight of supporting testimony held for jury.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Joseph Robertson admitted a charge of two prior convictions of felony, and, having been convicted of burglary, he appeals.

Affirmed.

Soren X. Christensen and Leon J. Dugan, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Dep. Atty. Gen., for the People.

KNIGHT, J.

A dwelling on McKinley street in Oakland was burglarized between the hours of 8 and 10:30 o'clock on the night of December 26, 1930, and a small amount of cash, two watches, and a few articles of jewelry including a gold watch charm, representing a football, were stolen therefrom. Appellant was charged with the commission of the crime, and with two prior convictions of felony. He admitted the prior convictions, and was found guilty by a jury of the charge of burglary. The sole ground urged for reversal is insufficiency of the evidence to sustain the judgment of conviction.

[1] The evidence upon which the conviction was obtained was, in substance, as follows: About 1 o'clock on the afternoon following the burglary, appellant was seen by an inspector of the Oakland police department to enter a pawnshop in that city, wherein, according to the proprietor of the shop, he sold the stolen watch charm, and signed the bill of sale therefor as follows: "George Williams—Hotel Adams," which was a fictitious name and false address. Upon leaving the pawnshop, he was arrested by the inspector, but later, when questioned about the matter by the officers, denied having entered the pawnshop as claimed by the inspector, or having sold therein the stolen watch charm, or having signed the bill of sale therefor as claimed by the proprietor of said shop, and finally he declined to make any further statement about the matter. Exemplars of his handwriting were obtained, however, and at the trial expert testimony was introduced to show that the signature and address attached to said document were written by him. Appellant did not take the witness stand in his own behalf, but, by the testimony of others, sought to establish an alibi. In this regard, his mother, with whom he lived on Davis street, testified that on the night of the burglary he left home between 7 and 8 o'clock; and his sister and her husband testified that he arrived at their home on Sixtieth street, 30 or 40 blocks distant from his mother's home, between 7:30 and 8 o'clock; that soon thereafter they drove away in their automobile, and that appellant then went across the street to visit another sister. The latter testified that appellant arrived there shortly after 8 o'clock and remained "close to an hour"; and his mother testified that he returned home between 9:15 and 9:30 o'clock, and did not again leave the house that evening. The dwelling that was burglarized was located approximately 50 blocks distant from appellant's home and in an opposite direction from the homes of his sisters.

TRISTRAM v. MARQUES.
Civ. 8088.

District Court of Appeal, First District,
Division 2, California.
Oct. 6, 1931.

The facts established by the prosecution in support of its case are almost identical with those presented in *People v. Lang*, 142 Cal. 482, 76 P. 232, 233, and it was there held that the same were legally sufficient to sustain the conviction. The defendant in that case was charged with having burglarized an apartment in a rooming house in San Francisco. An overcoat was stolen therefrom, and the prosecution proved that shortly after the burglary was committed the defendant pawned the coat and signed a fictitious name and false address on the books of the loan office; but when arrested he denied having pawned the coat. In holding that the evidence was sufficient to sustain the conviction, the court said: "While possession of the stolen property is not, of itself, sufficient evidence of the guilt of the party in whose possession it is found, still the recent possession, unexplained, is a very strong circumstance, when taken in connection with other circumstances that point to guilt. The fictitious name given at the loan office, the pawning of the coat on the very day it was lost, and the denying of the signature on the books of the loan office are potent facts which are sufficient to justify the inference of guilt. The authorities hold that where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the possession of a person who gives a false account, or refuses to give any account, of the manner in which he came into the possession, proof of such possession and guilty conduct is presumptive evidence not only that he stole the goods, but that he made use of the means by which access to them was obtained." (Citing a number of cases.) Additional cases holding to the same effect are *People v. Smith*, 79 Cal. 554, 21 P. 952; *People v. Murphy*, 91 Cal. App. 53, 266 P. 374; *People v. Fain*, 100 Cal. App. 439, 280 P. 162; *People v. Le Roy*, 192 Cal. 498, 221 P. 353; *People v. McClain* (Cal. App.) 1 P.(2d) 1023.

[2] It is evident, therefore, that under the law, as declared in the foregoing cases, the facts established by the prosecution in the present case are legally sufficient to sustain the judgment of conviction. The question of the soundness of appellant's alibi was of course for the jury to determine, as was the weight to be given to the testimony offered in support of it. And even accepting such testimony as true, it would appear that it was not sufficiently definite as to the exact time of appellant's arrival at his sisters' homes and his departure therefrom to preclude the inference that he was nevertheless afforded an opportunity to commit said burglary.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

1. Property ⇨9.

Possession is evidence of title, as regards right to obtain injunction preventing irreparable injury to property.

2. Injunction ⇨46.

Right to restrain by injunction may be exercised whenever, from peculiar nature of property affected by trespass, injury sustained cannot be remedied at law.

3. Pleading ⇨205(1).

Pleading facts entitling plaintiff to some relief in equity is sufficient against general demurrer.

4. Injunction ⇨118(3).

Complaint in action to prevent irreparable injury to property *held* sufficient.

Complaint stated that plaintiff was in possession of the property, and that defendant threatened to enter thereon under claim of ownership and commit irreparable injury to plaintiff's building.

5. Injunction ⇨118(2).

Complaint, in purchaser's action for injunctive relief against vendor threatening to interfere with property represented to be within boundaries of land conveyed, *held* to contain sufficient description of land.

Complaint contained sufficient description, as against contention that description of land contained in deed from vendor to purchaser was not set forth, but simply referred to as being property purchased and recorded in official records in certain volume at specified page, since the property conveyed, and for description of which reference was made to record, was not directly involved but was incidental to main issue.

6. Pleading ⇨12.

Demurrer for uncertainty would not lie where matter alleged to be uncertain was peculiarly within knowledge of party demurring.

7. Pleading ⇨54.

Preliminary averments of complaint can be made by apt and express averments without being rewritten.

8. Appeal and error ⇨1170(3).

That subsequent counts merely stated that all of "allegations in subdivision 1 of the

first cause of action herein is true," although being inapt reference, *held* not to require reversal (Const. art. 6, § 4½).

9. Quietting title *↪*52.

Judgment that purchaser was owner entitled to possession and in possession of certain parcels as appurtenances to property described in deed *held* not objectionable as adjudging purchaser to be owner in fee of such parcels.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by L. E. Tristram against Joseph F. Marques. Judgment for plaintiff, and defendant appeals.

Affirmed.

Jarrett Beckett and Edgar W. Howell, both of Ventura, for appellant.

Blackstock & Rogers and Merle J. Rogers, all of Ventura, for respondent.

JAMISON, Justice pro tem.

The complaint in this action contains four counts. The first count sets forth that prior to March 1, 1929, plaintiff purchased certain real property from defendant which had thereon an apartment house consisting of nineteen apartments and appurtenances thereto belonging. That said building was located on a hillside of sharp declivity and was supported by a concrete wall which was necessary to the stability of the building. That said wall inclosed an earthen fill. Then follows a description by metes and bounds of the wall and fill. That defendant, prior to the purchase of said building by plaintiff, represented to him that said wall and fill were included within the exterior boundaries of the property described in the deed conveying the premises purchased. That in fact the said earthen fill and a portion of said concrete wall were not within the exterior boundaries of the land described in said deed, which facts the defendant well knew. That said earthen fill and portion of said concrete wall were then and now are a necessary portion and appurtenance to said apartment building. That defendant now claims that he is the owner of said earthen fill and portion of said concrete wall theretofore described and threatens to tear out and demolish the same to plaintiff's irreparable injury. That while defendant claims to be the owner of said earthen fill and portion of said concrete wall, he has no right or title therein. That plaintiff since March 1, 1929, has been in the sole and exclusive possession of same and is entitled to maintain such possession. That if said concrete wall is destroyed or disturbed, plaintiff's said property will collapse and be destroyed. That

defendant is insolvent and could not be compelled to respond in damages.

The allegations of the second count are substantially that at and prior to the time plaintiff purchased said property, there existed a flight of concrete steps which afforded a means of ingress and egress to and from said apartments to the right of way described as parcel 3 in said deed. Then follows a description by metes and bounds of the land upon which said steps are located. That said steps are a necessary means for affording ingress and egress to and from said building. That at and prior to the purchase of the said premises defendant represented to plaintiff that the concrete steps were included within the exterior boundaries of the premises described in the said deed. That the said steps were not included in said boundaries, which fact was well known to defendant. That plaintiff relied upon the said representation of defendant. That defendant threatens to tear out and obstruct the use of said steps and unless restrained by an order of this court will carry out said threats to plaintiff of irreparable damage. That defendant claims to be the owner of the land upon which said steps are situated, but that he has no right or title thereto, and that since March 1, 1929, plaintiff has been in the possession and entitled to the possession of the land upon which the said steps are situated.

The third count in substance is to the effect that at and prior to the purchase of said premises there existed as a necessary part of the said building a certain metal stairway constructed as and for a fire escape, and is and was so constructed that the foot or base of same reached the ground at a point three feet outside of the boundaries described in the said deed. That defendant threatens to, and unless restrained by an order of this court will, tear out and destroy said portion of said fire escape and render the same useless to plaintiff's irreparable injury. That defendant is insolvent and could not be made to respond in damages. That plaintiff is the owner of said fire escape with the right to have the same rest as it now stands, and the right to have the use of the ground that serves as its foot or base.

The fourth count of the complaint in substance is as follows: That at and prior to said purchase the south foundation of said apartment building extended into and along the north edge of parcel 3 (presumably outside of the boundaries of the premises deeded to plaintiff) for a distance of about fifty feet along the said north edge for a distance ranging from about five inches to less than one-half inch. That at and prior to the time of the purchase of said building defendant represented to plaintiff that said building and the whole thereof was within the exterior

boundaries of the land described in said deed. That plaintiff believed, and relied upon the said representation, that said representation was untrue and was so known to defendant. That said foundation is a necessary part of said building and essential to its support and maintenance. That plaintiff has at all times since said purchase been the owner of said apartment building and the land upon which the same rests, including said foundation and base and the land upon which the same rests. That defendant claims some interest therein, but such claim is wholly without right. That defendant threatens to, and unless restrained by an order of the court will, destroy, interfere with, and obstruct said foundation to plaintiff's irreparable injury.

The relief prayed for is that defendant be enjoined from interfering with said concrete wall and earthen fill, or with the concrete steps, or the fire escape, and that it be decreed that plaintiff is the owner of the concrete wall and earthen fill, the concrete steps, and fire escape.

Defendant demurred to each of the four counts upon the ground that the facts stated do not constitute a cause of action and upon the further ground for uncertainty in that plaintiff's estate and title is not sufficiently set out, and specially demurred to the second, third, and fourth counts on the ground that paragraph 1 thereof is inferential. On July 14, 1929, the demurrer was overruled and defendant was given ten days to answer, and on July 26, the defendant having failed to answer, the court proceeded with the trial of the case and rendered judgment in favor of the plaintiff and from the judgment so rendered defendant appeals.

[1-4] Appellant contends that neither of the four counts of the complaint state a cause of action. He bases this contention upon the theory that the complaint fails to state facts showing respondent's ownership of the property, the threatened invasion of which he seeks to enjoin. The complaint states that respondent is in possession of the property, that appellant threatens to enter thereon under a claim of ownership and commit irreparable injury to respondent's building. In the case of *Dunker v. Field & Tule Club*, 6 Cal. App. 524, 530, 92 P. 502, 504, the court quoted with approval the following principle: "But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the court will be to grant the injunction. * * * Possession is evidence of title. A party may rely upon possession against a mere trespasser. *Kellogg v. King*, 114 Cal. 378, 46 P. 166, 55 Am. St. Rep. 74. Conceding that the complaint shows that appellant is merely a trespasser, yet his threatened acts, as therein set forth, would cause respondent's property to suffer irreparable injury if the said acts were carried

into effect. The right to restrain by injunction may properly be exercised whenever from the particular nature of the property affected by the trespass the injury sustained cannot be remedied by an action at law. *Roberts v. Hall*, 147 Cal. 434, 82 P. 66; *High on Injunction* (4th Ed.) 661; *Zierath v. McCann*, 20 Cal. App. 561, 129 P. 808. Pleading facts entitling plaintiff to some relief in equity is all that is necessary against a general demurrer. *Keele v. Clouser*, 101 Cal. App. 500, 281 P. 1073. This is not an action to quiet title, but, on the contrary, is an action for injunctive relief. We are of the opinion the complaint states a cause of action.

[5, 6] Appellant claims that the respondent's estate and title are not sufficiently set forth in the complaint. The basis of this contention is that the description of the land contained in the deed from appellant to respondent is not set forth, but is simply referred to as being the property purchased from appellant and recorded in the official records of Ventura county, Cal., in volume 250, at page 268, and he cites *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 P. 158, 159, as authority supporting this contention. That case was an action to quiet title to certain property which was described in the complaint as being contained in certain public records in the city and county of San Francisco. In that case the court said: "It is impossible to tell from the face of the pleading whether or not the public record to which reference is made includes within the property described in a mortgage all of that mentioned in the pleading as 'rights of way,' 'terminal lands,' and the 'Ocean Shore Railway property,' or only that last named." In that case the real property was the subject-matter of the action; in the instant case the property to which reference is made is to a record for its description, is not directly involved, but is incidental to the main issue. Besides, it is alleged that it was the property which appellant sold to respondent, and such being the case, the matter alleged to be uncertain is peculiarly within the knowledge of appellant and a demurrer for uncertainty will not lie. *Dow v. City of Oroville*, 22 Cal. App. 215, 134 P. 197; *Doe v. Sanger*, 78 Cal. 150, 20 P. 366.

[7, 8] Appellant attacks the sufficiency of counts 2, 3, and 4 for uncertainty upon the ground that they fail to make paragraph 1 of the first count a part of each of them. That simply stating, as they do, that "all of the allegations in subdivision 1 of the first cause of action herein is true," is not sufficient to make such allegations a part of said counts. He cites *Pennie v. Hildreth*, 81 Cal. 127, 22 P. 398, in support of this contention. This case holds that each count must state a cause of action complete in itself without reference to any other count. But in the later

decisions it has been uniformly held that preliminary averments of a complaint can be made, by apt and express averments, without being rewritten. *Green v. Clifford*, 94 Cal. 49, 29 P. 331; *Treweek v. Howard*, 105 Cal. 434, 39 P. 20; *Clark v. Berlin Realty Co.*, 33 Cal. App. 50, 164 P. 333. In the case under consideration paragraph 1 of the first count was a necessary part of the other counts without which a complete cause of action would not be stated. It must be admitted that the reference therein to the first paragraph of count 1 was neither apt nor express. However, it cannot be said that appellant was misled to his prejudice by such failure. Under the provisions of section 4½ of article 6 of the Constitution, this alleged error does not justify a reversal of the case.

[9] Lastly, the appellant contends that the decree is too broad, in that title is adjudged to be in respondent to the several parcels which are admitted by the complaint to be outside of the boundaries of the land described in said deed. We do not so construe the language of the judgment. It set forth that respondent is the owner entitled to the possession and in the possession of said parcels as appurtenances of and appertaining to said property described in said deed, and to said apartments. The judgment does not adjudge respondent to be the owner in fee of said parcels, but to be the owner of same as appurtenances with the right to their use and maintenance as such.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 386

KEELER et al. v. MURPHY et al.
Civ. 7620.

District Court of Appeal, First District, Division 2, California.
Oct. 6, 1931.

Rehearing Denied Nov. 5, 1931. Hearing Denied by Supreme Court Dec. 3, 1931.

1. Contracts ⇨24.

Offerees' letter approving offer but making several different or additional stipulations *held* counter offer, not acceptance, and did not result in binding contract.

2. Evidence ⇨441(1).

Oral agreement is not "executed" within statute, and therefore cannot alter written contract, unless fully performed by both parties (Civ. Code, §§ 1661, 1698).

[Ed. Note.—For other definitions of "Execute," see Words and Phrases.]

3. Evidence ⇨441(1).

Written contract cannot be modified by conflicting contemporaneous oral agreement between same parties (Civ. Code, § 1698).

4. Evidence ⇨450(5).

Provision in offer to exchange properties that ranch was subject to \$18,000 incumbrance, payable \$2,000 yearly, *held* not ambiguous, precluding parol evidence in explanation thereof (Civ. Code, § 1698).

5. Evidence ⇨441(11).

Holder of note payable one year after date *held* not legally bound by oral agreement to receive payment at specified rate yearly (Civ. Code, § 1698).

6. Brokers ⇨43(2).

Courts should not be overeager to thwart legislative purpose in adopting statute of frauds (Civ. Code, § 1624, subd. 6).

Civ. Code, § 1624, subd. 6, provides that agreement authorizing broker to purchase or sell real estate for compensation must be evidenced by memorandum subscribed by party to be charged.

7. Brokers ⇨43(2).

Hotel owners' contract employing brokers, who secured offer to exchange ranch for hotel properties, *held* contract employing brokers to "purchase real estate," within statute requiring written memorandum (Civ. Code, § 1624, subd. 6).

Contract was one employing brokers to purchase real estate, since offer or agreement to exchange hotel properties for ranch was in effect agreement to purchase land, consideration for purchase being hotel properties instead of cash.

[Ed. Note.—For other definitions of "Purchase," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Irvin Keeler and another, co-partners doing business under the firm name and style of Keeler & Graf, against J. L. Murphy and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, and F. Whitney Tenney, all of San Francisco, for appellants.

Hugh K. McKevitt and Jack M. Howard, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

[1] Appellants were the owners of the leasehold and furnishings of the Ramona

Hotel in San Francisco. Being desirous of disposing of these properties, they entered into negotiations with respondents, who were real estate brokers. Respondents secured an offer from one Swanson to exchange a ranch owned by him for appellants' hotel properties. This offer took the form of a writing embodying an agreement to exchange the properties upon terms set out therein, which was signed by Swanson and transmitted by respondents to appellants for their signatures. Instead of signing this proposed agreement, appellants attached thereto a letter, signed by themselves, which recited that they accepted and approved the proposed agreement "with the following stipulations and conditions added thereto." The letter set out several stipulations different from, or additional to, those contained in the proposed agreement signed by Swanson, and was therefore in legal effect not an acceptance of the contract proposed by Swanson, but a counter offer to him, and did not result in a binding contract between Swanson and appellants for the exchange of their properties.

However, the proposed agreement as executed by Swanson contained a provision by the terms of which appellants were to pay respondents a commission of \$2,500. In their letter attached to the proposed agreement, appellants stated that "the commission of \$2500.00 due to Keeler & Graf may be paid by us at any time within sixty days after closing of deal." This amounted to an agreement by appellants to pay respondents a commission of \$2,500 upon the exchange of the properties upon the terms set out in the proposed agreement signed by Swanson, as modified by the provisions contained in the letter signed by appellants.

One of the conditions contained in the proposed agreement was that Swanson's ranch was subject to an incumbrance "in the amount of \$18,000.00 payable \$2000.00 per year." It developed that this incumbrance was in fact a flat obligation contained in a note by the terms of which the entire \$18,000 was payable one year after the date of the note's execution. After extended negotiations, the exchange failed of consummation, and, upon the refusal of appellants to pay the commission, respondents sued and recovered judgment for \$2,500, from which appellants take this appeal.

Under section 1624, subdivision 6, of the Civil Code, an agreement authorizing a broker to purchase or sell real estate for compensation must be evidenced by a memorandum subscribed by the party to be charged. Respondents rely upon the letter subscribed by appellants and attached to the proposed agreement signed by Swanson to satisfy this requirement. Appellants, on the other hand, contend that, since their agreement, as evidenced by these writings, was to pay the commission only in case an exchange was effected

upon the conditions prescribed in the proposed agreement as modified by their counter offer, and since Swanson was unable to comply with the condition that the ranch should be subject to an \$18,000 incumbrance, payable \$2,000 per year, they are not bound by the terms of the memorandum to pay a commission to respondents.

In the trial court, respondents met this contention by offering oral testimony, which was received over appellants' objection, tending to prove first: That Swanson had an oral agreement with the bank by which he was to pay only \$2,000 per year on the \$18,000 obligation, and that the bank was willing to make the same terms orally with appellants in the event that they acquired the ranch; second, that at the time the proposed agreement was drawn appellants were advised of this fact and were satisfied to accept the ranch subject to the existing incumbrance; and third, that following the counter proposal contained in their letter appellants orally agreed to accept the ranch subject to the existing obligation. The trial court found in accordance with this testimony.

[2] Appellants attack the reception of this evidence and the making of findings based thereon as error, pointing to section 1698 of the Civil Code, which provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The cases are clear under this section that an oral agreement is not executed within the meaning of the Code unless it has been fully performed by both parties. *Pearsall v. Henry*, 153 Cal. 314, 325, 95 P. 154, 159, and cases cited therein; Civ. Code, § 1661. Applying this rule, it is clear that any subsequent oral agreement to accept the ranch subject to the existing incumbrance was not executed within the meaning of Civil Code, section 1698, and hence evidence thereof was improperly received.

[3-5] As to evidence that the bank had agreed orally to the payment of the \$18,000 at the rate of \$2,000 per year, and that appellants knew this fact and were satisfied with it prior to the drawing of the proposed agreement, it is settled that "a written contract cannot be modified by a contemporaneous oral agreement in direct conflict therewith between the same parties." *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304, 305. Respondents say that this evidence was properly admissible to explain the intention of the parties. But in our judgment the provision that the ranch shall be subject to an incumbrance "in the amount of \$18,000.00 payable \$2,000.00 per year" is not ambiguous and does not admit of the reception of oral evidence to explain its meaning. An incumbrance payable \$2,000 per year clearly means one so payable by its terms. The oral agreement by the bank to receive pay-

ment at the rate of \$2,000 per year would not be legally binding on the bank (*Henehan v. Hart*, 127 Cal. 656, 60 P. 426), which could still enforce the payment of the note according to its terms, if for any reason it saw fit.

Respondents rely on cases of which *Toomy v. Dunphy*, 86 Cal. 639, 25 P. 130, is typical, where the memorandum did not set out all of the terms of the proposed transaction, and oral evidence was admitted to supply the omitted terms. Such cases are distinguishable from this, where the terms upon which appellants were willing to exchange are fully set forth in the memorandum. In the cases of this class, relied upon by respondents, oral evidence was properly admitted to supply terms omitted from the memorandum which on its face was incomplete. They are not authority for the admission of oral evidence to vary or contradict a plain provision of the memorandum.

Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114, is typical of the other class of cases relied on by respondents. There an exchange was actually consummated between the parties, but on different terms than those provided in the memorandum; and the court allowed the recovery of the broker's commission on the express ground that the terms of the writing had been varied by a fully executed oral agreement. The case would be comparable to ours if appellants had actually exchanged their properties for Swanson's ranch subject to the existing incumbrance. The analogy between the cases fails, however, because in our case the oral agreement, if one was made, was never executed by the parties. No case has been cited by respondents holding that an explicit term of the memorandum relied upon by the broker can be shown to have been orally modified by the parties, in the absence of the further showing that the oral modification was subsequently executed by them.

[6] Respondents' difficulty is that they are relying upon a written memorandum which called for an exchange upon certain specific terms, and one of those terms the other party to the proposed exchange was unable to meet. The case is typical of the very evil sought to be avoided by the addition of subdivision 6 to section 1624 of the Civil Code. The oral testimony was in sharp conflict, all of the appellants denying that prior to the signing of the letter attached to the proposed agreement they were advised of the true terms of the \$18,000 incumbrance, and all of them denying that they ever subsequently agreed to accept the ranch with the existing incum-

brance thereon. It was to avoid the determination of such questions upon the uncertainty of conflicting oral testimony that subdivision 6 was added to Civil Code, § 1624. Courts should not be overeager to thwart the purpose of the Legislature in the adoption of such legislation. In the last analysis, this case is simply one in which respondents are seeking to vary or alter a plain term in a written agreement by oral testimony. This, under settled principles, they are not entitled to do.

[7] Finally, respondents say in their brief "that it is felt that there is considerable merit to the contention that respondents' contract of employment did not need to be evidenced by a writing," citing *Guy v. Brennen*, 60 Cal. App. 452, 213 P. 265. The manner in which respondents make the point indicates that they have no great faith in it themselves. The case cited dealt with the sale of a leasehold interest for cash, and the court held that a leasehold interest is not "real estate" within the meaning of Civil Code, § 1624, subdivision 6, and hence that the broker could recover a commission without the production of a written memorandum. Here the commission was to be paid for exchanging the hotel properties for land. In effect it was a proposed agreement to purchase the land, the consideration for the purchase being the hotel properties instead of cash. Almost universally where the question has arisen it has been held that an exchange is a purchase or sale within the meaning of the statute of frauds. Thus an exchange of real property for personal property is within the statute covering sales of real property (*Dowling v. McKenney*, 124 Mass. 478; *Poplin v. Brown*, 200 Mo. App. 255, 205 S. W. 411; *Peterson v. Nichols*, 110 Wash. 288, 188 P. 498; *McGough v. Finley* [Tex. Civ. App.] 179 S. W. 918; *Rutan v. Hinchman*, 30 N. J. Law, 255), and an exchange of personal property for personal property is a sale of goods, wares, and merchandise within the section of the statute covering sales of personal property (27 C. J., p. 233; *Franklin v. Matoa G. M. Co.* (O. C. A.) 158 F. 941, 943, 16 L. R. A. [N. S.] 381, 14 Ann. Cas. 302; *Ash v. Aldrich*, 67 N. H. 581, 39 A. 442; *Kuhns v. Gates*, 92 Ind. 66; *Aya v. Morson*, 90 Or. 647, 178 P. 207). We entertain no doubt, therefore, that this was a contract employing respondents to purchase real estate within Civil Code, § 1624, subdivision 6.

For the errors discussed, the judgment is accordingly reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

117 Cal.App. 220

IMPERIAL COUNTY v. ADAMS et al.
Civ. 453.

District Court of Appeal, Fourth District,
California.

Sept. 28, 1931.

1. Counties ⇨98(2).

Supervisor's preparation and collection of false claims for county road work held covered by supervisor's official bond (Pol. Code, §§ 2639, 2641, 2645).

Supervisor's acts, in view of Pol. Code, §§ 2639, 2641, were covered by the bond, conditioned that the supervisor should faithfully perform all official duties required by any law of the state, since the pretended action of the supervisor in employing individuals to work on the roads of his district was within his authority as ex officio road commissioner, and in compliance with the duty imposed on him as road commissioner under Pol. Code, § 2645.

2. Counties ⇨101(7).

Absent contrary showing, it may be assumed that supervisor's employment of individuals for road work was under board of supervisors' direction (Pol. Code, §§ 2639, 2641, 2645).

3. Counties ⇨197.

Object of statute is to give board of supervisors general information of character of claims for labor performed on roads (Pol. Code, § 2644).

Pol. Code, § 2644, provides that no claim for labor performed in any road district shall be allowed by the board of supervisors, unless accompanied by a report showing where the labor was performed, the nature of the labor, and the number of animals and kind of implements used.

4. Counties ⇨201.

Statement in claim for labor performed on county road, "1 man and 4 up fresno on desert roads," substantially complied with statutory requirements (Pol. Code, §§ 2644, 4075).

"Fresno" sufficiently designates, in California, the implement claimed to have been used, and the words "four up" in the phrase "one man and 4 up" in connection with road work has a definite and accepted meaning, and designates the number of animals used with the fresno scraper.

5. Counties ⇨98(2).

Statute requiring report with claims for road labor did not avoid liability on super-

visor's official bond for supervisor's collection of false claims presented without separate report, since report need not be separate instrument (Pol. Code, § 2644).

"Report" within Pol. Code, § 2644, providing that no claim for labor performed in any road district shall be allowed by the board of supervisors, unless the same be accompanied by report, showing where the labor was performed, the nature of the labor, and the number of animals and the kind of implement used, is sufficiently broad to include the itemization required by Pol. Code, § 4075, which provides that the board of supervisors must not hear or consider any claim in favor of any person against the county nor allow any claim or bill against the county or district fund, unless the same is itemized.

[Ed. Note.—For other definitions of "Report," see Words and Phrases.]

6. Evidence ⇨83(4).

Supervisor's employment of men and teams to perform road work was official duty, presumably regularly performed in statutory manner (Pol. Code, § 2645; Code Civ. Proc. § 1963, subd. 15).

7. Counties ⇨101(7).

Facts showed that board of supervisors, acting as board, approved false claims for road work collected by supervisor, authorizing recovery on supervisor's official bond (Pol. Code, §§ 2639, 4031).

Facts disclosed that each claim was first approved by the defaulting supervisor by writing on the face of the claim, "Approved by O. K. [supervisor's signature]," that each claim thus approved was passed to the other board members present at the meeting of the board, and that two other members placed the initials of their names on the claim immediately after the name of the supervisor; so that the requirements of Pol. Code, § 4031, that a majority of the board shall constitute a quorum, and that no act of the board shall be valid, unless a majority of all the members concur therein, and of Pol. Code, § 2639, that boards of supervisors must by proper order audit all claims on funds set apart for highway purposes, were satisfied.

8. Counties ⇨98(2).

Supervisor's dishonesty in collecting fraudulent claims rather than clerk's failure to record board of supervisors' allowance of claims in "minute book" held proximate cause of county's loss, authorizing recovery on supervisor's official bond (Pol. Code, § 4039, subds. 1, and § 4038, subds. 1, 2).

Pol. Code, § 4039, subd. 1, provides that board of supervisors must cause to be kept a "minute book," in which shall be entered the daily proceedings had at all regular and special meetings, and all orders and decisions made by them, except such as are required to be recorded in other specified books, and section 4038, subds. 1, 2, makes it the duty of the clerk of the board of supervisors to record all the proceedings of the board, and make full entries of all their resolutions and decisions on all questions concerning the raising of money for and the allowance of accounts against the county.

9. Interest ☞45.

Generally, absent contractual specification, law awards interest on money from time it becomes due and payable, if time is certain or ascertainable.

10. Counties ☞101(9).

Allowing interest on recovery on supervisor's official bond from date complaint was filed *held* proper.

Appeal from Superior Court, Imperial County; Lloyd E. Griffin, Judge.

Action by Imperial County against J. Roy Adams and the United States Fidelity & Guaranty Company. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

Edward C. Mills, of Los Angeles, and Simon P. Williams, of El Centro, for appellant.

Elmer W. Heald, Dist. Atty., and C. B. Smith, Deputy Dist. Atty., both of El Centro, for respondent.

JENNINGS, J.

The county of Imperial instituted this action against J. Roy Adams and the United States Fidelity & Guaranty Company, a corporation, surety upon the official bond of Adams as supervisor of Imperial county, to recover certain moneys illegally collected and wrongfully received by Adams from the county.

Adams was elected supervisor of Imperial county at the general election held in November, 1920, for a term of four years beginning on the first Monday in January, 1921, and ending on the first Monday in January, 1925. At the general election in November, 1924, he was re-elected to the same office for a second term of four years beginning on the first Monday in January, 1925, and ending on the first Monday in January, 1929. Appellant United States Fidelity & Guaranty Company became surety on the official bond of Adams for each of the two terms, and executed a separate bond covering each term in the statu-

tory penal sum of \$5,000. The bonds were identical in terms, except for the designation of the different terms of office, and were conditioned that Adams should "faithfully perform all official duties that now are, or that may hereafter be imposed upon him or required of him by any law of the state of California." As such county supervisor Adams was ex officio road commissioner of road district No. 3 of Imperial county.

Some time subsequent to his assuming the office of supervisor, Adams formulated and put into execution a plan for defrauding Imperial county. This plan was carried on throughout the remainder of his first term and during his second term until the month of April, 1925.

As road commissioner of road district No. 3, Adams was in charge of the employment of men and teams for the accomplishment of roadwork in his district.

Pursuant to the plan formulated by Adams, he made use of the printed and statutory form for demands against the county to prepare false claims against the county for the performance of roadwork in his road district, which work was never performed. The demands were made out in the names of three fictitious individuals, George Main, Frank Shubert, and Charles Roberts. Each demand was in the handwriting of Adams.

Following the preparation of each demand, Adams signed the fictitious name of the pretended claimant to the verification appearing on the demand and affixed his name to the jurat showing that the claimant had duly verified the claim before him as supervisor of Imperial county. The demand in this form was filed with the county clerk, as clerk of the board of supervisors. It was referred by the clerk to the district attorney, and, when approved by him, was presented to the board of supervisors by the clerk.

When the demands were presented to the board of supervisors, they were disposed of in the following manner: The demands bearing the approval of Adams were passed to the various members of the board, and three or more of the five members constituting the board placed their initials on the demands following the words "Approved by O. K." The demands were thereupon returned to the clerk of the board. These demands then consisted of the demand, a blank warrant attached to the demand, and the clerk's memorandum. The clerk then filled out and detached the memorandum, which he retained, and delivered the demand, with the blank warrant attached, to the county auditor, who thereupon made out the warrant for the sum stated in the demand, in the name of the claimant. The warrant was then mailed, in accordance with instructions from Adams, to the claimant named in the demand in care of Adams. Sub-

sequently, Adams, having received the warrants, presented them, bearing the purported indorsements of the payees, to the county treasurer, who paid the amounts represented by the warrants to Adams. The moneys thus fraudulently received by Adams amounted to a total of \$22,075. Of this sum, the limit of the surety's liability on both bonds was \$10,000, and it was stipulated that the surety's liability was further decreased by reason of the fact that any claim for a portion of the funds was barred by the statute of limitations. Judgment was rendered in favor of the county for the full amount sued for against J. Roy Adams, who failed to answer the complaint and for \$7,722.50, with interest thereon from March 13, 1926, against the surety on the bonds, United States Fidelity & Guaranty Company. From the judgment thus rendered the bonding company has prosecuted this appeal.

[1, 2] The contention is made that the appellant is not liable for any acts of Adams that were not done in his official capacity, and it is said that the acts of Adams in presenting to the county treasurer the warrants made payable to individuals whom he knew to be fictitious, containing the forged indorsements of such fictitious persons, representing payment of demands for work which he knew had not been performed, and in collecting the sums of money represented by such warrants, amounted to personal delinquencies not done in his official capacity or by color of his office. The contention is not a new one. It was made in *The City of Greenville v. Anderson*, 58 Ohio St. 463, 51 N. E. 41, 43, where a city clerk had drawn a warrant on the city treasurer for the payment of a claim which had not been allowed by the city council. The Supreme Court of Ohio answered the contention in the following language: "If the acts of an officer are to be regarded as unofficial whenever they are illegal, an official bond could serve no useful purpose, for there can be no breach so long as he performs his duties according to law. It is only when some duty has been omitted or disregarded or improperly or illegally performed that a liability can arise."

The same contention was made in *Lewis v. State*, 65 Miss. 468, 4 So. 429, 430. The Supreme Court of Mississippi disposed of it in the following language: "There is much refinement and quibbling in the books in behalf of sureties on official bonds, who are sought to be held responsible for the misconduct of their principal, as to whether the act of the officer was done *colore officii* or *virtute officii*, or whether it constitutes a misfeasance, a malfeasance, or a non-feasance. While the liability of sureties is not to be extended beyond the terms of their engagement, the public is entitled to some consideration as well as the voluntary sponsors of unfaithful public officers; and it must be true that if an of-

ficer, under bond to faithfully discharge the duties of his office, does an act as such officer, injurious to the county or to others, in regard to a subject over which he has jurisdiction and control, his sureties cannot escape responsibility for the act, no matter by what technical name it may be called. *Brandt*, Sur. § 452; *Murfree*, Off. Bonds, § 211; *People v. Treadway*, 17 Mich. 480; *Armington v. State*, 45 Ind. 10; *Mahaska County v. Ruan*, 45 Iowa, 328; *Kane v. Railroad*, 5 Neb. 105; *Fox v. Meacham*, 6 Neb. 530."

Section 2639, Political Code of California, provides that boards of supervisors of the several counties of the state shall have general supervision over the roads in their respective counties, and that they must by proper order cause to be worked such highways as are necessary to public convenience. Section 2641 of the same Code provides that boards of supervisors shall divide their respective counties into suitable districts, and that each supervisor shall be *ex officio* road commissioner in his supervisorial district. Section 2645 of the Political Code imposes upon road commissioners, under the direction and supervision and pursuant to orders of the board of supervisors, the duty of taking charge of the highways within their districts and of employing "all men, teams, watering carts, and all help necessary to do the work in their respective districts when the same is not let by contract." The pretended action of Adams in employing the individuals to work on the roads in his district was within his authority as road commissioner and in compliance with the duty imposed upon him as road commissioner under section 2645. In the absence of a contrary showing, it may be assumed that it was done under the direction of the board of supervisors of Imperial county, of which board Adams was a member.

[3-5] Appellant contends that no report in compliance with the provisions of section 2644, Political Code, accompanied the demands which form the basis of the present action, and that, for this reason, the board of supervisors was without jurisdiction to consider them, and that the allowance of such demands by the board, conceding that it took such action upon them, can give rise to no liability on the part of the surety on the official bond of Adams. Section 2644, Political Code, provides in brief that no claim for labor performed in any road district shall be allowed by the board of supervisors, unless the same be accompanied by a report showing where the labor was performed, the nature of the same, and the number of animals and the kind of implements used. The duty is imposed upon the board of supervisors to prescribe rules and blank forms for the making of the required reports. The evidence shows that attached to and forming a part of each demand was a statement relating to

the work claimed to have been done by the claimant, for which work compensation was demanded.

Taking as an example the statement forming a part of Respondent's Exhibit 1, it contains the heading "Road District No. 3 Fund." It gives the total amount demanded, and specifies in detail the number of days for which the claimant demands compensation. The following statement is included: "1 man and 4 up fresno on desert roads." The demand is duly verified by the pretended claimant.

Appellant concedes that the statement substantially complies with section 4075, Political Code, which provides that the board of supervisors must not hear or consider any claim in favor of any person against the county nor allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates, and particular service rendered, character of work done, number of days engaged, supplies or materials furnished, to whom, and quantity and price paid therefor, duly verified to be correct, and that the amount claimed is justly due. It is to be observed that section 2644 requires that the report shall specify where the labor was performed, the nature of the same, and the number of animals and kind of implements used. The word "fresno" sufficiently designates, in this state, the implement claimed to have been used. The words "four up" in the phrase "one man and 4 up," to one unfamiliar with roadwork, may appear unintelligible, but in connection with roadwork it has a definite and accepted meaning, and designates the number of animals used with the fresno scraper. There is, to be sure, no specific designation of the exact place where it was claimed the labor was performed; the statement being "on desert roads." This is admittedly a most general description of the place where the labor was claimed to have been performed, even though from the fact that it is entitled "Road District No. 3 fund" we may readily infer that the work was alleged to have been performed in road district No. 3. Conceivably there may have been a number of desert roads in that particular road district. But the plain object of section 2644 is to give the board of supervisors general information of the character of claims for labor performed on the roads. Its provisions are not nearly so specific as those that are contained in section 4075, which require detailed itemization of all claims against the county. Section 2644 requires the report to show the nature of the work. Section 4075 specifies that the itemized claim shall specify "the character of the work done." Obviously, these expressions mean the same thing, and, since it is conceded that the claims here under discussion substantially complied with section 4075, the conclusion naturally follows that, as to this particular feature of the nature or character

of the work, there was substantial compliance with the provisions of section 2644.

It is, however, urged that section 2644 specifically designates that claims for labor performed on roads must be accompanied by a report showing the various matters hereinabove enumerated, and it would appear from counsel's argument that it is his conception that claims for roadwork must be accompanied by a separate instrument entitled "report" which shall contain the required information. So strict a construction of section 2644 is unwarranted. The word "report" is sufficiently broad to include the itemization required by section 4075, and there is no requirement that the report contemplated by section 2644 shall be made in an instrument separate and distinct from the claim or demand.

[6] It is next urged that there is no evidence that the board of supervisors ever made any direction or order that Adams should employ men and teams to do the roadwork for which the false demands were drawn. It is pointed out that section 2645 imposes upon county supervisors the duty to employ men and teams for road work under the supervision and pursuant to orders of the county boards. Hence it is argued that it was incumbent upon respondent to produce evidence showing that the board of supervisors of Imperial county had by appropriate order directed Adams to employ men and teams to do the work for which the demands were presented. In the absence of such showing, it is said the board of supervisors lacked jurisdiction to consider the demands. But the employment by Adams of men and teams to perform roadwork is an official duty, and it is presumed that it was regularly performed (section 1963, subd. 15, Code Civ. Proc.) in the manner required by the statute.

[7] The objection is next made that there is no showing that the board of supervisors ever took any action as a board approving or allowing the demands of the fictitious claimants. Section 2639 of the Political Code provides that boards of supervisors must by proper order audit all claims on funds set apart for highway purposes and specify the fund or funds from which such claims, either in whole or in part must be paid. Section 4031 of the Political Code provides that a majority of the board shall constitute a quorum, and that no act of the board shall be valid, unless a majority of all the members concur therein. The evidence produced at the trial shows that each demand forming the basis of this action was first approved by Adams in the words appearing on the face of the demand "approved by O. K. J. R. Adams"; that each demand thus approved was passed to the other board members present at the meeting of the board, and that two other members placed the initials of their names on the demand immediately after the

name of Adams. Taking Respondent's Exhibit No. 1 as an example, it will be noted that the approval was manifested on the face of the claim as follows: "Approved by O. K. J. R. Adams, G. L. P. J.R.A." It sufficiently appears from the evidence presented that the letters "G. L. P." constitute the initials of one of the supervisors and the letters "J.R.A" are the initials of a third supervisor. It is therefore not open to question that the demands were actually submitted to and approved by three supervisors, a majority of the five members of the board, at regular meetings of the board. At another place on the demand appears the following language: "Allowed by the Board of Supervisors Apr. 2, 1923, \$184.00 out of Road District No. 3 fund. Countersigned W. H. Brooks, chairman of the Board of Supervisors."

This declaration of allowance of the various demands appearing upon them, countersigned by the chairman of the board, together with the approval by a majority of the members of the board at regular meetings of that body, manifested as heretofore described, sufficiently indicates that the board of supervisors did act upon the demands as a board.

[8] It is next urged that there is no evidence that any record of the fraudulent demands or of the board's action upon them was ever made in any book except the "Allowance book." Section 4039, Political Code, provides that boards of supervisors must cause to be kept:

"1. A 'minute book,' in which shall be entered the daily proceedings had at all regular and special meetings, and all orders and decisions made by them, except such as are required to be recorded in the 'road,' 'franchise,' or 'ordinance' books.

"2. An 'allowance book,' in which must be recorded all orders for the allowance of money from the county treasury, to whom made, and on what account, dating, numbering, and indexing the same through each year."

The evidence shows that the board of supervisors of Imperial County caused to be kept a "minute book," and that no reference to the fraudulent demands appears in this book. It also appears that the board caused to be kept an "allowance book," and that in this book entries were made by the clerk of the board showing the words "Road District No. 3" written across the page and under this heading the names of the claimants and the amounts of the demands. It is pointed out that, by the provisions of section 4038, Political Code, it is made the duty of the clerk of the board to "1. Record all the proceedings of the board. 2. Make full entries of all their resolutions and decisions on all questions concerning the raising of money for and the allowance of accounts against the county." This duty, it is said, the clerk

failed to perform, and it is argued that the clerk's action in certifying the demands to the auditor as demands regularly allowed by the board, when it appears that no sufficient record of the board's action was made in the manner required by the statutes or that any resolution or decision allowing the claims had in fact been made, was the efficient cause of the loss suffered by the county. It is then further contended that the supervisors, in adopting a course of procedure not authorized by law, made possible the clerk's action; that, broadly speaking, the board of supervisors is the county; that the county is the injured party; and that, in the final analysis, the county, through the negligence of its board of supervisors, brought about the loss which it sustained. The argument is not persuasive, although it bears the indicia of ingenuity. The efficient cause of the loss was the dishonesty of appellant's principal. It was he alone who concocted the scheme. It was he who, as supervisor, utilized the forms provided by the county for demands against the county. It was he who prepared the false demands for labor performed on roads in the district of which he was ex officio road commissioner, in compliance with the duty imposed upon him to employ men to work on the roads. It was he who approved the demands, each of which contained a verification purporting to have been made before him as supervisor and presented them to the clerk as true demands for work actually performed on the roads. He then sat as a member of the board at its regular meetings where the fictitious demands were allowed by a majority of its members. When the demands had been allowed, he instructed the auditor to send the warrants by mail to the claimants in care of himself, and, when they were received by him, he proceeded to forge the names of the supposed claimants, presented them to the county treasurer, received the amounts of money represented by the warrants, and converted the moneys thus fraudulently obtained to his own use. Adams was the efficient actor at every stage of the proceedings, and no amount of specious reasoning can conceal the fact that his acts done in ostensible compliance with the duty enjoined upon him by law as ex officio road commissioner were the proximate cause of the loss sustained by the County of Imperial. In *Campbell v. People*, 154 Ill. 595, 39 N. E. 578, a county clerk fraudulently increased the amounts for which certain county orders had been issued and authorized by the county board, and converted to his own use the excess over the amount allowed. It was the duty of the county treasurer, imposed by statute, to countersign all county orders. This duty the treasurer neglected to perform. In a suit against the clerk and the sureties on his official bond, it was contended that the proximate cause of the loss sustained was the negligence of the treasurer. The Supreme

Court of Illinois held that the unlawful acts of the clerk were the dominant and efficient cause of the losses sustained by the county, and that the sureties were not released from liability because of the negligence or misfeasance of the treasurer. In *Silver Bow County v. Davies*, 40 Mont. 418, 107 P. 81, the Supreme Court of Montana arrived at a similar conclusion.

[9, 10] The final contention made by appellant is that the trial court erred in allowing interest on the amount for which appellant was found liable on its bonds from the date on which the complaint herein was filed. It is urged that the claim of respondent was uncertain and unliquidated, and could not be ascertained from the face of the contract, and that interest is recoverable upon a claim of this character only after it is merged in a judgment. It is the general rule that, where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation. 14 Cal. Jur. p. 678; *Gray v. Bekins*, 186 Cal. 389, 399, 199 P. 767. The amount which was due on appellant's contract of suretyship was at least due at the time the action was instituted. This date was certain, and appellant was then apprised of the amount claimed. In *People v. Breyfogle*, 17 Cal. 504, a judgment against sureties on the official bond of a county treasurer for the amount of his defalcation, together with legal interest from the date of defalcation, was affirmed. The language of the court with reference to the allowance of interest is as follows: "There was no error in giving interest on the money from the time of the defalcation."

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 94

CUSHING v. LEVI et al.
Civ. 903.

District Court of Appeal, Fourth District,
California.
Sept. 24, 1931.

Rehearing Denied Oct. 21, 1931. Hearing
Denied by Supreme Court Nov. 23, 1931.

1. Specific performance ⇨49(2).

"Adequate consideration" required in action for specific performance merely means that contract price must be substantially just and fair valuation under all circumstances (Civ. Code, § 3391, subd. 1).

[Ed. Note.—For other definitions of "Adequate Consideration," see Words and Phrases.]

2. Specific performance ⇨114(2).

Allegation in plaintiff's specific performance suit that purchase price was fair and reasonable value of property held sufficient allegation of adequacy of consideration (Civ. Code, § 3391).

3. Appeal and error ⇨931(1).

Every reasonable inference which may be drawn from findings will be indulged to support judgment.

4. Specific performance ⇨123.

Findings in specific performance suit relative to value of property held sufficient to show adequate consideration (Civ. Code, § 3391).

The findings recited that the real property in question was not of fluctuating value, but that it gradually increased in value over period of several months following contract to about sum of \$90,000, and the court further found that the contract granted exclusive right to buy the property for a total purchase price of \$80,000 cash.

5. Appeal and error ⇨842(1).

What constitutes adequate consideration and whether specific performance shall be granted are questions for trial court (Civ. Code, § 3391).

6. Specific performance ⇨128(2).

If vendor disables himself from conveying or his wife refuses in bad faith to join, court may deny specific performance and give purchaser damages.

7. Specific performance ⇨128(2).

Judgment for purchaser for damages held warranted in specific performance suit, notwithstanding value of land had increased, where purchaser showed adequate consideration and vendor's fraudulent refusal to convey by having subsequently sold land to another (Civ. Code, § 3391).

8. Specific performance ⇨49(2).

Where contract for sale is supported by adequate consideration, mere increase thereafter in value of land will not prevent specific performance (Civ. Code § 3391).

9. Vendor and purchaser ⇨3(4).

Instrument giving option to purchase land became executory contract of sale when optionee made first payment on land.

10. Vendor and purchaser ⇨78.

Time held not of essence of land purchase contract, notwithstanding clause whereby pur-

chaser quitclaimed any interest in case of his failure to fulfill terms, where there was no provision expressly making time of essence or providing for forfeiture.

11. Contracts ⇨211.

Intent to make time of essence of contract must be clearly, unequivocally, and unmistakably expressed.

12. Contracts ⇨211.

Prescribing day for payment does not alone render time essential.

13. Appeal and error ⇨931(1).

All reasonable inferences from evidence must be construed, if possible, to support judgment.

14. Vendor and purchaser ⇨185.

Where time is not of essence of land purchase contract, purchaser has reasonable time after date specified within which to pay amount due, with compensation for delay.

15. Vendor and purchaser ⇨185.

Where time was not of essence, and purchaser, having been temporarily incapacitated by illness, tendered payment of interest five days after due date, delay did not result in forfeiture.

16. Appeal and error ⇨1011(1).

Finding on conflicting evidence will not be disturbed on appeal.

17. Appeal and error ⇨183.

Refusal to permit vendor's wife, intervening in purchaser's specific performance suit, to withdraw interpleader and ask for specific performance, *held* not error, where intervener made no objection to having title quieted in her and made no offer to deed her interest.

18. Trial ⇨367.

After case has been tried and submitted on one theory, court will not permit resubmission on entirely different theory against other party's objection.

19. Parties ⇨48.

Request of intervener to withdraw, made after close of argument, for purposes of decision, came too late.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Suit by Richard C. Cushing against Adolph Levi and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edward H. Whelan and Anthony T. Procopio, both of San Diego, for appellants.

Stearns, Luce & Forward, of San Diego, for respondent.

FINNEY, Justice pro tem.

This is a suit for the specific performance of a contract for the sale of real estate or for damages in case specific performance cannot be had. From a judgment in favor of the plaintiff, the defendants appeal.

On November 21, 1927, the plaintiff and the defendants entered into an agreement, the terms of which, so far as important here, are as follows:

"For and in consideration of ten (\$10) dollars, and other valuable consideration, receipt of which is hereby acknowledged, we hereby give to Richard C. Cushing of Los Angeles, California, an exclusive right to buy the following described real property situate in the city of San Diego, county of San Diego, state of California, on the following terms and conditions:

"Pueblo lots 1225, 1226 and 1239, and the west one-half of pueblo lot 1223, containing approximately 518 acres, at the total purchase price of eighty thousand (\$80,000) dollars, in cash, to be paid as follows:

"On or before December 1, 1927, the sum of one thousand (\$1,000) dollars;

"On or before April 1, 1928, the further sum of nineteen thousand (\$19,000) dollars, and the balance of the purchase price, viz., sixty thousand (\$60,000) dollars, to be paid as follows: Twenty thousand dollars on or before April 1, 1930, \$20,000 on or before April 1, 1932, and \$20,000 on or before April 1, 1934. The above-mentioned \$60,000 to be evidenced by three promissory notes of \$20,000 each, secured by a first mortgage on all of above-described property, payable as above stated, and shall bear interest at the rate of 6 per cent per annum, payable quarterly, from and after said April 1, 1928, providing, however, that the said Richard C. Cushing shall have paid to the undersigned, on or before February 1, 1928, interest on \$79,000, at the rate of 6 per cent per annum, until April 1, 1928, amounting to the sum of \$790. * * *

"It is agreed and understood that this agreement shall be binding on the heirs and assigns of the respective parties hereto, but said Richard C. Cushing hereby quitclaims any right, title or interest of any nature whatsoever that he may obtain to any of said property under the terms of this agreement in case of his failure to fulfill the terms and conditions hereof."

At the time of the execution of the agreement, plaintiff did not know that Adolph Levi

was married or that Eleanor Levi was his wife.

On December 1, 1927, plaintiff paid to defendants the sum of \$1,000, as required by the agreement, and on February 1, 1928, there became due thereon interest in the sum of \$790. This sum was not paid to the defendants, but on February 6, 1928, the amount was tendered to and refused by them. The delay in offering payment and in making such tender was caused by the illness of the plaintiff at the time in question. On February 4th the plaintiff received a letter from the defendants, dated February 3, 1928, stating that, inasmuch as he had not seen fit to make the payment due on February 1st, the agreement had been canceled. Immediately on receipt of this letter the plaintiff left his home in Los Angeles and proceeded by train to San Diego, arriving that evening. He immediately attempted, unsuccessfully, to communicate with defendant Edgar B. Levi, who was in charge of business relating to this agreement. On the next day, Sunday, February 5th, the plaintiff conferred with the said Edgar B. Levi and showed him a letter from plaintiff's doctor, certifying to his illness, but the defendant Edgar B. Levi ignored the same, and stated plaintiff had defaulted in his interest payment and was "out"; that he had a deal on for the land with other parties, but, if it did not go through, he would take the matter up with plaintiff. At this time plaintiff told Levi that he was prepared to pay the interest, together with proper compensation for the delay, and for the latter purpose offered Levi the sum of \$100, which was refused. On the next day, February 6th, plaintiff again conferred with Levi, and formally offered him \$790 in cash, as a tender of the interest due, but Levi refused the tender and stated to plaintiff that he was "out of luck," as he (Levi) was then on his way to close another and better deal, and for that reason he was glad plaintiff had not met his interest payment on February 1st. After plaintiff had made his tender, as above stated, Levi closed the "other deal," and on that date the defendants entered into a written agreement with one W. C. Zinkand for the sale of the same property for the sum of \$112,500, and received, as first payment thereon, the sum of \$5,000.

On February 14, 1928, plaintiff commenced this action against the defendants, and in his complaint alleged, among other things, the execution of the contract, the payment of the \$1,000 on December 1, 1927, and the tender of the interest due on February 1, 1928, and that his failure to pay the same promptly was due solely to the fact that he was incapacitated from transacting business by reason of illness, and that his delay and neglect were inadvertent, unintentional, and excusable, and he further alleged the bad faith of

the defendants in breaching the contract, and that he had performed all the conditions of said agreement on his part, and was ready and willing to make all payments required of him by the terms thereof; and that the \$80,000 mentioned as the consideration for said contract was and is the fair market value of said property. The defendants answered and put in issue all the material allegations of the complaint, and as a further defense defendant Adolph Levi alleged that he was at all times mentioned a married man, that said property was community property, and that his wife had not joined in nor, in writing or otherwise, consented to the execution of said agreement. Thereafter a complaint in intervention was filed by Eleanor Levi, which alleged she was the wife of defendant Adolph Levi, that the property in question was community property, and that she had not authorized the execution of the contract in question nor in any way consented to it, and she prayed that the agreement be canceled and that the plaintiff be restrained from asserting any right, title, or interest in or to said property.

[1] 1. Appellants contend that the specific performance of a contract will not be required by the court nor damages awarded, in lieu thereof, in the absence of an adequate consideration for the contract, and that such consideration must be specifically alleged in the complaint and found by the court and supported by clear and convincing proof, and it is further contended that no such allegation, finding, nor proof has been made in this case, and therefore the judgment appealed from must be reversed.

Appellants seem to contend that, if the value of the land at the time of the execution of the contract was a few thousand more than the price named in the contract, then the consideration is not adequate. This is not the law. The requirement of an adequate consideration in an action for specific performance does not mean that the contract price shall measure up to the highest market value of the property, but merely that it shall be a substantially just and fair valuation under all the circumstances of the case. *Law v. Title Guarantee & Trust Co.*, 91 Cal. App. 621, 267 P. 565. As said in *Boulenger v. Morison*, 88 Cal. App. 664, 669, 264 P. 256, 259: "Adequate consideration," as used in section 3391, subdivision 1, Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case."

[2-4] A complaint in an action for specific performance of a contract to sell real estate need not allege in *hæc verba* that the contract

is supported by an adequate consideration, but an allegation that the value of the real estate at the time of the execution of the contract did not exceed \$500, the consideration mentioned in the contract, with interest, and that \$440, with interest, had been paid, and the remainder deposited in court for the vendor, alleges adequate consideration within Civil Code, § 3391, prohibiting specific performance against a party who has not received an adequate consideration for the contract. *Boyd v. Warden*, 163 Cal. 155, 124 P. 841.

In the complaint in the case at bar, paragraph VII, it is alleged as follows: "That the sum of \$80,000, mentioned in said contract as the total purchase price of said property and as the consideration for said contract, is and at all times since the execution of the said contract has been a fair and reasonable value of said property."

This allegation is more definite than the pleading in *Boyd v. Warden*, *supra*, and is without doubt a sufficient allegation of the adequacy of the consideration. It shows that the contract was supported by an adequate consideration, and was, as to the defendants, just and fair. The finding of the court having reference to an adequate consideration reads as follows:

"XII. That said real property described in said contract and above described was not at any time between the 21st day of November, 1927, and the 6th day of February, 1928, of a fluctuating value, and did not during said time fluctuate in value and was not at any time by nature of fluctuating value; and that said property did not materially fluctuate in value during said period of time; and that it did gradually increase in value to about the sum of \$90,000 during said period of time."

It is a fair inference and deduction from this finding, construed in connection with paragraph II of the findings, wherein it is found that by the terms of "said contract the defendants granted to the said plaintiff the exclusive right to buy the property above described at the total purchase price of \$80,000 in cash"; that \$80,000 was approximately the value of the property at the time of the execution of the contract, because, according to said finding XII, the value of the land gradually increased from the figure named in the contract, to wit, \$80,000, to about \$90,000 during the period intervening between the time of the execution of the contract on November 21, 1927, and February 6, 1928. Findings of the trial court are to be liberally construed, and every reasonable inference or deduction which may be drawn therefrom will be indulged in support of the judgment. 2 Cal. Jur. pp. 870, 871. Under the liberal rules of construction referred to, we hold that, by paragraph XII of the findings, con-

strued with other findings in the case, the court has found that the value of the land at the date of the execution of the contract was \$80,000, and from this finding we must conclude, since the contract was entered into freely and voluntarily by the parties, that \$80,000 was an adequate consideration to support the contract, and that it was just and fair to all the parties. Finding No. XII is amply supported by the evidence; the defendant Adolph Levi himself testifying that \$80,000 was, in his opinion, the market value of the land at the date of the execution of the contract. It is apparent, therefore, that an adequate consideration for the contract has been alleged, found, and proved in this case.

[5-7] It seems to be a general rule that in a suit for specific performance or damages the plaintiff must allege and prove an adequate consideration and show a right to have the contract specifically performed, but what is an adequate consideration, and whether or not specific performance shall be required, when possible, are questions addressed almost solely to the discretion and determination of the trial court, and each particular case is to be determined upon its own merits and in view of the situation of the parties and all the facts and surrounding circumstances. *Wilson v. White*, 161 Cal. 453, 465, 119 P. 895; *Hansen v. Hevener*, 69 Cal. App. 337, 231 P. 361; *Boulenger v. Morrison*, *supra*. If the defendant has disabled himself from conveying the land, or if his wife, not being bound by the contract, refuses, through bad faith, to join in his conveyance, the court may, upon proof of an adequate consideration and the right to a conveyance, deny specific performance and give a money judgment against the defendant for any and all damages suffered by the plaintiff. 39 Cyc. 2084; *Kaufman v. Bell*, 89 Cal. App. 610, 265 P. 317. In the case at bar the plaintiff established by evidence an adequate consideration and a clear right to specific performance, and specific performance was denied by the court because defendants had fraudulently refused to convey, having sold the land to another buyer for a much larger price, and therefore the court denied specific performance and gave the plaintiffs a money judgment for less than one-third of the profit defendants expected to realize on the sale to the third party. Defendants therefore cannot complain of this judgment as to amount or otherwise.

[8] Where a contract for the sale of real estate is supported by an adequate consideration at the time of its execution, mere increase thereafter in the value of the land will not make the consideration inadequate or the contract inequitable, or thereby deprive the court of jurisdiction to render a judgment for specific performance. Consequently, the fact that in this case the land

gradually increased in value from \$80,000, on November 21, 1927, to \$90,000 on February 6, 1928, when the contract was breached by the appellants, did not render the contract so unfair or the consideration so inadequate, as to them, as to require the court to refuse specific performance, where it appears that the appellants deliberately disabled themselves from making a conveyance and refused to convey to the respondent, and in such case the court may deny specific performance and render a money judgment for any damages which the respondent may have sustained by reason of the appellants' breach of the contract. *Hansen v. Hevener*, supra; *McCowen v. Pew*, 147 Cal. 299, 303, 81 P. 958.

[9] 2. Appellants contend that time was of the essence of the contract sued upon in this case, and that the court erred in finding to the contrary and in excusing the delay of five days in the payment of \$790 which became due thereon February 1, 1928. Time was not expressly made the essence of this contract, and the contention that it was such rests chiefly upon the assumption on the part of the appellants that the contract was merely an option, unilateral and not mutually binding upon the parties, and that time is always of the essence of an option. It is probably true the instrument in question was an option—a mere offer to sell—and not binding upon the optionee until Cushing, the optionee, signified his desire to accept the same by paying thereon the sum of \$1,000 on December 1, 1927, as provided in the option. There is no dispute about this payment. Thereupon the instrument ceased to be an option and became an executory contract of sale, binding upon both optionor and optionee. *Smith v. Post*, 167 Cal. 69, 138 P. 705; *Flickinger v. Heck*, 187 Cal. 111, 113, 200 P. 1045. Such an executory contract can be enforced by specific performance. *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; *Bird v. Potter*, 146 Cal. 286, 79 P. 970.

[10-13] Giving due consideration to all the terms of the contract, and viewing it in the light of the circumstances under which it was executed, as shown by the evidence, it cannot be held that the parties intended to make time the essence thereof. Nowhere in the contract is there any provision that, if the payments are not made on the date specified, the contract shall be null and void, nor that any rights of the vendee thereunder shall be forfeited. Nor is there any provision that the vendor may claim a forfeiture if the terms or conditions of the contract are not complied with on the dates specified. It is not necessary, in order to make time of the essence of a contract, that it should be so declared in exact language or in so many words, but the intent to make it so must be clearly, unequivocally, and unmistakably shown or expressed in the document.

Merely prescribing the day on or before which a payment must be made or an act performed does not render time essential with respect to such payment or such act when time is not otherwise made the essence of the contract. *Miller v. Cox*, 96 Cal. 339, 31 P. 161. But appellants contend that the clause in the final paragraph of the contract shows definitely that it was the intention of the parties to make time of the essence of the contract. This clause reads as follows: "But said Richard C. Cushing hereby quitclaims any right, title or interest of any nature whatsoever that he may obtain to any of said property under the terms of this agreement in case of his failure to fulfill the terms and conditions thereof." The meaning of this phrase is not plain. All reasonable inferences that may be drawn from the evidence must be construed by us, if reasonably possible, so that they will tend to support the judgment. The clause which we have quoted might reasonably mean that Cushing will quitclaim the property in case of his failure in the performance of the conditions of the contract, and is not the equivalent of the provision in the contract before the court in *Bennett v. Hyde*, 92 Cal. 131, 28 P. 104, 105, as counsel contends, and which reads as follows: "In the event the parties of the second part fail to comply with any one of the agreements herein specified, and at the time specified, then this contract shall immediately become void, and the party of the first part shall be released from all obligations at law or in equity to convey said land; and the parties of the second part agree that they will, upon failure by them to comply with any one of their agreements herein specified, at the time specified, forfeit all claim to said land, and will deliver up said land, peaceably and without process of law, to the party of the first part. The party of the first part, upon receiving the several payments herein specified, at the time specified, agrees," etc.

[14, 15] It is plain from this language that the parties in the *Bennett* Case intended that a forfeiture should follow, ipso facto, upon failure to perform at the specified time. The language used by the parties in the instant case cannot be given any such meaning. It follows from this conclusion that time was not of the essence of the contract under consideration in this case, and that the failure of Cushing to make the payment of the \$790 on February 1, 1928, did not result in a forfeiture of his contract. He still had a reasonable time within which to pay, or tender payment of, the amount due, with compensation for the delay (*Potter v. Pigg*, 35 Cal. App. 707, 170 P. 1066; *Carr v. Howell*, 154 Cal. 372, 97 P. 885), and tender of such payment and compensation was made not later than February 6, 1928. In fact, payment of compensation was offered and refused on

February 5th and payment of the \$790 was offered to and refused by the appellants on February 6, 1928. The delay in making such payment was caused by the illness of respondent, which incapacitated him from attending to business, and the court has found on sufficient evidence that such delay was excusable. We see no reason to disturb that finding.

[16] 3. Appellants also contend that the court erred in finding appellants guilty of bad faith in their refusal to perform the contract. This finding was made upon conflicting evidence, and therefore will not be disturbed by this court or commented upon by us further than to say that an examination of the record convinces us that the finding is amply supported by the evidence. The finding is important chiefly in view of section 3306 of the Civil Code, which provides as follows: "§ 3306. *Breach of Agreement to Convey Real Property.* The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

The finding that the appellants acted in bad faith in refusing to perform their contract with respondent for the sale of the land in question clearly brings this case within the provisions of the latter part of said section 3306 of the Civil Code in the matter of estimating the damages, and accordingly the trial court has found and added to the damages assessed in the case the difference between \$80,000, the price agreed to be paid, and \$90,000, the value of the land to be conveyed, at the time appellants breached their contract. This was strictly in accord with the provisions of the Code and the decisions of the appellate and Supreme Courts. *Clark v. Yocum*, 116 Cal. 515, 48 P. 498; *Kaufman v. Bell*, 89 Cal. App. 610, 265 P. 317.

[17-19] 4. After the close of the testimony and arguments of counsel on both sides, and after the court had intimated, in delivering his opinion, that he would order judgment against the defendants, counsel for the defendants and the intervener, who was the wife of the defendant Adolph Levi, suddenly interrupted the court and addressed him as follows: "If the court please, may we at this time withdraw the interpleader and ask for specific performance?" "In other words we ask for judgment in the alternative." "Specific performance or damages." After an objection and protest against this pro-

cedure by counsel for the plaintiff, the court denied the request, and concluded the statement of his opinion and decision by ordering judgment against the defendants for \$11,000 and quieting title to the premises in the defendants and the intervener, against all claims of the plaintiff. The appellants assign as error the court's refusal to grant their request. The real estate in question was the community property of the defendant Adolph Levi and his wife, the intervener in this action. However, the intervener made no objection to having the title of the premises quieted in her, nor did she make or offer to sign any deed of her interest in the premises, either to the defendants or to the plaintiff in this action. Consequently there was no reason for the court to grant this request. Her withdrawal, under the circumstances, would have given the court no greater power to order specific performance of this contract, which she had not signed, than if she remained a party to the action, and in neither case would the court have such power. Therefore the court committed no error in refusing the intervener's request to withdraw. But, in any event, the request came too late. The case had been tried and submitted upon one theory and state of facts, and the court will not permit it to be suddenly resubmitted by one of the parties on an entirely different theory for the purposes of the decision, against the objection of the other party. We have carefully examined this and all other assignments of error, but find no error in the record which requires a reversal of this case. Consequently, the judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 83
TATUM v. LEVI et al.
Civ. 416.

District Court of Appeal, Fourth District, California.
Sept. 24, 1931.

Rehearing Denied Oct. 21, 1931. Hearing
Denied by Supreme Court Nov. 23, 1931.

1. Vendor and purchaser ⇨214(1).

Assignment of option gives assignee right to recover back moneys paid, in event of optionor's breach.

2. Vendor and purchaser ⇨339.

Purchaser's tender of performance or notice of rescission of option agreement held not condition precedent to maintaining action to recover deposit, where title was unmarketable.

3. Vendor and purchaser ☞130(5).

Recording of lis pendens in specific performance suit against vendor by prior purchaser rendered vendor's title unmarketable.

4. Vendor and purchaser ☞144(2).

Provision in option that vendor should defend against and determine "as speedily as possible" claims made against him under prior option allowed vendor reasonable time to defend.

The option contained agreement of parties that, if prior optionee should make any claim to or establish any right to the property, the vendor would have right to terminate the subsequent option on returning the amount paid, and continued with agreement of vendor to defend and determine any claim made by prior optionee as speedily as possible. The phrase "as speedily as possible" means within reasonable time or without unreasonable delay, having regard to all the circumstances of the case and the things to be done.

[Ed. Note.—For other definitions of "As Speedily As Possible," see Words and Phrases.]

5. Judgment ☞650.

Judgment, to be admissible in evidence, must be final.

6. Judgment ☞663.

Judgment from which appeal was pending held not admissible in evidence.

7. Vendor and purchaser ☞144(2).

Vendor's failure to convey marketable title, due to lis pendens filed in pending suit by claimant under earlier option, did not warrant recovery of deposit made under subsequent option, where later option further provided for vendor's defense of claims asserted under prior option and vendor exercised diligence.

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Suit by R. L. Tatum against Adolph Levi and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellant.

A. T. Procopio, of San Diego, for respondents.

FINNEY, Justice pro tem.

The plaintiff in this action brought suit against the defendants for the specific per-

formance of an option contract for the sale of real estate, with an alternative prayer for damages for violation of the contract. The defendant Adolph Levi filed a cross-complaint on the 15th day of May, 1928, alleging that the option contract was a contract for purchase and sale and that the cross-complainant offered on the 6th day of April, 1928, to convey the property to the plaintiff, but that the plaintiff refused to accept the offer, and prayed for the specific performance of the option agreement. Thereafter, permission of the court having been duly obtained, the plaintiff filed an amended complaint against the defendants for the recovery of \$5,000 which was the deposit made by plaintiff's assignor at the time of the execution of the option contract. It was alleged in the amended complaint, as well as in the original complaint, that the defendants had failed to perform the terms and conditions of the option contract, and that the plaintiff was therefore entitled to a return to him of the deposit made by his assignor. After a trial before the court without a jury, judgment was rendered by the trial court in favor of the defendants, denying the plaintiff all relief. From this judgment the plaintiff has appealed. On the 6th day of February, 1928, W. C. Zinkand entered into an option agreement with Adolph Levi, the material parts of which are as follows:

"Received of W. C. Zinkand, this 6th day of February, 1928, the sum of Five Thousand Dollars (\$5,000.00) for an option to purchase Pueblo Lots 1225, 1226, 1239, and the West One Half of 1223, in the City of San Diego, County of San Diego, State of California * * * for the term of sixty days from date.

"Upon the exercising of this option, said Five Thousand Dollars (\$5000.00) to apply on purchase price of One Hundred twelve thousand five hundred dollars (\$112,500.00) and shall be deducted from the first payment of twenty-eight thousand one hundred twenty-five dollars (\$28,125.00) and the balance of the purchase price, to-wit: Eighty-four thousand three seventy-five dollars (\$84,375.00) to be evidenced by three (3) promissory notes each in the sum of twenty-eight thousand one hundred twenty-five dollars (\$28,125.00) payable on or before one, two and three years after date of issuance of certificate of title, to Adolph Levi, with interest at six per cent (6%) per annum, payable quarterly, which said notes shall be secured by mortgage on said property. * * *

"Said property having this day been deeded to the Southern Title and Trust Company of San Diego, with instructions to convey said property to said W. C. Zinkand or his assigns, and accept said notes and mortgage payable to Adolph Levi; title to said prop-

erty to be clear and marketable; said Southern Title and Trust Company to issue its unlimited certificate of guarantee of title showing said premises in fee simple, free and clear of all encumbrances except such taxes as have become a lien since December 31, 1927.
* * *

"It is mutually agreed that should one R. C. Cushing make claim to or establish any right to said property, by virtue of or under an option dated November 21, 1927, the undersigned, Adolph Levi, shall have the right to terminate this option and cancel this agreement and demand a reconveyance of said property, upon returning to said W. C. Zinkand any and all moneys paid hereunder, without interest. Said Adolph Levi agreeing to defend and determine any claim made by said Cushing as speedily as possible.

"Time being of the essence of this contract and of all conditions and time therein contained should the said Zinkand, his heirs, or assigns, fail to perform in full compliance with this option then the said W. C. Zinkand, his heirs, or assigns, waive any and all rights hereunder and forever quit claim any claims whatsoever to Adolph Levi, his heirs or assigns, and the undersigned, Adolph Levi, shall retain any and all payments made hereunder as and for ascertained and liquidated damages, it being agreed that it would be impracticable and extremely difficult to fix the actual damages that would be sustained by said Adolph Levi. * * *"

The \$5,000 was duly paid by Zinkand to Levi, and Zinkand immediately assigned his interest in the contract to one E. L. Leavitt, who thereafter, and before the expiration of the option, assigned the contract to R. L. Tatum, plaintiff and appellant herein. Previous to the execution of the contract with Zinkand, and on the 21st day of November, 1927, Adolph Levi and Edgar B. Levi had entered into a contract with Richard C. Cushing for the sale of the same property for the sum of \$80,000. On February 1, 1928, an interest payment fell due under the terms of the Cushing contract, and Levi immediately claimed that Cushing was in default under that contract, by failure to make that payment of interest, and informed Zinkand that Cushing had no further rights under the contract and that all of Cushing's rights had been forfeited. Meanwhile Cushing had tendered payment of the interest on the 6th day of February, 1930, which tender had been refused by Levi. On the 14th day of February, 1928, Cushing filed suit against Levi for specific performance of the contract of November 21, 1927, with an alternative prayer for damages for its breach, and on the same day recorded a lis pendens on the property involved in that contract, being the same property described in the contract in this suit.

Prior to the commencement of his suit on April 13, 1928, neither the plaintiff Tatum nor his assignors had made any tender of performance under the option, or given notice of cancellation thereof, to the defendant Levi or any one acting for him. And no tender to plaintiff, or his assignors, of any deed or certificate of title, under the terms of the option, was ever made by the defendant Levi or his agents until June 6, 1929, more than a year after the expiration of the sixty-day period named in the option.

On the 25th day of April, 1929, judgment was rendered in the case of Cushing v. Levi, adjudging that the contract between Cushing and Levi, entered into on November 21, 1927, "be and hereby is declared void and unenforceable," and that the plaintiff, Richard C. Cushing, recover \$11,000 from the defendants therein, and in the same judgment it was further adjudged "that the defendants and the intervener, Eleanor Levi, are the owners in fee of the tract of land described in the complaint herein and the claims of the plaintiff herein, and of all persons claiming or to claim said premises or any part thereof, or any interest therein, through or under said plaintiff, are hereby adjudged to be groundless, and that the title to said land be quieted against all claims, demands or pretensions of the plaintiff."

The findings and judgment in that case indicate that Mrs. Eleanor Levi, the wife of Adolph Levi, intervened in the suit, and that the court was unable to decree specific performance of the contract with Cushing because of the fact that Mrs. Levi did not sign the contract of sale, and therefore had not consented to a conveyance of her community interest in the property, and that therefore the court could not specifically enforce the contract, but could merely award damages for its breach.

On the 7th day of May, 1929, a notice of intention to move for a new trial in the case of Cushing v. Levi was filed, and late in June an order was made denying the motion for a new trial, and on July 1, 1929, a notice of appeal was filed by the defendant Adolph Levi. This notice of appeal gave notice that the defendant appealed to the Supreme Court of the state of California from the judgment rendered in the case of Cushing v. Levi, and "from the whole thereof," and such appeal is still pending and undetermined. [See 3 P.(2d) 958.] A stay bond was filed and the execution of the judgment thereby stayed. Neither the intervener, Eleanor Levi, nor the plaintiff Cushing has appealed from any part of the judgment and the time within which either may appeal has long since expired.

In addition to the foregoing facts, the court found, among other things, that on February 6, 1928, and before the option agreement was executed, the defendant Adolph Levi con-

veyed the property described in the option, in trust, to the defendant Southern Title & Trust Company, with instructions to said company, signed by Levi and Zinkand, wherein the terms of the option were recited, and it was provided, among other things, that, if the said Zinkand or his assigns comply with the terms of the option within the time specified, "then you are to deliver to the said W. C. Zinkand, or his assigns, a deed for said property," and in said instructions it was further stated: "It has been agreed that a clear and marketable title should be delivered to the said Zinkand, or his assigns and that the Southern Title & Trust Company should issue its unlimited certificate of guarantee of title showing said premises in fee simple, free and clear of all encumbrances except such taxes as have become a lien since December 31, 1927." It was also found by the court, in effect, in finding No. XII, that on June 6, 1929, the defendant Adolph Levi duly caused a good and sufficient deed, conveying marketable title to the said property, to be tendered to R. L. Tatum, plaintiff herein, "together with a certificate of title (and) policy of insurance, which had been duly executed by the Southern Title & Trust Company, all of which the plaintiff refused to accept."

[1, 2] 1. The right of the plaintiff to maintain this action is questioned by the respondent, on the ground that the right to recover a deposit made by the optionee upon an unexecuted option agreement to sell real estate does not pass by assignment of the option to the assignee. This exact contention has been passed upon in the decisions of our courts, wherein it is held, as it must be here, that, when an optionee assigns the option without any reservation, he assigns all benefits under it, including the benefit of all payments made upon it by himself, and, in case of a breach of the option by the optionor, the assignee is entitled to recover the moneys paid on the option. *National Pac. Oil Co. v. Watson*, 184 Cal. 216, 193 P. 133; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 P. 82. Equally untenable is respondent's contention that the plaintiff cannot maintain this action because no tender of performance was made, or notice of rescission given by the plaintiff, before this action was commenced. This question must be decided upon the theory presented by the pleadings in which it was assumed that performance on the part of the defendant Levi was due at the expiration of the sixty-day period, named in the option, which period had expired when this suit was brought. It also appears that during the period mentioned, and for an indefinite time thereafter, the defendant Levi could not, on account of the Cushing claims, deliver a marketable title to the premises in contro-

versy. Under such circumstances, tender of performance or notice of rescission on the part of the plaintiff, would have been an idle act and was unnecessary. In fact, it is a general rule, where, under the terms of an unexecuted option agreement to sell real estate, the time has arrived for performance on the part of the vendor, and he is unable to perform as required by the option, the optionee or his assignee may bring suit to recover the deposit thereon, without tendering performance or rescinding the contract. 25 Cal. Jur. 531; *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 Am. St. Rep. 213; *Gwin v. Calegaris*, 139 Cal. 384, 390, 73 P. 851; *Prentice v. Erskine*, 164 Cal. 446, 449, 129 P. 585; *Milton Realty Co. v. Butterfield*, 87 Cal. App. 772, 262 P. 419; *Carter v. Fox*, 11 Cal. App. 67, 70, 103 P. 910; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 778, 186 P. 356; *Hooe v. O'Callaghan*, 10 Cal. App. 567, 571, 103 P. 175; *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 373, 62 P. 39; *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 P. 325.

[3] 2. It must be conceded, upon the findings of the court, that, because of the Cushing claims, Adolph Levi was not able to deliver a marketable title to the premises in question, or as called for by the option and in the instructions to the Southern Title & Trust Company, at any time, if at all, prior to April 26, 1929, the date of the entry of judgment in *Cushing v. Levi*, and more than one year after the expiration of the sixty-day period named in the option agreement. This suit, on recording of the lis pendens therein, clouded the latter's title to said premises, and made it unmarketable. The plaintiff, Tatum, who was the owner and holder of the option by assignment, could not, during the sixty-day period named in the option, or at any time thereafter, until the entry of said judgment, if at all, have been compelled to accept title from Adolph Levi, because of this cloud.

[4] Prior to the commencement of this suit, on April 13, 1928, Tatum had made no offer of performance under the option nor served any notice of cancellation thereof on the defendant Levi. On the contrary, on April 13, 1928, he brought this suit affirming, and asking specific performance of, his option. This option, in the fourth paragraph, states that it is mutually agreed that, if Cushing should "make any claim to or establish any right to said property" under his option dated November 21, 1927, Adolph Levi shall have the right to terminate the option held by plaintiff, upon returning to the optionee the amount paid by him thereunder, and continues as follows: "Said Adolph Levi agreeing to defend and determine any claim made by said Cushing as speedily as possible."

When the option in the case at bar was signed by Levi, the optionee knew of the existence of the prior option given by Levi to Cushing and knew that Cushing might make a claim or institute an action which would cloud Levi's title to the property in question, and, with this in mind, it was agreed between the parties that Levi should "defend" against and "determine any claim made by Cushing as speedily as possible." "As speedily as possible" means within a reasonable time or without unreasonable delay, having due regard to all the circumstances of the case and the things to be done. 1 Words and Phrases, First Series, page 529. In other words, Levi was to have a reasonable time within which to perform, that is, to defend against and determine, in the courts if necessary, any claim made by Cushing upon the property, and thus, to clear his title thereto, and during such time, neither the optionee nor his assignee can rescind for failure of title, or maintain any action against the optionor for the recovery of the deposit on the option. *Anderson v. Strassburger*, 92 Cal. 38, 27 P. 1095; *Easton v. Montgomery*, 90 Cal. 307, 27 P. 280, 25 Am. St. Rep. 123; *Dennis v. Strassburger*, 89 Cal. 583, 26 P. 1070.

[5, 6] 3. What has been done in the matter of clearing Levi's title of the Cushing claims is shown in the findings, from which it appears that, on April 25, 1929, in *Cushing v. Levi*, judgment was entered declaring that Cushing had no claim against the land in question and that he had taken no appeal from such judgment. It has also been stipulated in the record that Levi has acted as speedily as possible in bringing about this determination of the Cushings' claims. It appears, therefore, from the terms of the option agreement, as we have interpreted it, and from the undisputed evidence in this case, that the defendant Levi was not in default, either for his failure to deliver to the plaintiff a deed conveying a marketable title to the premises in question, before this suit was commenced, or for any delay in his efforts to clear his title of the Cushing claims. On the contrary, it is undisputed that the defendant Levi has acted with reasonable diligence in disposing of those claims and in preparing himself to deliver to the plaintiff a deed conveying a marketable title to the lands, as required under the terms of the option. And such a deed, the respondent contends, and the court has found, was duly tendered to plaintiff by the defendant Levi on June 6, 1929. This finding, however, is challenged by the appellant, on the ground that it is not supported by the evidence. In fact, the appellant contends, it conclusively appears from the evidence, that the Cushing claims have not been disposed of by a final judgment, and it is pointed out, and must

be conceded, that the judgment in *Cushing v. Levi*, which purports to dispose of these claims, has been appealed from by the defendant Levi, and that such appeal, so far as the record shows, is still pending and undetermined in the Supreme Court of the state of California. The judgment in *Cushing v. Levi* has been received in evidence in this case, and recites that the title to the land involved in that suit—being the same land involved—was "quieted against all claims, demands or pretensions" of the said Cushing, and such judgment was offered and received in evidence, in the case at bar, for the purpose of proving the same identical facts as those recited in the judgment itself, which facts were at issue in this case. It is a well-established rule that a judgment, in order to be admissible in evidence for the purpose of proving facts therein found or recited, must be a final judgment in the cause, and, if the action in which the judgment was rendered is still pending, necessarily the judgment is not final. 2 Cal. Jur. 412, 413; *Baker v. Eilers Music Co.*, 175 Cal. 652, 655, 166 P. 1006; *Lincoln v. Sup. Court*, 95 Cal. App. 35, 271 P. 1107. There is no escape, therefore, from the conclusion that the judgment in *Cushing v. Levi* was not final, and consequently that it was not admissible in evidence in this case for the purpose of proving either that the Cushing claims had been finally disposed of or that Levi's title to the property in question had been rendered marketable thereby, while the operation of the judgment was suspended by appeal. In fact, the judgment was not admissible in evidence for any purpose material to this cause, except to show that such a judgment had been rendered and that Levi had moved with diligence in procuring it. As there was no other evidence in the case tending in any way to show that the Cushing claims had been finally disposed of, the contentions of the appellant, as above indicated, must be sustained.

[7] However, the conclusion that finding No. XII is not supported by the evidence does not, in our opinion, require a reversal in this case. The option agreement sued upon in this case has been introduced in evidence and incorporated in the findings of the court, and is before us for interpretation. As pointed out above, we have held that, by the terms of the option agreement, the defendant Levi had a reasonable time within which to perfect his title against the Cushing claims. It also appears from the undisputed evidence in this case, as we have indicated above, that the litigation between Cushing and Levi, which involved the Cushing claims and resulted in the judgment in *Cushing v. Levi*, had been carried on as promptly and speedily as possible. This showing of diligence, on the part of Levi, in disposing of the Cushing

claims, was all that was required of him, under our interpretation of the option agreement, to defeat a recovery in this case, and that showing rests upon undisputed evidence. We think, therefore, acting under authority of section 956a of the Code of Civil Procedure, that we should amend the findings of fact and conclusions of law so as to conform with the evidence and the law in this case, and that such amendments should be made as follows, to wit:

First, by adding to finding No. II, as the last paragraph thereof, the following additional finding of fact, to wit: "That under and by virtue of the terms of said option agreement, the defendant Adolph Levi was given a reasonable time within which to defend his title to said premises against any and all claims of said Cushing, and to terminate and dispose of the same by proceedings in court or otherwise, as he might determine, and that all such proceedings, negotiations and litigation with the said Cushing, in that behalf, have been carried on as promptly and rapidly as possible and have resulted in the judgment in the case of Cushing v. Levi, hereinafter more particularly described."

Second, by amending finding No. XII so as to read as follows, to wit: "That said defendant Adolph Levi, on the 6th day of June, 1929, and before the said judgment in Cushing v. Levi had become final, caused a deed of said property to be tendered to the plaintiff herein, together with a certificate of title and policy of insurance, which had been executed by the said Southern Title & Trust Company, a corporation, which tender the plaintiff refused to accept."

Third, by striking from the conclusions of law paragraphs numbered I, II, III, IV, V, VI, and VII, and all of paragraph No. VIII to, but not including, the words, "That judgment be entered accordingly," and by inserting in lieu thereof the following, as conclusions of law therein, to-wit: "That the plaintiff R. L. Tatum is not entitled to take anything by this action and that the defendant Levi is entitled to recover his costs herein incurred."

And the trial court is directed to amend its findings of fact and conclusions of law accordingly. We have carefully examined the record, and are of the opinion that the evidence supports the findings of fact and conclusions of law, as amended, and that they fully support the judgment rendered in this case. Therefore, the judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

NIXON et ux. v. INDEMNITY INS. CO. OF NORTH AMERICA.
Civ. 7751.

District Court of Appeal, First District, Division 1, California.

Oct. 8, 1931.

Rehearing Denied Nov. 7, 1931. Hearing Denied by Supreme Court Dec. 7, 1931.

1. Insurance ⇨668(10).

In action on theft policy, whether insured jewelry was stolen *held for jury*.

2. Insurance ⇨539(3).

"Immediate notice" of loss required by theft policy means reasonable notice, and notice given after week's search by insured for lost pin was sufficient.

[Ed. Note.—For other definitions of "Immediate Notice," see Words and Phrases.]

3. Insurance ⇨658.

In action on theft policy, evidence of former felonious entrances to residence *held* admissible as showing residence was easily accessible as bearing on probability of theft of ring missing therefrom.

4. Appeal and error ⇨1050(1).

Admitting evidence that insured had never before made claim of loss under theft policy, on issue whether ring was stolen, *held* harmless error.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Boyd Nixon and Josephine L. W. Nixon, his wife, against the Indemnity Insurance Company of North America. From a judgment for the plaintiffs, the defendant appeals.

Affirmed.

Charles V. Barfield, of San Francisco, and Thomas P. Boyd, of San Rafael (Lionel Browne, of San Francisco, of counsel), for appellant.

Ralph W. Palmer, of San Francisco, for respondents.

TYLER, P. J.

Action upon a policy of insurance issued by defendant company which insured plaintiffs against loss by burglary, theft, larceny, or robbery of any of the property covered by the policy. Plaintiffs sued upon the instrument to recover the value of a diamond pin containing fourteen diamonds, which they alleged was feloniously taken and stolen from their residence. Judgment was prayed for in the sum of \$1,000. Trial was had before the court and a jury, which resulted in a verdict

in favor of plaintiffs in the sum of \$1,000 and costs. From such judgment this appeal is taken.

[1] The main point urged for reversal is that the evidence does not establish a burglary of respondents' house or a theft of the jewelry. No direct evidence of the stealing of the pin was offered by plaintiffs; the only evidence in the case being indirect and circumstantial in character. This evidence, however, in our opinion, is sufficient to give rise to the reasonable inference or probability that the disappearance of the pin was occasioned by felonious taking, and justifies the conclusion of the jury to that effect. It shows in substance that plaintiff Josephine Nixon last saw the pin on April 25, 1929. On that day she had worn it to a dinner party, and on returning to her home she either put it in a closet or on her dresser. The day following, her daughter had a group of some thirty friends for dinner. The day thereafter, Mrs. Nixon visited her nephew, who resided in a different county. On her return in the evening there was nobody in her home, and one of the windows was open. Plaintiffs' residence is situated on a side hill, and the windows thereof afford an easy method of entrance to the home. The residence had twice previously been entered by thieves. Immediately after her return from her visit Mrs. Nixon missed her pin. She was reluctant to inform her husband of her loss, and made a thorough search and investigation for about a week in the hope of finding the missing piece of jewelry. Failing to obtain any trace of the same, she then informed the police authorities and also her husband, who in turn immediately notified defendant company of the facts. These circumstances in our opinion are strong and persuasive that a theft was committed, and the inference to be drawn therefrom justified the submission of the case to the jury. *Zech v. New Jersey F. & P. G. Ins. Co.*, 218 Ill. App. 171; *Stern v. Employers' Liability Assur. Corporation* (Mo. App.) 249 S. W. 739; *Wolf v. Aetna Accident & Liability Co.*, 183 App. Div. 409, 170 N. Y. S. 787.

[2] Appellant raises the further contention that the insured failed to give immediate notice of the loss, for which reason they were not entitled to recover. The policy provides that, in the event of a loss, the insured shall give immediate notice to the company and the police authorities having jurisdiction. The notice required to be given only means reasonable notice, and, under the circumstances of the case, and considering the extensive search that Mrs. Nixon made for the missing pin before concluding that it was stolen, we are of the opinion that the notice was sufficient. Moreover, this question is raised for the first time on appeal.

[3, 4] And, finally, appellant complains that the trial court erred in the admission in evidence of certain testimony. Evidence was received to the effect that the residence had on two occasions previously been feloniously entered. The trial court was of the opinion that this was a circumstance going to show that the premises were easy of access as bearing on the probability of the theft of the property. We see no error in this conclusion. *Reese v. Fidelity & Deposit Co. of Maryland*, 93 Misc. Rep. 31, 156 N. Y. S. 408. The same may be said as to the admission in evidence of the fact that Mrs. Nixon, while carrying insurance against burglary for a long period, had never before made a claim of loss under a theft policy. Whether she had or not made such a claim was immaterial, but the admission of the evidence was harmless, and certain it is that it does not constitute prejudicial error.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

LOEB v. KIMMERLE et al. *
Civ. 6889.

District Court of Appeal, Second District, Division 2, California.
Sept. 28, 1931.

Rehearing Denied Oct. 27, 1931. Hearing
Granted by Supreme Court Nov. 25, 1931.

1. Assault and battery ☞35.

Implied finding that defendant not taking part in actual assault committed by co-defendant was mental participant, and that defendants were acting in concert, *held* supported.

2. Assault and battery ☞24(1).

Complaint for assault and battery need not allege that there was conspiracy between indirect actor and one committing assault to recover from indirect actor.

Complaint need not contain allegation of conspiracy, since the actionable wrong is the tort committed, and the liability is determined by the ultimate fact of whether the alleged indirect actor participated in the commission of the wrong; the evidence establishing the conspiracy being merely proof of the ultimate fact.

3. Appeal and error ☞880(2).

Defendant could not complain of exclusion of codefendant's evidence.

4. Appeal and error ⇨1078(4).

Assignment of error to exclusion of evidence not supported by argument or citation of authority *held* insufficient.

5. Trial ⇨76.

Sustaining objection to question already asked and answered *held* not error.

6. Assault and battery ⇨27.

Excluding cross-examination testimony of assaulted plaintiff regarding telephone conversation showing that plaintiff came to stockholders' committee offices, anticipating trouble, *held* error; assault having grown out of friction between committeemen.

7. Appeal and error ⇨1048(6).

Error in excluding assaulted plaintiff's cross-examination testimony regarding telephone conversation *held* not prejudicial, where testimony of other party to conversation regarding conversation was uncontradicted.

8. Appeal and error ⇨201(2).

Remarks of judge while ruling on objections to evidence *held* not reviewable, where trial judge's attention was not directed to claimed misconduct.

9. Trial ⇨91.

Refusing to strike out testimony admitted without objection *held* proper.

Refusing of motion to strike out testimony was proper, since one cannot take a chance on answer to question being favorable, and, when disappointed, have motion to strike out take the place of an objection.

10. Witnesses ⇨280.

Cross-examining witness as to why he did not, when giving testimony on previous occasion, state defendant referred to codefendant as "big Irishman" as testified in assault and battery action being tried, *held* objectionable as being argumentative.

11. Assault and battery ⇨28.

In action for assault and battery, sustaining objection to cross-examination question as to whether defendant referred to codefendant as "big Irishman," as testified by witness, *held* prejudicial error.

Sustaining of objection to the cross-examination question was prejudicial error, since the Irish have a reputation for their ability and willingness to make use of the manly art on convenient occasions, and if defendant in referring to codefendant stated "this big Irishman is a friend

of mine and is going to see that I get a square deal," as testified by witness, the jury might well have believed that defendant's state of mind was not peaceable, while if defendant merely stated that "this is a friend of mine who is going to see that I get a square deal," as witness had testified on the previous occasion, the jury might have determined that defendant had an altogether peaceful purpose in mind.

12. Appeal and error ⇨933(5).

Court assumed statement in defendant's affidavit, supporting motion for new trial for jury's misconduct, regarding matter particularly within plaintiff's knowledge but not denied by him, to be true.

13. Appeal and error ⇨1015(5).

Trial court's determination, on motion for new trial, of question of fact regarding jury's alleged misconduct, *held* binding on appellate court.

14. Assault and battery ⇨43(3).

Instruction covering liability for resulting damages of one who does not actually participate in commission of assault *held* erroneous.

Such instruction, to the effect that if one man carries out a plan originated by both of them, or carries out a plan originated by one of them for the benefit of the other or for the benefit of both of them, they are equally blame in the eyes of the law and equally liable for any injury or damages inflicted, was erroneous, since one would not be responsible for the origination and execution of a plan by his codefendant without his co-operation, even though it was for his benefit.

15. Appeal and error ⇨1170(1).

Where evidence was close as to defendant's participation in assault committed by codefendant, errors which might have materially influenced jury in its deliberations required reversal (Const. art. 6, § 4½).

16. Appeal and error ⇨724(2).

General statement that rulings made by trial "judge seemed to be constantly against me" *held* insufficient assignment of error.

17. Trial ⇨140(1).

Truth of testimony of witnesses is for jury.

18. Assault and battery ⇨40.

\$50,000 compensatory damages for loss of eye, fracture of left malar bone, injury to nose and hand, and shock to nervous system, *held* excessive by \$25,000.

19. Damages ⇨208(1).

New trial ⇨74.

Assessment of damages is, first, within peculiar province of jury, and, second, for trial judge in passing on motion for new trial.

20. Appeal and error ⇨1004(1).

Appellate courts will not disturb assessment of damages unless verdict is so grossly excessive as to suggest passion, prejudice, or corruption on part of jury (Code Civ. Proc. § 657, subd. 5).

21. Appeal and error ⇨743(1).

Statement that improper references were made to criminal case and fact that defendant had been paroled *held* insufficient assignment of error.

Statement was insufficient assignment, since no specific quotations were made and no reference given to transcript where improper references could be found.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Arthur M. Loeb against H. J. Kimmerle and De Kalb Spurlin. Judgment for plaintiff, and defendants appeal.

Judgment against De Kalb Spurlin reversed; judgment against H. J. Kimmerle modified and, as so modified, affirmed.

H. J. Kimmerle, in pro per.

Tanner, Odell & Taft, of Los Angeles, for appellant Spurlin.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

Each defendant has appealed from the judgment rendered in this case which was in favor of the plaintiff in the sum of \$50,000 compensatory and \$2,948.60 actual damages. We shall consider first the appeal by De Kalb Spurlin.

The action was one to recover for the injuries inflicted upon respondent as the result of an assault and battery by the appellant Kimmerle. The testimony adduced by respondent indicated that his left eye was injured to such an extent that it was rendered blind, his left malar bone was fractured, his nose injured, one hand hurt, together with other minor injuries. The appellant Spurlin took no part in the actual beating which was administered. It was claimed by appellant that Spurlin and Kimmerle were jointly interested in the act and had an understanding that they were going to rid a committee of Julian Petroleum Corporation stockholders of which Loeb and Spurlin were members, of either what is called the "Jewish" or per-

haps the "Julian" interest. It is now the contention of this appellant that the evidence is insufficient to warrant the implied finding of the jury that he was a conspirator or in other words united and co-operated in the assault. A résumé of the testimony produced by respondent and pertinent to the question thus raised follows: The respondent Loeb, the appellant Spurlin and L. L. Horchitz, ——— Conlon, ——— Rubin and C. C. Julian were elected at a mass meeting held June 10, 1927, the members of a stockholders' committee of the corporation. Spurlin was elected chairman. There existed factional differences among the stockholders which were apparently carried over into the committee. L. L. Horchitz was made secretary of the committee and two rooms were secured for its use in the Wilcox building. On June 20th, at a meeting of the committee attended by Loeb, Spurlin, Horchitz, and Rubin, Loeb offered a resolution that Spurlin resign as chairman thereof, and according to the testimony of the respondent "Mr. Spurlin bolted out of the door; he never waited to hear the end of it." The respondent also testified that he remained in the office until "four or half past four," but did not see Spurlin again that afternoon or evening. However, the appellant Spurlin took his evening meal at the home of and stayed all night with his friend whom he had known for twenty years, the other appellant. H. J. Kimmerle, where they discussed the happenings of the afternoon, although it was testified by the former that he "went out with the primary purpose of listening to Julian on the radio." Mr. Horchitz arrived at the committee's offices the following morning about 8:40 or 9 o'clock. Mr. Spurlin was already there and met him at the door with the statement, "I don't want you here, get out," at the same time holding the door, whereupon Horchitz forced his passage, breaking the glass in the door in his successful effort. This altercation was reflected in the daily press, which at the time followed very closely every incident connected with the Julian affair. Kimmerle, reading an account of the incident, called up his friend Spurlin to ascertain if he had been hurt and arranged to meet him about noon either at the office or at a nearby restaurant for lunch. It was also arranged that Kimmerle would if possible make arrangements for other and different offices in the Stock Exchange building and assist Spurlin in moving that afternoon. They met at the luncheon establishment and there they were interviewed by a reporter for one of the daily newspapers, who testified that the appellant Spurlin asked him to come back to his table; that he went and was there introduced to the appellant Kimmerle; that they briefly discussed the fight which had taken place that morning, whereupon, in the words of the witness, Spurlin "told me if I wanted to

see some action or see something doing, to come up to the Wilcox building to that office that afternoon. I asked him what he meant, I asked him to explain, but he did not. He just said to be up there. Then I asked him who Mr. Kimmerle was. He said 'This big Irishman is a friend of mine and is going to see that I get a square deal.' Mr. Kimmerle said: 'Yes that is it.' Mr. Carey went to the offices of the committee during the afternoon, but too late for the "action." As reporters will, he asked Kimmerle what had happened and was referred to Spurlin. The latter responded to an inquiry as to what had happened to Loeb as follows: "We have sent him back to C. C. Julian where he belonged." Another newsgatherer, representing a different newspaper, was present and an eyewitness of the fracas. After Loeb had been forcibly and violently ejected, this reporter, a Mr. Bolger, said to Kimmerle (Spurlin being present according to the witness' recollection), "You know that Spurlin is a physical coward," to which Kimmerle replied: "Yes I know that, and that is why I am here," and also volunteered the information that "the Jewish element was to be eliminated—the committee had been made up of a majority of Jews, and they were to be eliminated and that they had done their work and they had gone now, that they had been put there for a purpose and their purpose had been satisfied and they had gone." Within five minutes of this conversation Bolger asked Spurlin if the committee would continue to function and Spurlin said to him: "When you burn one rat the rest will usually leave the ship; and he didn't expect any of the committeemen would be back." Another eye witness was J. A. Oldaker, who testified that immediately after this unfortunate affair Mr. Kimmerle announced to all who were in the room and in the immediate presence of the appellant Spurlin that "he came up there to clean house and he was going to clean it out." The manager of the Wilcox building testified that shortly after the assault Spurlin invited him and Kimmerle into the inner office, where Kimmerle made the statement that "Mr. Spurlin was very nervous and quite sick over being pushed off the committee, and that he was there to clean house." After the offices had been moved and on June 23, the stockholders' committee issued a statement over the name of the appellant Spurlin, as chairman, asking for proxies in which it was said among other things: "Since organizing this committee we have been side tracked and hampered by insidious propaganda from many quarters. It has been a real battle, one which has not only required moral courage but physical strength, and in order to purge this committee of these individuals with sinister motives we have been required to use both moral and physical strength, and where necessary we have not failed to use both." This pro-

nouncement follows one earlier in the report to the effect that the respondent Loeb in a time of excitement had stated that he had been put on the committee "by C. C. Julian for C. C. Julian, and that he had no stock and no interest in the stockholders." Not only this pamphlet purported to be issued by the committee with the appellant Spurlin as chairman, but also there is evidence that Spurlin and Kimmerle and others consulted about it before it was printed; that while Spurlin may not have seen the exact language first quoted, nevertheless he told Kimmerle to "go ahead—fix it up." We must add one more significant bit of testimony before we proceed to an examination of the sufficiency of the evidence. The respondent testified that he was sitting in the outer office reading a newspaper when the appellants returned from luncheon; that appellant Spurlin stepped over to him and said: "Mr. Loeb, would you mind accompanying me into the inner office? I want to speak to you." That as soon as they entered the inner office the appellant Kimmerle stripped for action by removing his hat and coat; that the last-named appellant took a seat at the desk opposite the respondent, whereupon the following occurred: Spurlin remarked to Kimmerle "This is one of the Jews," and the latter said: "What the hell are you doing around here? Who the hell sent you up around here?" Respondent queried: "With what authority do you speak to me?" Kimmerle, striking his fist on the desk, responded, "Never mind who I am, you are sent up here by C. C. Julian," whereupon the respondent says, he walked out of that office and to the desk in the outer office followed by Kimmerle and it was there the attack took place.

Of course, there is testimony in the record contrary to much of that which we have set down. For example, appellant Spurlin testified that it was respondent who bolted the meeting of the 20th and not he; that he did not know that the reference to the use of force was in the report to the stockholders until after it was printed and delivered; and that he had telephoned to the police station after the altercation with Horchitz and arranged for an officer to be present at about 1 o'clock p. m.

[1] The question with which we are confronted, however, is not whether the evidence is ample to have supported a contrary verdict, nor whether we think the weight of evidence points to a different result, but whether there is substantial evidence which, if believed, warranted the jury in arriving at the conclusion to which it came.

The test by which we are to determine the liability of the appellant is this: Did he unite or co-operate in inflicting a wrong upon the respondent? In *More v. Finger*, 128 Cal. 314-319, 60 P. 933, 935, it is said: "The plain-

tiff is entitled to relief for the injury from such of the defendants as she can show have united or co-operated in doing her the wrong." To the same effect reference may also be had to *Nevin v. Gary*, 12 Cal. App. 1, 106 P. 422, and *Revert v. Hesse*, 184 Cal. 295, 193 P. 943. In *Smith v. Blodget*, 187 Cal. 235-242, 201 P. 584, 587, the same rule is phrased in these words: "It is the civil wrong, not the conspiracy, which constitutes the cause of action, and therefore the plaintiff may bring his suit along any lines which he deems most likely to afford him redress for the particular injury which he has sustained, and, if successful in proving an injury of the nature claimed, may recover judgment in that action against all those who have united or co-operated in inflicting that injury." See, also, *Frost v. Hanscome*, 198 Cal. 550, 246 P. 53.

Applying the test to the present situation, what must we say are the allowable deductions from the recited testimony? The resolution was directed towards the removal of Spurlin and not of Kimmerle, the latter of whom was not even a member of the committee. The invitation to Carey to witness some action was issued by Spurlin and not by Kimmerle. It was Spurlin as chairman of the committee who reported that they had not hesitated to use force. True, Kimmerle participated in the preparation of the report and talked it over with Spurlin and prepared the final draft at Spurlin's direction, but we repeat he was not a member of the committee. Again it was Spurlin who invited respondent into the inner office for a few words, but without protest of any kind permitted Kimmerle to prepare for the assault by removing the handicap of his coat and immediately, in response to Spurlin's statement, "this is one of the Jews," launch his verbal assault. Spurlin stood by while his friend of many years' standing and at whose house he had stayed the night before announced that he had come "there to clean house and he was going to clean it out," and it was Spurlin who made the remark that, "When you burn one rat the rest will usually leave the ship." Leaving out of consideration for the time being the contrary testimony and reducing that set forth to its significant elements, it is impossible to say that the jury was not justified in deducing therefrom that appellant Spurlin was the mental participant and Kimmerle the physical—that they were acting in concert and each knew the intent and purpose of the other.

[2] Appellant next assails the judgment because, he says, the verdict is against law and gives as his reason therefor the fact that the complaint did not charge or set out facts indicating a conspiracy so as to warn him that he was being held as a party to the assault because he did conspire with Kimmerle. In our discussion of the previous contention we have

already observed that "It is the civil wrong, not the conspiracy, which constitutes the cause of action." *Smith v. Blodget*, supra. In *Herron v. Hughes*, 25 Cal. 555, we find this succinct statement of the rule, which has been quoted with approval in the more recent case of *Bowman v. Wohlke*, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011: "Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done. In *Saville v. Roberts*, 1 Ld. Raym. 378, Mr. Chief Justice Holt said: 'An action will not lie for the greatest conspiracy imaginable if nothing be put in execution; but if the party be damaged the action will lie. From whence it follows that the damage is the ground of the action, which is as great in the present case as if there had been no conspiracy.'" So, too, in *More v. Finger*, supra, it is said in addition to what we have already quoted: "The complaint alleges that the plaintiff was deprived of the note by the wrongful acts of the defendants, and that they entered into a conspiracy for that purpose, but the conspiracy thus alleged is not the gist of the action. The gist of the action is the injury done to the plaintiff by these wrongful acts, and this injury is actionable, whether it is the result of a conspiracy or not. The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved." Considerable reliance is had by appellant upon the case of *McPhetridge v. Smith*, 101 Cal. App. 122, 281 P. 419, but we find no statement therein which indicates that in an action for the tort of two or more persons it is essential to a recovery against an indirect actor and participant therein that he confederated and conspired with the one who directly acted. In fact, the case is in full accord with those authorities from which we have already extracted excerpts. Sound reason brings us to the same conclusion. The actionable wrong is the tort committed. The liability is determined by the ultimate fact of whether the defendant participated in the commission of the wrong. The evidence establishing the conspiracy is merely proof of the ultimate fact.

[3-7] A number of instances where testimony on cross-examination or direct was excluded by the court are assigned as error. Some of these instances are objections sustained to the questions of the other defendant of which this appellant may not complain, another is supported by neither argument nor citation of authority, and in the case of at least one assignment the question was already asked and answered. It is unnecessary to comment further upon them, but there is one line of proffered evidence which we find

demands considerable attention. The plaintiff introduced a chain of circumstances to show Spurlin's connection with the assault. Kimmerle contended and testified that upon his arrival at the office of the committee on the afternoon of June 21st he attempted to talk to Loeb about adjusting the friction existing among the members of the committee and read a resolution adopted at the mass meeting of the stockholders to the effect that the people who had put up the money for stock should be in charge of the affairs of the Julian Petroleum Corporation; that thereupon Loeb said: "I do not know anything about such a set of resolutions; I am sent up here by C. C. Julian for C. C. Julian; I do not care a damn about any resolutions." That thereupon, he (Kimmerle) told respondent that he didn't belong in the office of the committee but did belong in C. C. Julian's office and ought to go there; that thereupon Loeb attacked him. During the cross-examination of the respondent appellant's counsel ascertained that Horchitz had called respondent on the telephone after the fight between Horchitz and Spurlin in the morning and attempted to elicit from him a conversation to the effect that Horchitz had told him to come on up to the committee's rooms and not to be a coward and to show thereby, inferentially at least, that Loeb had come up anticipating trouble, thus tending to corroborate Kimmerle's version of the affair and the version of appellant Spurlin that arrangements had been made for the presence of a police officer so that the move to the new offices might be made peaceably. The respondent argues that it is immaterial what Horchitz may have said to respondent and further that assuming its materiality Horchitz admitted the conversation and hence its rejection becomes harmless. We entertain no doubt that the testimony was material, that the cross-examination should have been permitted particularly in view of Spurlin's account of the meeting on the afternoon of the 20th to the effect that it was respondent who left the meeting and not he. It is difficult for us to conclude that the error was prejudicial for the reason that Horchitz subsequently testified that he did telephone to the respondent and say that he didn't want Loeb to abandon the ship and act a coward just at that time. Loeb responded to the request and appeared. There is no contradiction of the testimony of Horchitz and we fail to see how respondent's statement of the same matter could have altered or affected the result.

The same disposition must be made of appellant's claim that Police Officer Hynes was not permitted to testify concerning his assignment to the Julian case and that when he did start for the offices at about 1 p. m. on the 21st he was invited to lunch by Horchitz. He was permitted to state that Spurlin had called him twice, once about 10 a. m. and

once about 12 noon, asking him to be present and that he did go to lunch about 1 o'clock with Horchitz and the latter testified that it was at his invitation.

[8] Complaint is also made of remarks of the judge concerning the materiality or effect of evidence as the trial proceeded, while ruling upon objections. It is sufficient to say that we have scanned the record in vain to find where counsel directed the trial judge's attention to this claimed misconduct for the purpose of rectifying the damage if any was done. On one occasion when such a course was pursued the judge did admonish the jury to disregard his remarks, thus indicating no desire on his part to influence them by suggestion. And of course under a familiar rule, to support which it is unnecessary for us to cite authorities, it is impossible for us to sustain appellant's position.

[9] The respondent's wife was asked to testify concerning his average income for a period of ten years prior to the trial. No objection was interposed that the proper foundation had not been laid, nor that the testimony was hearsay. The witness was cross-examined as to her knowledge and the means by which she came to that knowledge. Some time later in the trial counsel made a motion to strike her testimony "on the earnings of her husband." We cannot support the claim of appellant. He "cannot lie by and take a chance upon an answer being favorable, and, when disappointed, have a motion to strike out take the place of an objection." *Price v. Northern Electric Ry. Co.*, 168 Cal. 173, 142 P. 91, 95; *People v. Lawrence*, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; *Pinto v. Seely*, 22 Cal. App. 318, 135 P. 43.

[10, 11] It is next claimed that the court committed error during the cross-examination of Mr. Carey, who it will be remembered testified that he met Mr. Spurlin at the luncheon establishment on June 21st just previous to the affray; that Spurlin invited him back to the table where Kimmerle was and informed him that if he wanted to see some action or see something doing, to come up to the Wilcox building that afternoon; and further that in response to a query as to who Mr. Kimmerle was, Spurlin replied, "This big Irishman is a friend of mine and is going to see that I get a square deal." After being confronted with his testimony before the grand jury on another feature, he was shown the transcript of his testimony in a previous civil action wherein the respondent here was plaintiff and Kimmerle was defendant, which testimony read that Spurlin replied to the inquiry that Kimmerle was a friend of his, leaving out all reference to "big Irishman." Counsel then asked Carey why he did not at the time of giving the testimony just referred to use the designation "big Irishman," and the court very properly sustained an objec-

tion on the ground that the question was argumentative. Then counsel queried: "Well, did he say 'big Irishman,' or didn't he?" An objection that it was immaterial was promptly sustained. Without doubt this was error and an altogether too restricted view of the proper cross-examination of the witness. Nor can we say that it was not prejudicial. One of the important factors by which the jury were led to believe that Spurlin united and co-operated in the assault was the testimony of the witness Carey to which we have just made reference. The use of the expression "big Irishman" undoubtedly had its effect upon the jury. If Spurlin said this is a friend of mine who is going to see that I get a square deal, he may have had an altogether peaceful but defensive purpose in mind; but when he said, if he did, this "big Irishman" is a friend of mine, the jury may well have believed that his state of mind was not peaceable. The Irish have a very definite and common reputation for their ability and willingness to make use of the manly art on convenient occasions. Whether they possess this tendency more than other people is beside the point because they have the reputation in the same manner as the Scotch have for thrift and frugality. It was therefore important to appellant to cross-examine the witness upon the use of the designation. Whether the error requires a reversal of the action must await a later paragraph.

[12, 13] It is also argued by appellants that the plaintiff and the jury were guilty of misconduct of such nature as to necessitate a retrial of the issues. The circumstances appearing from the affidavits in support of this contention are as follows: On the opening day of the trial a Mrs. Chester Brown, who had been serving with the jury panel, was drawn as a prospective juror. She was examined and passed for cause. However, she was peremptorily challenged by the plaintiff, it subsequently appearing that she was the wife of a gentleman whom the plaintiff had known in South America several years before. That during the first recess after being excused Mrs. Brown engaged in conversation with the plaintiff and his wife and thereafter during the trial of the action, as she was not needed elsewhere as a juror, but remained in attendance during the remaining sessions. She also during the same time conversed with members of the jury. The jury was instructed and charged with the delivery of a verdict about 10:45 o'clock a. m. on the morning of March 15. About 11:30 a. m. of the same day Spurlin was about to leave the courtroom when the clerk stated that he had better wait a few minutes because unless they arrived at a verdict before noon it would be necessary for each side to pay one-half of the expenses of luncheon. What occurred next is subject to conflicting versions. The

appellant and one of his counsel aver that Mrs. Loeb said, "Why Mrs. Brown has invited the jury and us out to lunch," whereas one of plaintiff's counsel says the remark was, "Mrs. Brown said she intended to take the jury out to lunch to day." They also differ as to the response of the clerk of the court, counsel for appellant averring that he said to Mrs. Loeb: "You can't do that. The case has not been decided." And counsel for respondent swearing that the clerk responded that Mrs. Brown had been planning for some time to give a lunch to the members of the panel when they had completed their service. The appellant averred that he had been informed and believed, and therefore swore, that the jury and Mr. and Mrs. Loeb did actually have lunch at about 1:30 p. m. of the same day with Mrs. Brown at her residence. This was after verdict rendered. There is no denial of this averment either from counsel or from the plaintiff or his wife, and it being a matter particularly within the knowledge of Mr. and Mrs. Loeb, we must assume it to be true. We are, however, faced with this problem: If the invitation were extended to the members of the jury and before verdict, so that they understood that the Loeb's would be present it was a most serious interference with the due administration of justice and should not be countenanced. If, however, the invitation had not been extended, but was only an unexpressed intent, there was no such interference. The trial judge upon the motion for a new trial resolved that question in favor of the respondent and we are bound by his determination of that question of fact as fully as we would be upon any other issue of fact.

[14] We now turn to appellant's claim that the court misinstructed the jury. Our attention is directed to an instruction covering the subject of the liability of one who does not actually participate in the commission of an assault for the damages resulting therefrom when done by another. In general the instruction is a correct statement of the law, but we find in it this serious misstatement: "If one man carries out a plan originated by both of them, or carries out a plan originated by one of them for the benefit of the other or for the benefit of both of them, they are equally to blame in the eyes of the law and equally liable for any injury or damages inflicted." (Italics ours.) While the remainder of the instruction was correct, we must observe that in a latter part the court told the jury that the plaintiff was required to prove his case by a preponderance of the evidence "bearing in mind all of the instructions of the court as to the liability and responsibility of one defendant for the acts of another." The first-quoted part of the instruction is so complete in itself that even though the latter part correctly stated the law, yet

the most that we can say is that they are contradictory and we have no way of knowing which the jury accepted as their guide. We have already stated the test by which the liability of this appellant should have been determined. Certainly he could not be responsible for the origination and execution of a plan by his codefendant without his co-operation even though it were for his benefit.

Finally, it is urged that the verdict is excessive and the result of passion and prejudice. This is not a question which will likely result upon a retrial of the case and it is fully discussed in that part of the opinion dealing with the appeal of Kimmerle. Nothing further need be said here.

[15] Do the errors require a reversal of the the judgment in so far as the appellant Spurlin is concerned? We have already indicated that the evidence, when that introduced by both parties is considered, is very close concerning the participation of this appellant in the assault. If the jury believed that he had arranged for the presence of a police officer, it is difficult to believe that he had in mind the commission of an offense of the character here in question. Furthermore, although the jury were fully and painstakingly instructed not to consider any remarks of the trial judge while passing upon objections and although we have found no occasion to determine the claims made by appellant in this regard because they were not of such a character as to be irremediable, yet it is possible they too may have contributed to the conclusion of the jury. We cannot under all the circumstances say, under section 4½ of article 6 of the Constitution, that there has not been a mistrial. The errors may have materially influenced the jury in its deliberations and if so the verdict ought not to stand.

We have yet to consider the appeal of H. J. Kimmerle.

[16] This appellant says, "The rulings made by the judge seemed to be constantly against me," and then refers to certain pages of the transcript where we may find examples. It is obvious that such a general statement is not a sufficient assignment of error either in the exclusion or rejection of testimony to warrant us in ruling upon any question. However, by reason of a reference in the opening brief of this appellant to the brief of the appellant Spurlin, we have examined all of the assignments wherein it is claimed that the court committed error in the rejection of testimony offered by this appellant or in the admission of testimony over his objection, and it is sufficient to say that we can find nothing of which he can rightfully complain.

[17-20] It is next said that the verdict was excessive and that "Loeb and his wife had testified to an earning capacity greatly in

excess of the facts." Here, too, it is patent that we are not authorized to consider the truth or untruth of their testimony. That duty rested with the jury.

The adoption of the appellant Spurlin's brief on the point by this appellant, however, renders it necessary for us to examine the argument therein contained that the verdict of \$50,000 for strictly compensatory damages is excessive; it being remembered that there was also awarded to the plaintiff the sum of \$2,948.60 as special or actual damages. In addition to our former recitals of injury, to wit, the loss of the left eye, a fracture of the left malar bone, an injury to the nose and one hand, we ought to set down that respondent's testimony also indicates that his general nervous system was affected; that from time to time he required sedatives to induce sleep; that at the time of the trial he was unable to read for more than fifteen minutes at a time by reason of the fact that reading brought on severe headaches; and that he had been up to the time of the trial unable to follow his business and had lost the power of concentration. There is testimony also to the effect that respondent is and had been for many years a contractor with an income therefrom in the neighborhood of \$10,000 per annum. It should be noted, however, that in one of respondent's answers he admitted financial inability to enter into the contracting business, although he also asserted that his health would not permit it either. The life expectancy of respondent was shown to be 27.45 years. Can we say that the verdict is so large that it bears upon its face the imprint of passion or prejudice? Succinctly put, such is the test, codified in this state and found in subdivision 5 of section 657 of the Code of Civil Procedure and judicially announced as early as the case of *Aldrich v. Palmer*, 24 Cal. 513. To determine what is a just and reasonable compensation is a difficult task, one not possible of exact ascertainment. For that reason the assessment of damages is first of all the peculiar province of the jury and second, that of the trial judge when passing upon a motion for a new trial. *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100. Whence it follows that the appellate courts will not disturb the verdict unless it is so grossly excessive as to immediately suggest to the mind "passion or prejudice, or corruption on the part of the jury." *Reneau v. Hirsch*, supra, with cases there cited; *Morris v. Standard Oil Co.*, 188 Cal. 469, 205 P. 1073. Some aid is furnished us by the precedent of *Maede v. Oakland High School District* (Cal. Sup.) 298 P. 987, 989, which was a case where a high school boy, aged fifteen, was injured by an explosion in the vocational training class of the Technical high school. As stated in the opinion, the injury resulted "in the loss of one eye, a cut on the nose and slight cuts on the

chest." The jury returned a verdict in the sum of \$35,000. The District Court of Appeal under the announced doctrine refused to disturb it, although it was made to appear from the record that at one time the trial judge was inclined to believe it excessive. 291 P. 874. However, the Supreme Court transferred the cause to itself for decision and reduced the judgment to \$16,000, saying on the point: "We now come to the consideration of the question earnestly urged by appellants, which is whether or not the damages as assessed herein are so far excessive and disproportionate to the injuries sustained by respondent, as measured by other awards judicially sanctioned in this and other states of the Union as fair compensation for like injuries, as to require reduction on the ground that they appear 'to have been given under the influence of passion or prejudice.' Section 657, subd. 5, Code Civ. Proc. It being impossible to restore a lost member of the body, the law undertakes to do the next best thing humanly possible, in lieu of restoration, which is to compensate the loss with a money consideration. Out of the long experiences of the past, in which all the elements and inconveniences of loss have been considered, weighed, and appraised, a standard, not invariable, it is true, has been adopted by courts of law. The average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts, has its place in arriving at the estimate. The compensation assessed in the instant case, compared with a long list of cases in which the loss of an eye was, as here, the single damage to be compensated, so greatly exceeds the amounts of award in the average cases as to justify the claim on the part of the school district and the officers that the verdict of the jury was the result of passion and prejudice. It is rather coincidental that *Damgaard v. Oakland High School District of Alameda County et al.* [(Cal. Sup.) 298 P. 983], *supra*, presents a case in point of injury very similar in all respects to the instant case, even to the loss of an eye, caused through an explosion which occurred during an experiment conducted in the chemistry department of the same high school district in which respondent herein was injured. The jury in that case assessed the damage at \$15,000. Respondent here did not suffer any damages greater than was suffered by the *Damgaard* youth. There is nothing in either case that would seem to justify a preference of one over the other. Nevertheless, out of an abundance of caution, we have concluded that a judgment of \$16,000 will be just in the circumstances of the case."

We have also considered another element. As is said in *O'Meara v. Haiden*, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381, radical changes have taken place in social conditions in the

past few years, particularly with respect to incomes and the cost of living. However, considering the rather unsatisfactory testimony of annual earnings as distinguished from income from investments, as well as the fact that the fracture of the malar bone was slight, and the verdict in the *Maede* Case, we feel compelled to the conclusion that the verdict here could only have been arrived at as the result of prejudice and passion. For that reason it is excessive. In view of the fact that the testimony does indicate an extreme shock to the nervous system, we think the amount allowed in the *Maede* Case may in fairness be here increased and further that \$25,000 will, as fairly as it is humanly possible, compensate the respondent for his loss.

Appellant next presents the alleged misconduct of Mrs. Brown and the jury, but that matter was fully covered while considering the appeal of Spurlin.

[21] Finally appellant, without giving us any specific quotations from or reference to the transcript says that improper references were made to the case of the criminal assault and the fact that he had been paroled. This, too, is an insufficient assignment of error.

Judgment against De Kalb Spurlin reversed. Judgment against H. J. Kimmerle is modified by reducing the award from \$50,000 to \$25,000, and, as so modified, the judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

117 Cal.App. 283
SPECIALTY OIL TOOL CO. v. AMES, Judge.
Civ. 585.

District Court of Appeal, Fourth District, California.

Sept. 30, 1931.

Rehearing Denied Oct. 21, 1931. Hearing
Denied by Supreme Court Nov. 27, 1931.

1. Appeal and error ⇨612(5).

Where transcript does not contain testimony of important witness, trial judge need not certify to its correctness (Code Civ. Proc. § 953a).

2. Appeal and error ⇨553(1).

Old method of preparing appeal record by settlement of bill of exceptions *held* available to appellant on whom "alternative" method works hardship (Code Civ. Proc. § 953a).

Petition for writ of mandate by the Specialty Oil Tool Company against the Honor-

able H. G. Ames, Judge of the Superior Court of Orange County.

Writ denied.

John J. Beck, of Los Angeles, for petitioner.

Leonard Evans, of Anaheim, for respondent.

JENNINGS, J.

Petition for a writ of mandate to require respondent to certify to the correctness of a certain transcript of proceedings had in an action in which this petitioner was defendant and one Roy H. Moore was plaintiff. It appears from the petition that in the action of *Moore v. Specialty Oil Tool Company*, a corporation, tried in the superior court, judgment was rendered against the defendant, this petitioner; that petitioner, desiring to appeal from the judgment thus rendered, proceeded under the so-called alternative method, and in accordance with the provisions of section 953a, Code of Civil Procedure, filed with the court a notice of appeal from the judgment and a request for the preparation of the clerk's transcript; that thereafter petitioner duly filed the clerk's transcript and the reporter's transcript on appeal and presented the reporter's transcript to respondent for his approval; that respondent refused to certify the reporter's transcript for the reason that the testimony and proceedings in the cause up to the hour of 11 o'clock a. m. of the first day of trial were not included in the transcript, such testimony and proceedings having been reported by a court reporter who died shortly thereafter. It is further alleged in the petition that a bona fide effort to transcribe the notes of the deceased reporter was made by the reporter who reported the remainder of the proceedings, and that the endeavor was made to secure other persons experienced in transcribing notes to make the transcription, but that such efforts proved unsuccessful. The allegation is made that the reporter's transcript presented for respondent's approval contains substantially all of the evidence submitted during the trial and that it contains everything necessary to a fair determination of the appeal, and that petitioner is willing to accept the transcript and to prosecute its appeal on the record as submitted. It is made to appear that the proceedings reported by the deceased reporter consisted of opening statements of opposing counsel and the testimony of a witness produced for the purpose of identifying certain documents which were subsequently admitted in evidence under stipulation of counsel; that respondent has offered to stipulate that

this statement of the proceedings reported by the deceased reporter may be included in the proffered transcript and has requested the successful plaintiff in the action to submit an amendment to the transcript in the event he considers the transcript submitted to be incomplete, but that plaintiff refuses to enter into the offered stipulation or to submit any amendment to the transcript.

The answer of respondent to the petition herein denies that the testimony and proceedings reported by the deceased reporter consisted merely of opening statements of opposing counsel and of the testimony of the single witness named in the petition, and alleges that the plaintiff in the action was sworn as a witness and testified prior to the hour of 11 o'clock a. m. of the first day of trial; that his testimony related to the making of the contract between himself and the petitioner, the terms of the contract, the performance by plaintiff of the contract, the amount paid to him, and the balance claimed by him to be due and unpaid at the time of trial; that this testimony was reported by the deceased reporter and was not included in the transcript submitted; and that for this reason the transcript presented for respondent's certification is not a full, true, and fair transcript of the proceedings had or of the testimony introduced at the trial of the cause.

[1, 2] Under the provisions of section 953a, Code of Civil Procedure, the duty is imposed upon the trial judge to examine the reporter's transcript and to see that it is a full, true, and fair transcript of the proceedings had at the trial and of the testimony offered or taken. If he so finds it, he is required to certify to its truth and correctness. The petition herein discloses that the transcript presented to respondent for his certification was neither a full nor a true transcript of the testimony received during the trial. Respondent's answer to the petition makes it obvious that the transcript submitted is fatally defective, in that it does not contain the testimony of a most important witness relating to the essential features of the subject-matter of the action. Under these circumstances, respondent was under no compulsion to certify to the truth and correctness of the transcript. If this ruling appears to work a hardship on petitioner, it is to be observed that the old method providing for the preparation and settlement of a bill of exceptions is always available for the purpose of preparing a record to be used on appeal. *Allen v. Conrey*, 22 Cal. App. 409, 412, 134 P. 730.

Writ denied.

We concur: BARNARD, P. J.; MARKS, J.

214 Cal. 74

JULIAN v. GOLD et al.

L. A. 11276.

Supreme Court of California.

Sept. 30, 1931.

1. Appeal and error ⇨1071(1).

Contradiction in findings that parties to written lease orally agreed to reduce rentals, but that landlord did not accept such rentals as full payment, *held* material, requiring reversal.

2. Contracts ⇨237(1), 255.

Irrespective of consideration, executed oral agreement may constitute modification or release of written agreement.

3. Landlord and tenant ⇨200(2).

Oral agreement reducing monthly rentals under written lease *held* binding on landlord so far as executed, precluding recovery of sums allowed as rebates.

4. Estoppel ⇨90(2).

Landlord, who without objection accepted monthly rentals in amount less than that specified in lease, *held* estopped under statute from subsequently recovering difference (Code Civ. Proc. § 2076).

Code Civ. Proc. § 2076, provides in part that person to whom tender is made must specify any objection he may have, and, if objection be to amount of money, he must specify amount required, or be precluded from objecting afterwards.

In Bank.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by Adele Julian against Henry S. Gold and another. Judgment for plaintiff, and defendants appeal.

Reversed, with directions.

Loucks & Phister, of San Pedro, for appellants.

Macfarlane, Schaefer, Haun & Mulford and Raymond V. Haun, all of Los Angeles, for respondent.

PRESTON, J.

Action by landlord against tenants for rent. Judgment for plaintiff; defendants appeal. The facts are not in dispute.

[1] On July 24, 1923, N. Julian, the husband and assignor of plaintiff, as lessor, made a lease to defendants of certain business property in San Pedro, Los Angeles county, for the period of five years from December 2, 1923. The agreed rental was \$6,000

per annum for the first two years, \$7,000 per annum for the next two years, and \$7,500 per annum for the last year; rent to be paid monthly in advance. Defendants lived up faithfully to the terms of the lease until October 10, 1925, upon which date the parties entered into an oral agreement whereby the monthly rentals were to be reduced in effect to \$450 per month. Defendants faithfully lived up to this agreement also for a period of more than two years, to wit, until January 3, 1928, upon which date they paid on account of the January rent the sum of \$137.50. In February following, this action was brought, the gravamen of which was to claim all the balance of back rent from October 27, 1925, to January 3, 1928, with interest, and the balance of the rent for the month of January, 1928, same being the difference between \$625 and \$137.50, or \$487.50. Findings 6 and 7 made by the trial court related to this subject, and read as follows:

"That it is true that on or about the 27th day of October, 1925, the defendants and N. Julian, the assignor of plaintiff, entered into an oral agreement wherein and whereby it was agreed that the rental upon the premises * * * from and after the 10th day of October, 1925, would be at the rate of * * * \$450.00 per month, said sum to be paid * * * \$387.50 in cash and * * * \$62.50 by the credit against security deposited with lessor, as provided in said lease, but said agreement or modification of said lease was not in writing and there was no consideration therefor.

"That it is true that from the 27th day of October, 1925, to and including the month of December, 1927, and for each and every intervening month, including the month of October, 1925, the defendants paid to N. Julian and/or to the plaintiff the sum of * * * \$387.50 as rent for each of said months, but it is untrue that the said N. Julian and the plaintiff herein accepted said sums as and when paid in full for the rental of said premises for each of said months from and beginning with the month of October, 1925, to and including the month of December, 1927."

If finding No. 7 means that when plaintiff received the rents in question she merely had mental reservations of an undisclosed intent to apply these payments on account, defendants, not having knowledge of such a state of mind, then nothing appears upon which to overthrow finding No. 6. But if finding No. 7 means that it was understood by all the parties that the payments as made were merely to be payments on account and not in full, then the two findings are contradictory, and the contradiction, if material, is sufficient to work a reversal of the judgment.

We think that these findings do relate to a material issue in this case. This issue is:

Does the fact that plaintiff for two years accepted, in lieu of the several sums falling due monthly under the lease, a lesser sum, under an agreement that such lesser sum should constitute the rental, foreclose her from claiming the amounts rebated in a subsequent action against the lessee?

The mind of the trial court was evidently that the agreement to reduce the rent existed but being oral and unsupported by a consideration, although it was carried out, it was nevertheless a mere nudum pactum, subject to repudiation at any time, and retroactive in its effect. Respondent has adopted this contention, and cites the following authorities in support of it: *Dodge v. Chapman*, 42 Cal. App. 612, 183 P. 966; *Gordon v. Green*, 51 Cal. App. 765, 197 P. 955; *Sinnige v. Oswald*, 170 Cal. 55, 148 P. 203, 204; *Wayland v. Latham*, 89 Cal. App. 55, 264 P. 766. She could as well also have cited the following additional California cases to the same effect: *Campbell v. Spare*, 180 Cal. 128, 179 P. 384; *James Eva Estate v. Oakland, etc., Co.*, 40 Cal. App. 515, 520, 181 P. 415.

[2] We think that undoubtedly an error has crept into the above holdings, and, inasmuch as the statements are obiter, we may properly declare here the true rule of decision. This rule is that an executed oral agreement will serve as a modification or release of a written agreement and this too without regard to the presence or absence of a consideration. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Bennett v. Potter*, 180 Cal. 736, 183 P. 156; *Molera v. Cooper*, 173 Cal. 259, 160 P. 231.

Where the agreement has been fully executed, the item of consideration seems clearly to be a false quantity. Unhappily, however, statements may be found in some of our opinions that an executed oral modification of a contract, to be valid, must rest upon a valid consideration. These statements are in the main, if not entirely, mere obiter dicta. For example, in the case of *Estate of McDougald*, 146 Cal. 196, 199, 79 P. 875, 876, where the interest rate in a note secured by a mortgage was reduced by oral agreement and carried out for a period of time, the court held: "Doubtless, as an executory agreement to bind the parties in the future, and so far as it was unperformed, it was invalid. But it would have been valid if it had been in writing (*Hewitt v. Dean*, 91 Cal. 5, 27 P. 423), and, so far as it had been performed [by the deceased], we see no reason why it was not valid as an executed parol agreement. Civ. Code, § 1698. The validity of such agreements arises from the fact that, apart from the loan of the money, there is a lawful and valuable consideration for the promise of the mortgagee to rebate the interest." It is true that it is there impliedly stated that in every such instance a consideration must be present, but there a consideration was present,

and whether the holding would or would not have been the same, in the absence of such consideration, cannot be told. However, the decision in *Sinnige v. Oswald*, supra, was based upon the express authority of said holding. In the *Sinnige Case*, the rent called for by the written lease was by oral agreement reduced from \$347 to \$317 per month; the lesser sum was paid for some nine months, for each payment a receipt in full to date being given. Thereafter suit was brought, not to recover the amounts so rebated, but to recover rentals subsequently accruing. It was contended that the unexecuted portion of the lease had been altered by the oral agreement. The court properly held the latter contention to be unsound, and, in doing so, used the following language: "Concessions of the kind that were shown by the defendants, when supported by a consideration, are valid to the extent that a lower rent has been tendered and accepted as satisfaction in full of the installments thus paid. They are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent where no such change of terms has been made in writing. *Estate of McDougald*, 146 Cal. 196, 199, 79 P. 875."

At a glance it will be seen that the statement that a consideration is necessary is purely obiter, and crept into the opinion by reason of the language in the *McDougald Case*. This expression has been made the foundation of every decision relied upon by respondent in this action as well as of the additional cases cited by us to the same effect. There is no need to recite the facts in each of said cases; it is enough to state that the question involved is identical with that appearing in the *Sinnige Case*, with the possible exception of *Gordon v. Green*, supra, the facts of which are not clear on this point. If it can be said that that case does sustain respondent's contention, we feel compelled to decline to follow it.

[3] Abundant outside authority exists to show that, so far as executed, the oral agreement reducing the rent is binding upon the lessor. 16 *Ruling Case Law*, page 924, § 431, in this behalf, reads as follows: "But it is held that if the lessor orally agrees to reduce the rent, and to accept a less sum than stipulated for and such agreement is carried out for a number of years by the payment by the tenant and the acceptance by the lessor of such rent as reduced, and the giving of the receipts therefor as in full of all rent to the date of said receipts, the lessor will be regarded as having made a valid gift to the tenant of the difference between the rent paid and that stipulated for in the lease, and cannot recover of the latter the amount so given him."

A note writer under *Torrey v. Adams*, 254

Mass. 22, 149 N. E. 618, 43 A. L. R. 1447, 1487, after citing the general rule, uses the following language: "It is to be noted, however, that no consideration is necessary to be shown to support an agreement reducing the rent where the contract is wholly executed; that is, where the reduced rent has been accepted as payment in full (citing *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638)." The same authority states (43 A. L. R. page 1458): "It is a rule established by many well-considered cases that parties to a lease cannot escape from their secondary (modifying) agreement on the ground of want of consideration, where it has been fully executed, nor, if partially executed on both sides, can they repudiate that part of it which has been executed, though the unexecuted part may be repudiated unless grounds of equitable estoppel exist." The above is approved in 46 A. L. R., pages 1518, 1519, where the annotator, in the note under *Hurlbut v. Butte-Kansas Co.*, 120 Kan. 205, 243 P. 324, again comments upon the rule that a consideration is not necessary to support a waiver of rent, where the transaction is carried out, it being a mere voluntary relinquishment of a known right.

A well-reasoned case also is that of *Doyle v. Dunne*, 144 Ill. App. 14, where the syllabus correctly states the holding as follows: "A parol agreement to reduce rent entered into by a lessor without consideration is a mere nudum pactum, not binding, and while the lease remains executory is not susceptible of being enforced, but a reduction accomplished periodically as the rent accrues, by accepting a sum less than the stipulated rent for such period, is valid and constitutes an executed gift."

The case of *Brackett Co. v. Lofgren*, 140 Minn. 52, 167 N. W. 274, 275, L. R. A. 1918F, page 998, seems to be a well-considered case in point. There it was held that where the parties to a five-year lease agreed to reduce the rent and month after month for two years the lessee paid and the lessor receipted for rent at the reduced rate, the lessor could not thereafter recover the amount rebated. The court said: "This much is clear. The rule (referring to the general rule) must not be applied to a case where parties to a contract, still executory, agree to reduce the consideration and thereafter both sides execute the contract as modified. After an agreement has been fully executed on both sides the question of consideration becomes immaterial. A pure gift, fully executed, is valid. [Citing cases.] This lease was executory at the time the agreement to reduce the rent was made. The parties saw fit to execute it on both sides in accordance with the modified terms, for the period in controversy. To the extent that it was so executed, it became a closed inci-

dent, and the amount rebated cannot now be recovered. This position is sustained by reason and authority. [Citing many cases.]"

[4] We therefore conclude that, in so far as said lease contract has been fully executed, the plaintiffs have lost their right to recover the sums allowed as rebates on the several installments of rent. We reach this same conclusion upon a well-known rule of waiver set up by section 2076 of the Code of Civil Procedure, which reads as follows: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

Under this section, if the lessor was unwilling to accept the amount tendered as in full, he could have protested then, but his acceptance, as in full payment, of a lesser sum than that due, brings him within the rule of estoppel declared by the above section. *Smiley v. Read*, 163 Cal. 644, 647, 126 P. 486, 487. In the case just cited, a deed was tendered and accepted which the grantee knew contained a less area than that called for by the underlying contract of sale and purchase. Inasmuch as the facts showed that the purchaser knew of the shortage at the time the deed was accepted, the court, in disposing of the claim that he still might have relief because of this shortage said: "It makes no difference how soon after the consummation of the sale plaintiff made his objection. His duty was to assert his unwillingness to accept the land offered at the time of the tender. Failing to do this, he was estopped from demanding the fraction of an acre representing the difference between the amount of land mentioned in the contract and that specified in the certificate of title." See, also, to the same effect *Montgomery v. De Picot*, 153 Cal. 515, 96 P. 305, 126 Am. St. Rep. 84; *Cavalieri v. Hess*, 205 Cal. 706, 272 P. 295.

These matters render it unnecessary to pursue any other points relied upon for a reversal of the judgment. At the beginning of the trial in this cause, it was stipulated that, if defendants showed that on or about the 27th day of October, 1925, an agreement was entered into between the lessor and the lessees that the rental of the premises should be at the reduced rate instead of the amount called for in the original lease, and such agreement was valid, then plaintiffs should recover only the sum of \$312.50 and no more. Were it not for the apparent ambiguity in the findings above discussed, we should not hesitate to modify the judgment and affirm it in the sum of \$312.50. But because of said

ambiguity, we deem it best merely to enter a judgment of reversal. Accordingly, the judgment is reversed, with directions that proceedings be taken not inconsistent with this opinion.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

214 Cal. 108

PEOPLE'S FINANCE & THRIFT CO. OF VALLEJO v. SHAW-LEAHY CO. et al.

S. F. 14264.

Supreme Court of California.

Oct. 16, 1931.

1. Bills and notes ☞155.

Accelerating clauses in trade acceptance, providing that note should mature at option of holder in event acceptor suffered fire loss or failed to meet at maturity any prior trade acceptance, held not to destroy negotiability of instrument.

2. Bills and notes ☞385.

Transferee of negotiable trade acceptance, with acceleration clauses, had no duty to notify acceptor prior to fixed maturity date that it had instrument.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the People's Finance & Thrift Company of Vallejo against the Shaw-Leahy Company and another. From a judgment for plaintiff, the Shaw-Leahy Company appeals.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 295 P. 1072.

Stanislaus A. Riley, of San Francisco, for appellant.

O'Hara, Hatch & Pope, of Vallejo, for respondent.

CURTIS, J.

Upon further consideration of the respective claims of the parties in the above-entitled action, we have concluded that the opinion of the District Court of Appeal rendered herein contains a correct determination of the issues presented, and we hereby adopt said opinion as the opinion of this court. The opinion follows the ruling of the Supreme Court of Idaho in the case of McCornick &

Co. v. Gem State Oil & Products Co., 38 Idaho, 470, 222 P. 286, 34 A. L. R. 867. The acceleration clauses contained in the trade acceptance in the present action are word for word like those construed by the Supreme Court of Idaho in the case just mentioned. This state and the state of Idaho have adopted the Uniform Negotiable Instruments Law, and the provisions thereof involved in these two cases are identical. It is useless to enact legislation having for its object the unification of our laws if the courts of the several states are to place different and opposite constructions as to the meaning of the laws thus enacted. Of course, if there is anything manifestly erroneous in the interpretation of a statute given by the courts of one jurisdiction, it should not be followed by the courts in other jurisdictions. We find nothing in the opinion of McCornick & Co. v. Gem State Oil & Products Co., supra, out of harmony with the decisions of this state, or otherwise erroneous. We are therefore of the opinion that, in harmony with the policy of this state, as manifested by its adoption of the Uniform Negotiable Instrument Act, if for no other reason, we should align our decision with that rendered by the Supreme Court of Idaho. The opinion of the District Court of Appeal rendered herein is as follows:

Respondent obtained judgment against the corporate defendants above named in an action to recover on a trade acceptance; and one of the defendants, Shaw-Leahy Company, has appealed; the single question presented for determination being the negotiability of the trade acceptance.

The instrument bears date November 8, 1924, and was made payable on February 12, 1925. It was given by appellant to the defendant Martin S. Barrett Company (hereinafter referred to as defendant) in payment of certain goods sold by the latter to appellant at an agreed price of \$475. Under the terms of the sales contract, appellant was given the right to return the goods or any part thereof at any time prior to the maturity date of the trade acceptance; and on December 1, 1924, it exercised its right in this regard and returned the goods, which were accepted by the defendant. Thereupon by mutual consent the sales contract was rescinded and appellant demanded the surrender of the trade acceptance. In response to the demand defendant represented that for business reasons it desired that the instrument remain with the bank until the maturity thereof, promising that it would pay the same at that time; and appellant assented to the proposition. The truth of the matter was that two weeks previously and on November 15, 1924, defendant assigned and transferred said trade acceptance to respondent for a valuable considera-

tion, but appellant did not learn of such assignment until more than a year and a half thereafter. When the trade acceptance fell due, defendant failed to keep its promise to pay the same, and more than two years thereafter respondent brought this action against appellant and defendant to collect the amount thereof. The instrument in question reads as follows: "Trade Acceptance. The obligation of the acceptor of this bill arises out of the purchase of goods from the drawer. Upon the acceptor hereof suspending payment, giving a chattel mortgage, suffering a fire loss, disposing of his business or failing to meet at maturity any prior trade acceptance, this trade acceptance, at the option of the holder, shall immediately become due and payable. No. 728. San Francisco, Calif., date—Nov. 8, 1924. \$475.00. On February 12, 1925, pay to the order of Martin S. Barrett Co., 55 New Montgomery St. San Francisco, Calif.—Four Hundred seventy-five and No/100 Dollars. Value received and charge the same to the account of Martin S. Barrett Company, 55 New Montgomery Street, San Francisco. Shaw-Leahy Co. 416 Market Street, San Francisco, Calif. Martin S. Barrett, Drawer, President." And across the face of the instrument was written: "Payable at Anglo-California Trust Co., Market and Sansome streets, S. F. Shaw-Leahy Co., Inc. D. R. Shaw."

[1] The question as to the negotiability of the instrument arises from the provision thereof accelerating its maturity date; and appellant contends as a matter of law that in order to preserve negotiability the events and contingencies specified in the acceleration clauses must be such in their nature that the happening thereof will be brought about by some act or omission on the part of the acceptor, that is, which will depend upon his future volition; also that the same must relate to some business act incidental to the collection of the instrument. As will be noted, the provision of the instrument in question declares that the same is payable on February 12, 1925, but shall mature immediately upon the happening of any one of the five events or contingencies set forth therein; and while appellant concedes that there are cases sustaining negotiability of instruments embodying acceleration clauses similar in substance to clauses 1, 2, and 4 of the instrument under consideration, it is claimed that clauses 3 and 5 thereof, relating to the events of "suffering a fire loss" and "failure to meet at maturity any prior trade acceptance," do not fall within the scope of the foregoing rules, and therefore are destructive of negotiability.

Much of the confusion existing in the decisions of courts of the various states relating to the law of negotiable instruments which led to the adoption in nearly all of the states of the uniform negotiable instrument law

seems to have continued particularly with reference to the effect upon negotiability of certain forms of acceleration clauses; and evidently any attempt to reconcile the conflicting cases would be both interminable and impossible. As said by the Supreme Court of this state in the case of *Utah National Bank v. Smith*, 180 Cal. 1, 179 P. 160, 161, in quoting the language of the supreme court of the state of Utah (*Felt v. Bush*, 41 Utah, 462, 126 P. 688): " * * * The negotiable instruments law was intended to give legislative sanction to the majority rule to which reference has been made and was conceived by its authors and adopted by the different state Legislatures for the express purpose of harmonizing the conflicting decisions which had been rendered on the subject of negotiable instruments and the rights of those interested therein whose rights were acquired before maturity. As we view it, therefore, it is our plain duty to follow the numerous decisions that have directly passed upon the negotiable instruments law, and have construed it in accordance with the majority rule. The question is one of business expediency, and not of logic or equity as applied to an individual case."

The acceleration clauses contained in the instrument in the present case are identical in form with those construed by the Supreme Court of Idaho, in the case of *McCornick v. Gem State Oil & Products Co.*, 38 Idaho, 470, 222 P. 286, 34 A. L. R. 867, which state, like California, has adopted the uniform negotiable instrument law, and it was held that said clauses were not destructive of negotiability. Appellant has advanced no convincing reasons to show that the decision in that case is unsound or contrary to the weight of authority; and we are of the opinion, therefore, that it is determinative of the present controversy.

The arguments appellant makes in furtherance of its legal contentions are based mostly upon certain language used in an article appearing in a law review published by one of the eastern universities, portions of which article are quoted in appellant's brief. But it is evident from an inspection thereof that the author, after reviewing the conflicting decisions, assumes only to set forth his individual views as to what the law upon this particular subject ought to be, some of which are in harmony with the law as declared in adjudicated cases, and others are in conflict therewith. The author's view that negotiability is destroyed by acceleration clauses relating to extrinsic facts is admittedly based upon the English rule announced in the case of *Alexander v. Thomas*, 16 Q. B. 333; but the author frankly concedes that "numerous decisions in this country repudiate the English case and uphold negotiability" (citing among other cases "those collected in 1 Daniel

Negotiable Instruments, § 43; 8 Corpus Juris, 133, note 75; and Van Arsdale-Osborne Brokerage Co. v. Martin, 81 Kan. 499, 106 P. 42"). For example, it has been held that negotiability is not destroyed where the instrument provides that the maturity date shall be accelerated if certain property is sold (Nickell v. Bradshaw, 94 Or. 580, 183 P. 12, 11 A. L. R. 623), or in case of the death of the maker before maturity (Miller, as Ex'r, v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; Bristol v. Warner, 19 Conn. 7; Martin v. Stone, 67 N. H. 367, 29 A. 845); or upon the completion of a building (Stevens v. Blunt, 7 Mass. 240; Goodloe v. Taylor, 10 N. C. 458); or if certain machinery is sold (Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542; Cisne v. Chidester, 85 Ill. 523; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808); or upon the delivery of certain property to the payee (Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356). And the cases of McCornick v. Gem State Oil & Products Co., supra, and Ernst v. Steckman, supra, are authority for the proposition that it is not essential that the events be such that the happening thereof depends upon the future volition of the acceptor, or be wholly under his control, but that they may relate to the happening of contingencies beyond the control of both the acceptor and the holder. True, there are cases holding that negotiability is destroyed where acceleration is placed entirely under the control of the holder, or made dependent upon his whim or caprice, regardless of any act of the acceptor, such as accelerating maturity whenever the holder "deems himself insecure" (Moyer v. Hyde, 35 Idaho, 161, 204 P. 1068, 28 A. L. R. 695; First Nat. Bank v. McCartan, 206 Iowa, 1036, 220 N. W. 364), or upon the institution of suit or attachment proceedings against the maker or indorser (Great Falls Nat. Bank v. Young, 67 Mont. 328, 215 P. 651). But as will be noted that is not the situation here. Therefore, it would appear that aside from the decision in McCornick v. Gem State Oil & Products Co., supra, there is ample authority to sustain the contention that accelerating clauses such as "suffering a fire loss" and "failure to meet at maturity any prior trade acceptances" are not destructive of negotiability.

Appellant places much reliance also upon the case of Great Falls National Bank v. Young (Mont.), supra, but as will appear from the decision itself the contrary views therein expressed are based upon the published article above mentioned, and are not only incompatible with the legal principles enunciated by the Supreme Court of Idaho in the case of McCornick v. Gem State Oil & Products Co., supra, but are also in direct conflict with the established rule followed in the states of Oregon and Iowa. Furthermore,

the decision in the Montana case is somewhat questioned in the fourth edition of Brannan's Negotiable Instruments Law (p. 54); and the construction the Supreme Court of Montana places upon the term "determinable future time," as used in the Uniform Negotiable Instruments Law (Civ. Code, § 3082, subd. 3, and section 3085, subd. 2) is evidently at variance with the one adopted by the Supreme Court of this state in the case of Utah State National Bank v. Smith, supra, wherein it is said: "A matter is determinable 'that may be accurately found out, settled, or decided.' Standard Dictionary. That is, 'capable of being determined, definitely ascertained, decided upon, or ended.' Webster's New International Dictionary. A future determinable time could be one determinable at some time in the future, as well as one determinable at present, or in advance." For the reasons stated we are of the opinion that the decision in the Montana case should not be followed in preference to the decision in the Idaho case.

The language used in deciding the case of Westlake Mercantile Corp. v. Merritt, 204 Cal. 673, 269 P. 620, 61 A. L. R. 811, cited by appellant, has no application to the questions at issue here. There the instrument provided: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, *maturity being in conformity with original terms of purchase*" (italics ours); and it was held in substance that the clause was more than a mere statement of the transaction which gave rise to the instrument, as is permitted by the Negotiable Instrument Law (subdivision 2, § 3084, Civ. Code); and that pursuant to the italicized portion of the provision maturity of the instrument was made subject to the terms of an extrinsic contract of purchase, and that consequently negotiability was destroyed because the source of the acceptor's obligation to pay did not arise from the instrument itself, but grew out of a collateral transaction; in other words, that one of the principal elements of negotiability is certainty of payment, and that therefore since the italicized words rendered payment conditional or uncertain, they were destructive of negotiability.

[2] Appellant further contends that respondent is estopped to assert any rights against appellant under said trade acceptance because of the failure of respondent at any time prior to August, 1925, to notify appellant of its claim to said trade acceptance. We find no merit in the point, for if, as held, the trade acceptance be negotiable, it was admittedly acquired for a valuable consideration prior to the maturity date thereof and also before the rescission of the sales contract pursuant to which the trade acceptance was given; and consequently under such circumstances there would seem to be no legal duty

Imposed upon respondent to notify appellant prior to the fixed maturity date of the instrument that it was the owner and holder thereof.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; RICHARDS, J.

214 Cal. 81

**SECURITY TRUST & SAVINGS BANK v.
SOUTHERN PAC. R. CO. et al.
L. A. 11285.**

Supreme Court of California.
Sept. 30, 1931.

Rehearing Denied Oct. 29, 1931.

1. Vendor and purchaser ⇨85.

Evidence authorized rescission of agreement to partially cancel land sale contract as induced by mutual mistake regarding loss of title.

2. Parties ⇨7(1).

Facts showed substitution of bank as trustee of company seeking rescission of agreement to partially cancel land sale contract, with company's approval, authorizing bank to sue in its own name (Code Civ. Proc. § 369).

3. Limitation of actions ⇨127(3).

Permitting plaintiff who originally sued as owner of land to amend complaint after limitations had elapsed, to claim as trustee, *held* authorized.

Permitting amendment was authorized, where it was not seriously contended that plaintiff ever claimed in its own right, since its title was derived from a trustee and was admittedly the title of a trustee, and where the amended complaint merely remedied the failure of the original complaint to fully set forth the circumstances and facts of the trust relationship; amendment not substituting a new cause of action and not prejudicing the rights of defendant.

4. Judgment ⇨683.

Judgment in assignee's suit holding assignment void did not preclude action by authorized party on same claim.

5. Trusts ⇨134.

Transfer of title to land to trustee carries with it equitable right.

6. Reformation of instruments' ⇨36(1).

Action *held* one for rescission of agreement to partially cancel land sale contract rather than for reformation.

7. Vendor and purchaser ⇨85.

Action to rescind agreement to partially cancel land sale contract *held* not barred by laches; evidence not showing alleged delay harmed defendant.

8. Vendor and purchaser ⇨85.

Judgment rescinding agreement to partially cancel land sale contract *held* not erroneous for failing to require plaintiff-purchaser to pay interest on sum restored from date of cancellation to date of tender (Civ. Code, §§ 1691, 3407).

Judgment was not erroneous since requirements of Civ. Code, §§ 1691 and 3407, that everything of value be restored, and that defendant be restored to substantially the same position as if the contract had not been made, were satisfied when the money actually received by the purchaser on cancellation was returned, since, while the purchaser had the use of the money during the period preceding the rescission, the vendor presumably had the use of the land.

9. Vendor and purchaser ⇨85.

Judgment rescinding agreement to partially cancel land sale contract *held* to satisfy defendant-vendor's equities in requiring plaintiff-purchaser to reimburse defendant for taxes paid with interest thereon (Civ. Code, § 3408).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshal F. McComb, Judge.

Action by the Security Trust & Savings Bank against the Southern Pacific Railroad Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Frank Thunen, of San Francisco, for appellants.

Anderson & Anderson and Walter M. Campbell, all of Los Angeles, for respondent.

PER CURIAM.

This is a suit against defendant Southern Pacific Railroad Company, the vendor under a contract for the sale of real property, to rescind an agreement of cancellation of part of said contract. Plaintiff bank sues as trustee for Atlantic & Pacific Fibre Company, the purchaser. The property involved is part of a federal land grant to defendant, and the essential facts necessary to an understand-

ing of the controversy are as follows: On July 27, 1866 (14 Stat. 299, § 18), Congress made a grant of lands to Southern Pacific Railroad Company for the construction of a railroad, and thereafter the company filed its map of general route, from Mojave to Needles. After some administrative disapproval, the road as constructed was sanctioned, and became known as its main line, to distinguish it from a branch line subsequently constructed. The latter branch line from Mojave to Yuma was authorized, and a grant of lands was made to the company by the Act of Congress of March 3, 1871 (16 Stat. 579, § 23). During approximately the same period the Atlantic & Pacific Railroad Company was incorporated, and Congress authorized it to build a road from Missouri and Arkansas to California. A grant of lands was also made to this company. It filed a map on April 11, 1872, but never constructed a road, and the granted lands were subsequently, in 1886, forfeited to the United States.

By the terms of the acts, the granted sections were to be taken from lands lying within a twenty-mile strip on either side of the road. Where for any reason title could not be secured to lands located in that manner, which were primary grants, provision was made for selection of other lands within a ten-mile additional strip, as indemnity. The routes which have just been described paralleled each other in many places, and this caused a considerable amount of overlapping of the granted lands. Not only was there such overlapping between the Southern Pacific and the Atlantic and Pacific, but the Southern Pacific main and branch line grants overlapped; and there were additional conflicts between primary and indemnity lands. Extensive litigation ensued between the Southern Pacific and the United States government for the purpose of clearing the titles.

On July 23, 1885, the Southern Pacific Railroad Company entered into four executory contracts to sell 50,000 acres of its granted lands at \$1 per acre to Atlantic & Pacific Fibre Company, a British corporation. The purchase price was paid at once, but, most of the land being as yet unpatented, and the title uncertain, it was provided that the said sum of \$1 per acre should be returned, without interest, for every acre to which title eventually failed. The only contract which concerns us here is that numbered 4723, covering 17,768.41 acres. On April 21, 1903, after years of litigation between the Southern Pacific and the federal government, the parties agreed to a partial cancellation in accordance with the provisions of the contract, involving 2,162.09 acres, title to which then appeared to be lost to the railroad company. The sum of \$2,162.09 was refunded to the Fibre Company. Thereafter the railroad company continued its battle to secure title

to the lands. Its original attempt had been to secure them under the act of 1871. Now, however, it proceeded to make its claim under the main line primary grant of the act of 1866. In this it was successful, and patent was issued as to the lands involved in this action on September 22, 1921.

On September 5, 1918, plaintiff was advised by its attorney that defendant would probably secure the patent. Plaintiff communicated this fact to the Fibre Company, and on December 3, 1918, served upon defendant notice of rescission of the cancellation. The consideration received (\$2,641.21) was tendered. The notice was ignored, and a second notice was served, which likewise met with no action on the part of defendant. Subsequently this suit was brought. The court found that the cancellation of 1903 was entered into under mutual mistake, both parties then believing the title to be absolutely lost; that plaintiff had given proper notice of rescission promptly upon discovery of the facts, and had brought the suit with reasonable diligence and within the period of the statute of limitations. Other findings touching upon other issues were all in favor of plaintiff, and will be considered hereinafter. Judgment was rendered for the plaintiff, and defendant brought this appeal.

[1] Defendant strenuously insists that the cancellation was not induced by mutual mistake, but was in fact a compromise, and that the Fibre Company actually invited and eagerly accepted it because the lands were at that time deemed to be worthless. While the evidence is in some conflict, and permits of various inferences, we think that the one drawn by the trial court finds substantial support in the record. The Fibre Company was represented in all of the negotiations by Jackson A. Graves, a California attorney, and he did at times, and particularly in his letter to the company on September 8, 1902, suggest that it would not be worth while to continue the litigation for the title. But it does not satisfactorily appear that this pessimistic opinion led to any similar feeling or action on the part of the Fibre Company. In 1903 counsel for defendant advised Graves that it had definitely lost title to the property, and Graves so advised the officials of the Fibre Company. Graves thereupon proceeded to deliver up the contract for partial cancellation without further direction from the Fibre Company. As to the mistake, the record is not in doubt. There is ample evidence tending to show that this belief in the loss of the title, as a result of the failure of the years of litigation to establish it under the act of 1871, was concurred in by all of the responsible parties. The railroad company apparently overlooked the possibility that the land might be claimed as within the primary limits of the main

line, under the act of 1866. Little reference to authority is needed to show that such a mutual mistake as to a basic element of the contract is grounds for rescission. See *Hannah v. Steinman*, 159 Cal. 142, 112 P. 1094; 13 Cal. L. Rev. 246.

[2] In addition to its argument on the merits of the issue, defendant also sets up a number of special defenses; the first being that plaintiff has no authority to bring this action on behalf of the Fibre Company. It is pointed out that the suit is brought as trustee, and that there is no instrument executed by the Fibre Company directly constituting plaintiff such trustee. Irrespective of the fact that the point was not raised by demurrer, we believe with the trial court that such authority was present. In the early stages of the controversy, when the government first challenged the title to the lands, Graves advised the Fibre Company to take advantage of an act of Congress which protected citizens who were bona fide purchasers of such property. Acting upon his advice, the Fibre Company on January 27, 1893, made an assignment to him, absolute in form, under which he made application for title. But the transfer was actually without consideration, and it was understood and repeatedly asserted by him to his partners as well as to the Fibre Company that he took the assignment as trustee, to hold the title for the benefit of the company. The assignment was consented to by defendant on March 28, 1893. It is now contended by defendant that, as far as it was concerned, Graves' title was absolute. But the record indicates full knowledge on the part of defendant of the true circumstances. For example, the Fibre Company remained a party defendant in the title suits after the assignment to Graves and after he had been joined. And, when Graves' application was before the courts, he made no concealment of the actual facts, and his claim as a bona fide purchaser was adjudged invalid. There are various other indications which need not be developed. On March 21, 1914, Graves made an assignment to plaintiff. The assignment covered all the right, title, and interest in contract No. 4723, although the lands specifically described therein did not include the lands involved in this action. This assignment was expressly consented to by defendant. Later, on December 2, 1918, Graves quitclaimed to plaintiff all of his rights under the contract and to the lands in controversy, and the second notice of rescission advised defendant of this fact, and also of the fact that the rescission, was made on behalf of the Fibre Company as owner, by plaintiff bank as trustee. In the quitclaim deed of May 10, 1919, from the Fibre Company to Walter Campbell, hereinafter discussed, the right to enforce the rescission previously made is specifically assigned. Ir-

respective of the validity of this assignment, there can be no doubt but that it gave notice to defendant of the authority to sue on behalf of the Fibre Company, and, what is more important, of the approval by the Fibre Company of the rescission. Without going further into the details of the complex negotiations, we are satisfied that their effect was to substitute plaintiff as trustee for the Fibre Company with the approval of said company. This being so, plaintiff could sue in its own name. Cal. Code Civ. Proc. § 369; *Tandy v. Waesch*, 154 Cal. 108, 97 P. 69.

[3] Nor do we see any merit in the contention that plaintiff, having originally sued as owner of the lands, had no right to amend its complaint, after the period of the statute of limitations had elapsed, to claim as trustee. It is not seriously contended, nor could it be contended, that the plaintiff bank ever claimed in its own right. Its title was derived from Graves, and was, as his, admittedly the title of a trustee. The first complaint did not fully set forth the circumstances, nor fully allege the fact of trust relationship; the amended complaint did. The amendment did not substitute a new cause of action, and did not prejudice the rights of defendant. We think that the trial court was clearly justified in permitting the amendment, under the liberal rules prevailing in this state. See *Rabe v. Western Union Telegraph Co.*, 198 Cal. 290, 244 P. 1077.

[4] The only other contention which requires discussion is that plaintiff is estopped by a former judgment on the same issues. On May 10, 1919, prior to the commencement of the present action, the Fibre Company and plaintiff made an assignment to Walter Campbell, attorney for the plaintiff, of their interest in and causes of action relating to those lands included within contract No. 4723, which were the subject of the cancellation agreement of 1903. Campbell thereupon brought a suit against defendant based upon the same notice of rescission, and made substantially the same allegations as in the instant case. But the defendant railroad company raised the objection that the partial assignment had been made without its consent, as required by the terms of the contract, and the court properly held the assignment void; thus leaving Campbell without authority to maintain any action. Defendant asserts that there were other reasons for holding the assignment void, but whether this is true or not is immaterial. The important fact is that this proceeding between Campbell and defendant was not decided on the merits. The judgment was therefore not conclusive on any of the issues involved herein, and the doctrine of estoppel by judgment can have no application.

[5-7] We have carefully examined the other points made by defendant, and find noth-

ing in them to require a reversal of the judgment. Like the matters already discussed, they deal almost entirely with the inferences to be drawn from the evidence contained in a voluminous record. It is, for example, contended that the assignment to plaintiff was of nothing more than the right to file a suit in equity for relief on grounds of mistake; but the record shows that the title to the land was transferred to it, as trustee, and, where the title is transferred, the equitable right follows. *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959. It is further argued that what is being sought is reformation, and not rescission; but obviously, so far as the agreement of partial cancellation is concerned, a rescission is the remedy demanded. Nor does the record support the contention that the action to rescind is barred by laches. Graves, it appears, did not maintain close touch with the litigation which was being carried on by the attorneys for the railroad company; and in 1903 he discontinued his law practice. Whether he had notice of the possibility of securing the title under the new proceedings is a question which was resolved by the trial court on conflicting evidence, and we are not convinced that its conclusion was incorrect. Moreover, there is no evidence that the alleged delay worked a disadvantage to defendant, and without such a showing the claim of laches cannot be successfully maintained. *Newport v. Hatton*, 195 Cal. 132, 231 P. 987; *Simmons v. Briggs*, 69 Cal. App. 447, 231 P. 604.

[8, 9] Defendant finally complains that the judgment is erroneous in not requiring plaintiff to pay interest on the sum restored, from the date of cancellation to the date of tender. We do not think that this is a necessary prerequisite to rescission. The requirement that everything of value be restored (Cal. Civ. Code, § 1691) and that defendant be restored to substantially the same position as if the contract had not been made (Cal. Civ. Code, § 3407) was satisfied when the money actually received was returned. The purchaser had the use of the money during that period, it is true, but defendant presumably had the use of the land. It is pointed out by defendant that under section 3408 of the Civil Code the court may require the party to whom the relief is granted to make any compensation to the other which justice may require. In this case, the judgment required plaintiff to reimburse defendant for taxes paid, with interest thereon. This was, we think, all that might reasonably be demanded. Between the time of the original sale in 1885 and the cancellation in 1903, defendant had the use of the purchase money paid by the Fibre Company, which it later returned without interest. The equities seem to be fairly well balanced.

We have not attempted in this opinion to discuss all of the complex factual situations set forth in the briefs, but we have examined them all, and find ourselves in agreement with the trial court on each issue.

The judgment is affirmed.

214 Cal. 105

TURNER v. TJENSVOLD et al.
S. F. 13496.

Supreme Court of California.
Oct. 16, 1931.

Fraudulent conveyances §297.

In action to avoid deeds, evidence supported finding that grantor was not insolvent at date of their execution (Civ. Code, § 3442).

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by M. C. Turner, as trustee of the estate of Gabriel Tjensvold, bankrupt, against Paul F. Tjensvold and another. From a judgment for the named defendant, plaintiff appeals.

Affirmed.

L. L. Steele, of Oakland, for appellant.

H. S. Henlon, of Oakland, for respondent.

CURTIS, J.

Action brought by the plaintiff as trustee of the estate of Gabriel Tjensvold, bankrupt, against Paul F. Tjensvold, and the Berkeley Thousand Oaks Realty Company, to set aside and to have declared null and void two certain deeds, one a quitclaim deed made by said bankrupt to the defendant, a son of said bankrupt, and the other a grant deed made to said defendant, Tjensvold, by said realty company, and further to direct the Berkeley Thousand Oaks Realty Company to execute a grant deed to plaintiff to the real property described in said quitclaim and grant deeds. The defendant company entered its appearance in the action and by answer disclaimed any interest in the action, and attached to its answer a deed to said real property in favor of the plaintiff to be delivered to the plaintiff in the event the court should find plaintiff entitled thereto. The defendant Tjensvold by his answer admitted the bankruptcy of said Gabriel Tjensvold, the appointment of plaintiff as trustee of the estate of the bankrupt, the execution of said quitclaim and grant deeds, but denied that the said Gabriel Tjens-

vold was insolvent at the date of the execution and delivery of either of said deeds, and further alleged that said quitclaim and grant deeds were not executed for the purpose of hindering, delaying, or defrauding the creditors of the said Gabriel Tjensvold, but because the said Gabriel Tjensvold had announced his intention of discontinuing making payments upon the aforesaid property, and that the grandmother of the said defendant had agreed to and did make the balance of the payments on account of said property for the use and benefit of the said defendant. The case was tried by the court without a jury. The trial court made findings and rendered judgment in favor of the defendant Tjensvold, and the plaintiff has appealed from this judgment.

It is now contended by the plaintiff on this appeal that the quitclaim deed was executed without consideration and at the date thereof the said Gabriel Tjensvold was insolvent. Therefore, the plaintiff contends that the deed is void under the terms and provisions of section 3442 of the Civil Code. It is admitted by the respondent that no consideration was paid for the deed. The quitclaim deed was executed and delivered on March 18, 1926. As to the insolvency of said Gabriel Tjensvold at the date of the execution of said deed, the trial court found that he was not insolvent at said date, but that he was then "engaged in a successful contracting and building business, had an established credit and maintained a bank account and was able to pay all obligations up to the month of November, 1926, when he met with an accident which impaired his health and subsequent thereto his business suffered and he became financially involved."

The only evidence introduced by the plaintiff in support of the allegations of his complaint to the effect that said Gabriel Tjensvold was insolvent was the testimony of the said Gabriel Tjensvold. He admitted certain indebtedness set forth in his petition in bankruptcy, the major portion of which was owed to creditors residing in Canada, where the said Gabriel Tjensvold resided before coming to this state. He testified, however, that at the date of the execution of the deeds referred to above, his property in Canada exceeded in value the amount of these debts and at that time his business was prospering, and he

had adequate means to meet all of his indebtedness. In this state of the evidence we cannot say that it is insufficient to support the finding as to the solvency of said Gabriel Tjensvold.

It might be well to here state the sequence of events which led up to the execution and delivery of these two deeds. We take these facts from the findings of the court, and there is no claim by the plaintiff that they are not supported by substantial evidence. On December 30, 1922, Gabriel Tjensvold entered into the contract for the purchase of the real property involved herein. He discontinued payments under the contract in November, 1923, for the reasons already stated. In April, 1924, Lydia Fockler, the grandmother of the defendant Paul F. Tjensvold, agreed to make all future payments on said contract for the benefit of said defendant provided the contract was assigned to him, which was done in April, 1925. The amounts called for in the contract were paid in full under this agreement by the said Lydia Fockler. Thereupon on February 23, 1926, the Berkeley Thousand Oaks Realty Company executed and delivered its grant, bargain, and sale deed to defendant, Tjensvold. Thereafter and on March 18, 1926, and at the request of the Oakland Title & Guaranty Company, and for the purpose of correcting any possible defect in the title to said real property, the said Gabriel Tjensvold executed and delivered to his son, the defendant Tjensvold, said quitclaim deed, which had been prepared and presented to said Gabriel Tjensvold for execution by the said title company.

In view of these facts we think it unnecessary to discuss the points of law raised by the appellant both in his opening and reply briefs. The principles of law are no doubt correctly stated by the plaintiff, but in view of the findings of the court, they are not applicable to the facts in this case. The only real point involved in the case as it is presented on appeal is the sufficiency of the evidence to support the findings. In our opinion, the evidence meets this requirement.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.

116 Cal.App. 258

SHANNON v. FLEISHHACKER et al.

S. F. 14443.

Supreme Court of California.

Oct. 23, 1931.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

On hearing by Supreme Court.

Denied.

For former opinion, see 2 P.(2d) 835.

Everette C. McKeage, of San Francisco, for appellant.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, for respondents.

PER CURIAM.

In denying a hearing in this case, we withhold our approval of that part of the opinion which deals with the meaning and effect of the Child Labor Law (Deering's General Laws 1923, Act 3625) and of the Compulsory Education Law (Deering's General Laws 1923, Act 7487).

The petition for a hearing is denied.

214 Cal. 99

SCILINI v. SCILINI.

S. F. 13452.

Supreme Court of California.

Oct. 16, 1931.

1. Divorce ⇨303(3).

Any effect of minute order purporting to modify interlocutory divorce decree was superseded by subsequent written order modifying final decree as to child's custody.

2. Divorce ⇨303(3).

Modification of divorce decree to give father custody of child only on Sunday afternoons *held* not abuse of discretion (Civ. Code, § 246).

The original decree gave father the right to visit the child and take him to places of amusement at all reasonable times.

3. Divorce ⇨303(3).

That modification of divorce decree giving father right to child's custody at times on which parties might agree might result in further litigation *held* no ground for reversal.

4. Appeal and error ⇨714(5).

Mere printing of minute order and affidavit in appendix to appellant's brief did not make them part of record on appeal.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Angelo Scilini against Mary L. Scilini. From an order modifying final decree of divorce, defendant appeals.

Affirmed.

A. J. Stebenne, of Redwood City, for appellant.

Joseph J. Bullock, of Redwood City, for respondent.

CURTIS, J.

The parties hereto were granted an interlocutory decree of divorce on the 23d day of January, 1926. The decree was granted on the cross-complaint of the defendant, which charged cruelty on behalf of the husband, the plaintiff. By the decree the care, custody, and control of the minor child of the parties, a boy then about sixteen months old, was awarded to the defendant, the mother, "until the further order of this court, and the right is given to plaintiff to visit said minor child at all reasonable times, and at all reasonable times to take him to places of amusement." The decree further provided that the plaintiff should pay to the defendant the sum of \$75 per month for the support of herself and said minor child. On January 31, 1927, a final decree of divorce was made by the court, which contained the same provisions respecting the care, custody, control, and support of the minor child as did the interlocutory decree.

[1] From the record before us it is apparent that many disagreements and controversies arose between the parties regarding the rights of the plaintiff under said decree to visit and have the custody of said minor. The plaintiff made frequent applications to the court for a modification of this decree. All of these applications, made prior to December 19, 1928, with one exception when the court permitted the plaintiff to take the minor child for a week's visit to Hollister, were either denied by the court or withdrawn before any action was taken thereon. On December 19, 1928, plaintiff filed an application for a modification of both the final and interlocutory decrees respecting the care and custody of the minor child, and also regarding its support. With this application the plaintiff filed a supporting affidavit by himself to which the defendant filed a counter affidavit. The application came on for hearing before the court on December 22, 1928. At that time the court made a minute order

purporting to modify the interlocutory decree of divorce, and submitted for decision the application for modification of the final decree. On January 9th following, the trial court filed and entered a formal written order modifying the final decree of divorce. From this order of January 9th the defendant has taken this appeal. No appeal was taken from the minute order of the court modifying the interlocutory decree. Whatever may have been the effect of this minute order, we think it was superseded and nullified by the subsequent written order of the court of January 9th modifying the final decree of divorce and fixing and determining the rights of the parties to the care, custody, control, and support of said minor child.

The pertinent portions of said last-named order read as follows:

"Wherefore, by reason of said findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed that said final decree of divorce be and the same is hereby modified.

"In regard to the care, custody and support of said minor child, Angelo Joseph Scilini, to read as follows, viz.:—the care, custody and support of said minor child, Angelo Joseph Scilini, until the further order of this court be and is hereby awarded to both plaintiff and defendant. The plaintiff to pay defendant the sum of twenty-five (\$25) dollars per month for the support and maintenance of said minor child while said child is in her care, and until the further order of this court.

"Plaintiff to have the custody of said minor child each and every Sunday afternoon from two (2) o'clock P. M., until sundown, and upon such other days each week as said parties may agree, failing to so agree, the court upon application of either party will determine such time."

While the intent and meaning of this order respecting the care and custody of said minor is not entirely clear, we construe it to be that the plaintiff, the father of said minor, was to have the care and custody of said minor "each and every Sunday afternoon from two (2) o'clock P. M. until sundown, and upon such other days each week as said parties may agree," and that the defendant, the mother, should have its care and custody all of the balance of the time. Respondent, the father, concedes that the construction we have given to this portion of the decree as modified is the correct one. It is not clear just what the position of the appellant, the mother, is in respect to the meaning of this decree in its modified form. Surely she could not ask for a more favorable construction of this provision of the decree than that which we have given to it. If her fears are occasioned by the terms of the minute order modifying the interlocutory decree respecting the care, custody, and control of the minor, they are un-

founded, as we have held that the minute order is superseded and was rendered ineffective by the formal written order modifying the final decree of divorce.

As we view the original final decree and the final decree as modified, we are unable to say that the latter is more favorable to the plaintiff than the former. By the original decree the plaintiff, or father, was given the right to visit the minor child and take him to places of amusement at all reasonable times. By the modified decree his rights to the custody of the minor are restricted to Sunday afternoon of each week between 2 o'clock and sundown. The exercise of any further right to the custody of the minor by the father can only be had with the consent of the defendant. It is true the court reserved the right to determine the time when the plaintiff might have the custody of the minor in addition to Sunday afternoon in case the parties failed to so agree, but this right the court would have had even without such a reservation.

[2] It is not an easy matter to determine just what is the position or claim of the appellant, the mother, on this appeal. She cites section 246 of the Civil Code, which prescribes the general rules to be followed by the court in awarding the custody of minors, and intimates that the same were not followed by the court in its order appealed from. Among other things, it is there provided that, "other things being equal, if the child is of tender years, it should be given to the mother." As we have seen in all of the decrees and orders made by the court respecting the care and custody of said minor, the court awarded the child to the mother. A further provision contained in said section of the Code is that in awarding the custody of a minor child the court should be governed "by what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare." It does not appear that this provision of the Code section was in any way violated by the trial court when it modified the terms of the final decree, so that the father, instead of being given the right to visit the child and take him to places of amusement at all reasonable times, was awarded the custody of the child only on Sunday afternoon of each week. It has not been made clear to us that there was anything more detrimental to the best interest of the child for the father to have its custody Sunday afternoon than on any other days, morning or afternoon.

There is an intimation in defendant's brief that the court abused its discretion in permitting the father to have the custody of the child for any period of time whatever. In this connection it is stated in her brief that the court erred in failing to consider as conclusive the testimony given in the affidavits

of appellant, Dr. Blood, and Mrs. Mangini, appellant's mother, regarding the health of the child and the mother's ability to care for it. Conceding that this testimony is undisputed, we do not think that the order made by the court modifying the final decree was to any material extent inconsistent with this testimony. While defendant was opposed to the father visiting the child or having the custody at any time, yet this right was given to the father in the original final decree, and defendant made no application to have the terms of the decree modified. She simply resisted the father's attempt to have his right to the custody of the child enlarged over those imposed by the final decree. She and her witnesses above mentioned gave evidence by affidavits to the effect that it was not for the best interest of the child, considering its state of health, that the father should have its care and custody, and, furthermore, that when the child was with its father the latter gave it food and other things to eat which impaired its health. With this testimony before the court, it refused to modify the terms of the decree as requested by the father, and limited the time when he might see or have the custody of the child to one afternoon of each week. We find nothing in these acts of the court which would justify the conclusion that the court abused its discretion.

[3] Defendant further contends that the decree as modified is indefinite and uncertain and will result in further litigation between the parties. We have held that the order modifying the final decree is not as clear as it might have been made, still its terms are susceptible of construction, and we have given it what we deem to be a fair and reasonable interpretation. That it will result in further litigation is apparent unless the parties thereto agree between themselves as to the times when the father may have the custody of the child other than on Sunday afternoon of each week. This is not ground for reversing the judgment. The trial judge undoubtedly thought he would give the parties one more opportunity to reach an amicable agreement regarding the times when the father might have the child with him. In case they failed in this respect, the court would act in the matter.

[4] We have considered the minute order of December 22, 1928, and the affidavit of Dr. Blood as if they were legally a part of the

record in this case, when in fact they are not. Neither of them is set forth or referred to in the transcript on appeal. They were printed in the appendix to appellant's brief, but the mere printing of them in such appendix does not make them a part of the record on appeal, or give to the court any right to consider them in passing upon the merits of the appeal.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

Orville B. COCKERILL, Petitioner, v. The
STATE BAR OF CALIFORNIA,
Respondent.

L. A. 12664.

Supreme Court of California.
Oct. 26, 1931.

In Bank.

Application to review an order of the Committee of Bar Examiners of the State Bar of California denying application for admission to the bar.

Leonard E. Thomas, of Los Angeles, for petitioner.

Thomas C. Ridgway and Philbrick McCoy, both of Los Angeles, for respondent.

WASTE, C. J.

For the purpose of correcting clerical error, the opinion of this court appearing in 298 P. 807, is amended by striking out the words "Board of Governors" in the nineteenth line from the bottom of page 807, col. 2, and inserting in lieu thereof the words "Committee of Bar Examiners"; and by striking out of the seventh line of the opinion, on the same column and page, the words "Board of Governors," and inserting in lieu thereof the words "Committee of Bar Examiners"; and by striking out of the eleventh line from top of page 808, col. 1, the word "to" and substituting therefor the word "by."

117 Cal.App. 404

RISING et ux. v. VEATCH.

Civ. 7590.

District Court of Appeal, First District, Division 2, California.

Oct. 7, 1931.

1. Trial ⇨133(6).

In malpractice action, giving testimony which mentioned insurance carried by defendant *held* prejudicial error, notwithstanding instructions to disregard.

Testimony relating to insurance was prejudicial error which could not be cured by the court's action in striking it out and admonishing the jury to disregard it, notwithstanding the claim that the question which elicited the answer complained of was put to elicit an admission of liability, since the question was put to counsel's own client, and counsel either knew or should have known the answer to be expected, and the answer as given contained no admission of liability.

2. Physicians and surgeons ⇨18(10).

In malpractice action, based on dentist's failure to take steps to treat patient after being informed through nurse of patient's condition, instruction that, if nurse had actual or ostensible authority to receive messages for dentist, dentist would be bound by message to nurse, *held* proper.

3. Physicians and surgeons ⇨14(4).

Dentist is held to reasonable degree of skill and learning generally possessed by dentists in same locality, and to reasonable skill in applying learning.

4. Evidence ⇨512.

Ordinarily, prevailing standard of skill and learning in locality and propriety of particular conduct of practitioner are questions requiring expert testimony.

5. Physicians and surgeons ⇨18(8).

Only where propriety of practitioner's treatment is matter of common knowledge or ascertainable by nonexpert's senses is expert testimony unnecessary.

6. Physicians and surgeons ⇨18(8).

In malpractice action, whether dentist, who had removed patient's impacted tooth, on being informed that patient's jaw was swollen and lower jaw and neck were discolored, should have diagnosed condition as needing further or different treatment from home treatment already prescribed, was question requiring expert testimony.

7. Physicians and surgeons ⇨18(8).

In malpractice action, whether dentist, who had removed patient's impacted tooth, on being informed of patient's swollen jaw and discolored lower jaw and neck, had positive duty to visit patient in her home, was question requiring expert testimony.

8. Physicians and surgeons ⇨15.

Mistake in diagnosis renders dentist liable only when caused by failure to exercise ordinary care, diligence, and skill.

9. Physicians and surgeons ⇨18(9).

In malpractice action, based on dentist's failure to take steps to treat patient, whose impacted tooth he had previously removed, after being informed of patient's condition, evidence of contributory negligence *held* for jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Stanley Rising and wife against Henry Veatch. Judgment for plaintiffs, and defendant appeals.

Reversed.

Hadsell, Sweet & Ingalls and Redman, Alexander & Bacon, all of San Francisco, for appellant.

Albert J. O'Brien and D. J. O'Brien, Jr., both of San Francisco, for respondents.

DOOLING, Justice pro tem.

[1] In this action for malpractice respondents recovered judgment against appellant, a dentist. The case was tried before a jury. In the course of the examination of respondent, Ethel Rising, she was asked by her counsel to relate a certain conversation with appellant. Over repeated objections of appellant's counsel, the following testimony was given: "In regard to reimbursing us for the doctor bills— * * * Reimburse us for the expenses of the doctors; that it was out of his hands, and would have to be handled through his insurance."

Counsel for appellant immediately assigned the asking of the question and the answer as prejudicial misconduct that could not be cured by admonition, and asked the court to declare a mistrial. The court refused to declare a mistrial, but struck out the offending answer and admonished the jury to disregard it. The whole proceeding so closely paralleled the similar proceeding in *Squires v. Riffe* (Cal. Sup.) 295 P. 517, that the one might have been modeled upon the other. The courts have so frequently, and in the strongest terms, condemned the eliciting of

evidence concerning insurance against liability carried by defendants that no excuse can be conceived for counsel bringing it out, and the practice is so recurrent as to call for the sternest measures by both trial and appellate courts whenever it occurs.

Counsel for respondents cite *Lahti v. McMenamin*, 204 Cal. 415, 268 P. 644, and claim that the purpose of the question was in good faith to elicit an admission of liability. But the question which elicited the answer complained of was put to counsel's own client, and counsel either knew, or should have known, the answer to be expected. The answer as given contained no admission of liability, and was admissible on no conceivable ground. That there was in fact no admission seems clear from what immediately followed when the court turned to the witness and asked: "That is the complete answer is it?" to which the witness replied: "As near as I can remember it."

Without reflecting on the good faith of counsel, we must hold under the authority of *Squires v. Riffe*, *supra*, that the giving of the testimony complained of was prejudicial error which could not be cured by the action of the court in striking it out and admonishing the jury to disregard it.

While this conclusion necessitates a reversal, certain other points are made which should be determined for the guidance of the court upon a second trial. The facts of the case are that appellant in his office removed an impacted tooth from the mouth of respondent Ethel Rising. He gave her some medicine to use at home, and instructed her to return to his office the next day. Upon the next day the patient's jaw was swollen and her lower jaw and neck discolored, and she remained in bed. Her husband called at appellant's office, and finding appellant out, related the condition of his wife to appellant's nurse, and suggested that appellant call at her home to see the patient. The following day, the patient's condition being much the same, the husband repeated his call at appellant's office, again found appellant absent, and had a similar conversation with the nurse. Thereafter, the patient's condition becoming more aggravated, her husband made several unsuccessful efforts to reach appellant by telephone, but did not again call at his office. Finally a physician was called in and found the patient suffering from an infection which had its beginning in the wound in the mouth from which the tooth had been removed and had spread to the neck and shoulder. The treatment of this infection was prolonged and painful before a cure was effected.

[2] It is not claimed that the original operation was negligently or improperly performed, or that the after-treatment originally prescribed was not proper, the gist of the action being based upon the claim that, after

being informed through his nurse of the patient's condition, appellant failed to take any steps to care for or treat her.

From the testimony of appellant and his nurse it would appear that the symptoms of the patient as described by the husband to the nurse were never related by the nurse to the doctor. However, the jury were properly instructed that, if the nurse had actual or ostensible authority to receive messages for appellant, appellant would be bound by the message as given to the nurse. Treating the case then as one in which the husband's message had been delivered to the doctor verbatim, was the evidence sufficient to support a verdict against appellant?

The facts have not their pattern in any decided case that has been called to our attention, but the rules of law applicable to them are simple and well settled.

[3-5] A dentist, like a physician, is held in the practice of his profession to that reasonable degree of skill and learning generally possessed by others of his profession in the same locality, and to the exercise of reasonable and ordinary skill in the application of that learning. *Nelson v. Parker*, 104 Cal. App. 770, 286 P. 1078. Ordinarily, proof of the prevailing standard of skill and learning in the locality, and proof on the question of the propriety of particular conduct by the practitioner in particular instances, is not a matter of general knowledge, and can only be supplied by expert testimony. *Patterson v. Marcus*, 203 Cal. 550, 553, 265 P. 222. Only in those instances where the question of the propriety of the treatment may be said to be so well known or simple as to be matter of common knowledge, or the matter is of such a nature as may be ascertained by the ordinary use of the senses of a nonexpert, does expert testimony become unnecessary. *Barham v. Widing*, 210 Cal. 206, 291 P. 173; *Nelson v. Parker*, *supra*.

[6-8] In this case the only testimony of an expert at all calculated to throw light on the propriety of appellant's conduct was that of a physician, Dr. Ottinger, who was asked whether a woman who had had an impacted tooth extracted and who on the following day and the day after had a swelling in her jaw and a discoloration of the lower jaw and neck, finally extending to the shoulder, should have had medical treatment. To this question the witness replied: "Yes, she should have had something."

As we view it, the case in this phase presents two questions: (1) Having in view the prevailing standard of skill and learning of dentists in the same locality, in the exercise of ordinary care should appellant, upon being informed that his patient's jaw was swollen and her lower jaw and neck discolored, have from that information diagnosed the condition as one needing further or different treatment from that which he had already

prescribed for use at home by the patient? and (2) Was there, in view of the prevailing standard of practice among dentists in the locality, any positive duty upon appellant to visit the patient in her home? We cannot close our eyes in the consideration of the second question to the fact that dentists are primarily office practitioners, and that it is the common practice at least for them to treat patients in the office and not elsewhere. On neither of these questions was any expert testimony given. Nor in our judgment are they questions upon which a layman could properly form an opinion. On the first question, for aught that appears from the testimony, a dentist of the prevailing skill and learning of dentists generally in the community might in the exercise of ordinary care have concluded that the treatment which he had already prescribed was sufficient to meet the conditions described by the husband to the nurse. "A physician is not held to a higher degree of responsibility in making a diagnosis than in prescribing treatment. See *Brewer v. Ring*, 177 N. C. 476, 99 S. E. 358, 364. When due care, diligence, judgment, and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. *Jaeger v. Stratton*, 170 Wis. 579, 176 N. W. 61. A mistake in diagnosis in the present case was alleged and proved, and is conceded to have taken place. But it was not only necessary for the plaintiffs to prove such mistake, but also that the mistake was due to failure to exercise ordinary care, diligence, and skill in making the diagnosis. *Schumacher v. Murray Hospital*, 58 Mont. 447, 193 P. 397, 403. Mere proof that the diagnosis was wrong would not support a verdict. *Edwards v. Uland*, 193 Ind. 376, 140 N. E. 546, 548. * * * As to what is or is not the proper practice is uniformly a question for experts, and can be established only by their testimony." *Patterson v. Marcus*, 203 Cal. 550, 552-553, 265 P. 222, 223.

We conclude that, in the absence of expert testimony as to the usual standards of skill and learning of dentists in the same locality, and the propriety or impropriety of appellant's conduct judged by those standards in the face of the information conveyed by the husband to the nurse, the verdict is without support in the evidence.

[9] The question of the contributory negligence of respondents on the facts proved was, in our opinion, properly left to the jury. Certain instructions complained of which were given because of a misconception by the trial judge of the issues and the evidence are not likely to be repeated.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

GARRETT et al. v. SWANTON et al. *
Civ. 8087.

District Court of Appeal, First District, Division 2, California.

Oct. 5, 1931.

Rehearing Denied Nov. 4, 1931. Hearing Granted by Supreme Court Dec. 3, 1931.

1. Municipal corporations ⇨864(4).

Contract for constructing water system payable solely from income of system *held* not violative of constitutional provision limiting indebtedness (Const. art. 11, § 18).

The agreement involved provided that machinery and material required for power plant and water system would be furnished for specified sum, payable in sixty monthly installments, and that obligation to pay installments should be special obligation payable solely from water development fund, municipality to maintain rates for product or service to provide for such payments so far as it might be permitted to do so by law, and that ownership of machinery and structures would remain with company until all installments were paid. In event of breach of agreement by municipality, company was given right to repossess machinery, material, and structures, and to keep all installments paid for rental thereof.

2. Municipal corporations ⇨225(1).

Contract for sale of water system machinery, and material, reserving title in seller, *held* not invalid as pledging city property (Charter of City of Santa Cruz, § 212).

There was no hypothecation or pledging of city's property, because city did not own machinery, material, and structures installed under contract and would not own them until full amount of contract price was paid.

3. Municipal corporations ⇨225(1).

Contract for sale of machinery and material for water system, reserving title in seller, *held* not invalid as incumbering or hypothecating income of entire system.

4. Municipal corporations ⇨864(4).

Contract obligating city to maintain water rates to provide for payment of water system *held* not to create liability of city within constitutional debt limitation provision (Const. art. 11, § 18).

5. Municipal corporations ⇨237.

Notice calling for bids for water system equipment and material permitting bidders to state terms of purchase and payment *held* not

violative of charter (Charter of City of Santa Cruz, § 192).

Charter of City of Santa Cruz, § 192, provides that where work to be done exceeds \$500, it shall be let to lowest bidder after advertisement for sealed proposals and that notice shall specifically state the work to be done. The notice set forth in exhibit of the complaint complies with the requirements of such section, in that it specifically sets forth the work to be done.

Appeal from Superior Court, Santa Cruz County; H. G. Jorgensen, Judge.

Action by J. H. Garrett and others against F. W. Swanton, individually, and as Mayor and Member of the Council of the City of Santa Cruz, and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Maurice J. Rankin, of San Jose, and J. L. Johnston, of Santa Cruz, for appellants.

John H. Leonard, City Atty., of Santa Cruz, and Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for respondents Swanton and others.

Carey & Gorfinkel, and Maurice R. Carey, all of San Francisco, for respondent Fairbanks, Morse & Co.

JAMISON, Justice pro tem.

This action was brought by plaintiffs, as residents and taxpayers of the city of Santa Cruz, against defendants to cancel an agreement entered into between the city of Santa Cruz and Fairbanks, Morse & Co., a corporation, for the construction of a water system and power plant for the purpose of furnishing water and generating electricity for the use of said city, to recover for said city from defendants the sum of \$30,000 which defendants had theretofore caused to be paid from the funds of said city to Fairbanks, Morse & Co. under the said agreement and to enjoin defendants from further proceeding or paying any more money under said agreement.

Defendants' demurrers to plaintiffs' complaint were sustained upon the ground that it did not state facts sufficient to constitute a cause of action and that it could not be amended so to do. Judgment was thereupon rendered in favor of defendants, and from this judgment plaintiffs have appealed.

[1] Appellants contend that the said agreement which is annexed to and made a part of the complaint is invalid and void because it is in violation of section 18 of article 11 of the Constitution of this state, which provides: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or

for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." The said agreement provided that Fairbanks, Morse & Co. would furnish the necessary machinery and material called for by the contract for the sum of \$152,960, less an allowance of \$9,000 for old equipment, to be paid in sixty monthly installments commencing on September 1, 1928, and continuing on the first of each succeeding month until paid in full. The agreement further provided that the obligation to pay the said installments is not a general obligation of the municipality payable from taxes or its general funds, but a special obligation payable from the water development fund; the municipality to maintain rates for the product or service which will provide for said payments so far as it may be permitted to do so by law. The ownership of the machinery and structures to remain with said company, and until all installments are paid, in the event of a breach of the agreement by the municipality the company is given the right to repossess said machinery, material, and structures and in that event the company shall keep any and all installments paid as and for rental thereof.

Appellants allege in their complaint that including the obligation incurred pursuant to said agreement the expenditures of the said city of Santa Cruz for the fiscal year from July 1, 1927, to July 1, 1928, will exceed the income and revenue for that year and that no assent therefor by a vote of two-thirds of the qualified electors of said city has been had.

Appellants take the position that when the said agreement was entered into on May 14, 1927, that it created an immediate liability, within the meaning of the said constitutional provision, for the full amount of the contract price, namely, \$152,960, even though the payments were to be made in installments during a period of five years thereafter, and cites in support thereof the following cases: *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925; *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, and *Mahoney v. San Francisco*, 201 Cal. 248, 257 P. 49. As pointed out in these cases, there is a clear line distinguishing them from *McBean v. Fresno*, 112 Cal. 159, 44 P. 358, 361, 31 L. R. A. 794, 53 Am. St. Rep. 191; *Smilie v. Fresno County*, 112 Cal. 311, 44 P. 556; and *Doland v. Clark*, 143 Cal. 176, 76 P. 958, which held that where the debt was spread over a period of years it did not constitute an immediate liability. But the last-named cases involved contracts for furnishing to the city in the future, services, materials, etc., and in each of these cases no indebtedness or liability was incurred until the consideration was furnished for which payment was to be made. As was said in the case of *McBean v. Fresno*,

supra, "no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed."

In the case under consideration the contract does not provide that the work shall extend over the period of five years called for by the said contract, nor that the installments shall be paid for each year for the work performed in that year. Therefore, if the debt provided for by the said contract was payable from the ordinary revenue and income of the city of Santa Cruz it would constitute an immediate liability and would violate the said provision of the Constitution.

Respondents contend that the indebtedness or liability created by said agreement was not payable out of the income and revenue of the municipality derived from direct or indirect taxation, but that it was an indebtedness or liability payable out of a special fund created solely from the income derived from the water system of the said municipality, and that therefore the said agreement does not violate the said constitutional provision. There is abundant authority supporting this contention of respondents, both in the decisions of the Supreme Court of this state and in the courts of last resort of other jurisdictions. Notably among these decisions is that of our own Supreme Court in the case of *Shelton v. City of Los Angeles*, 206 Cal. 544, 275 P. 421, 423. In this case the court said: "The money used and proposed to be used in the purchase of the lot of ground and the erection of the building was not to be taken from the ordinary revenues of the city, and to that extent it may be said that the city's credit was not involved in the incurring of the indebtedness," and quotes with approval the case of *Mesmer v. Board etc.*, 23 Cal. App. 578, 138 P. 935, where the same rule is announced, and cites numerous cases from other jurisdictions upholding this principle, in addition to which we cite the following: *McClain v. Regents of University*, 124 Or. 629, 265 P. 412; *State, etc., v. Clausen*, 134 Wash. 196, 235 P. 364; *Fox v. Bicknell et al.*, 193 Ind. 537, 141 N. E. 222; *Kasch v. Miller*, 104 Ohio St. 281, 135 N. E. 813; *Barnes v. Lehi City*, 74 Utah, 321, 279 P. 878.

Appellant relies upon the cases of *Chester v. Carmichael*, 187 Cal. 287, 201 P. 925, 926; *City and County of San Francisco v. Boyle*, 195 Cal. 426, 233 P. 965, and *Feil v. City of Coeur d'Alene*, 23 Idaho, 32, 129 P. 643, 43 L. R. A. (N. S.) 1095, in support of his contention that the said agreement violates the said constitutional provision; but in the case of *Shelton v. City of Los Angeles*, supra, the court said that these cases were not in point for the reason that they involved indebtedness or obligations of the municipalities concerned in the litigation which were intended to be satis-

fied out of revenues derived by such cities from the exercise of the power of taxation.

The same is true of the cases of *Mahoney v. San Francisco*, 201 Cal. 248, 257 P. 49, and *City of Santa Cruz v. Wykes* (C. C. A.) 202 F. 357, also relied upon by appellant.

It was expressly agreed in the contract between the city of Santa Cruz and Fairbanks, Morse & Co. that the obligation to pay said installments was not a general obligation of said city payable from the taxes or its general fund, but only a special obligation payable from its water development fund, which fund was established by resolution No. 2215 of said city in accordance with the provision of section 1 of ordinance No. 1287 of said city. In *Butler v. City of Ashland*, 113 Or. 174, 232 P. 655, the court said: "The authorities are well-nigh unanimous that, where a contract creating an indebtedness provides for a special fund with which to meet the indebtedness as the same accrues, and no general liability is thereby created against the municipality such an indebtedness is not within the constitutional inhibition against creating a debt in excess of a fixed amount." *Griffin v. Tacoma*, 49 Wash. 524, 95 P. 1107, 1110; *Winston v. City of Spokane*, 12 Wash. 524, 41 P. 888.

We are of the opinion that the said contract was not in violation of the said provision of the Constitution.

[2, 3] The next contention of appellants is that the said contract violates section 212 of the charter of the city of Santa Cruz. Section 212 provides: "The council shall never sell, lease, assign, convey, mortgage or hypothecate the water system, or any part thereof, or the rents or income therefrom, unless authorized so to do by vote of the people." They assert that when this water system under the contract was installed it became a part of the general water system of the city, that by the terms of the contract the material, machinery, and structures so installed were pledged as security for the payment of the remainder of the purchase price subject to forfeiture and loss to the city should the purchase price not be paid, and in support of this contention they cite *Chester v. Carmichael*, supra. In that case the city of Sacramento had become the owner of the property. There was no special fund from which to pay the cost entailed upon the city by reason of the ownership thereof. As a condition for the transfer of the property to the city it was required to expend a minimum sum of \$5,000 annually and in the event of its failure to do so it would forfeit said property. In that case the court said: "Notwithstanding the absence of any liability for damages for failure to perform, and the fact that the obligation could not be specifically enforced, there was an obligation in favor of and for the benefit of the grantors, involving

the expenditure in a certain way, and for specified purposes, of future revenues of the city, accompanied by what was in substance a pledge of the property conveyed as security for its performance." In that case the city of Sacramento owned the property which the court held to be pledged, while in the case under consideration the city of Santa Cruz did not own the machinery, material, and structures installed under said contract, and will not own it until the full amount of the contract price has been paid. The city could not hypothecate or pledge property which it did not own or to which it had no title. Appellants also claim that the said contract incumbers or hypothecates the income of the entire water system of the city of Santa Cruz. Section 1 of Ordinance No. 1287 of said city provides that "the rents, incomes and receipts from the water system of said city shall be used solely and exclusively for the operation, maintenance, construction, improvement, extension, enlargement and upkeep thereof and for the payment and liquidation of the principal and interest of any bonded indebtedness now existing or which may be hereafter created for the operation, maintenance, construction, improvement, extension, enlargement or upkeep of said water system."

This ordinance authorized the expenditure of the water system fund for the indebtedness created by the said contract, to wit, expenditure for the improvement, extension, and enlargement thereof, and merely providing, as said contract did, for payment for such extension, improvement, and enlargement out of said fund did not constitute hypothecation of same.

[4] Appellants further claim that in the event that the fund of the waterworks system is insufficient to meet the payments called for by the contract the city would be forced to make the payments from its general fund. In the case of *Shelton v. City of Los Angeles*, supra, the same contention was made, and in disposing of this contention Justice Shenk, who delivered the opinion, said: "It may be conceded that, upon the incurring of the proposed indebtedness, a strong moral obligation, which the city could not well avoid, would rest upon the city council and mayor to approve a schedule of rates theretofore fixed by the board sufficient to discharge the principal and interest as the same might become due. But this obligation or 'liability,' as the latter term is used in the Constitution, is not a financial one, in default of which the city would be required to disburse the general funds of the city or other moneys derived from taxation. The argument that the obligation of the legislative body of the city to safeguard the credit of the city by approving adequate water rates would amount to a 'li-

ability' within the constitutional section is not persuasive."

[5] The final contention of appellants is that the proceedings of the council violated section 192 of the charter of the city of Santa Cruz, in this, that the notice for the work calling for bids permitted the bidders to state the terms of purchase and payment instead of the notice fixing such terms.

Said section 192 provides that where the work to be done exceeds \$500, that sum shall be done by contract and shall be let to the lowest bidder after advertisement for sealed proposal, etc. Such notice shall specifically state the work to be done. The notice set forth in Exhibit C of the complaint complies with the requirements of said section 192, in that it specifically sets forth the work to be done and does not violate any of the provisions of said ordinance by requiring bidders to state terms of purchase and payments. It may be added that section 40 of article XI of the charter of the city of Santa Cruz provides that nothing contained therein should be construed as requiring a vote of the electors on a proposition to acquire any property or expend money, for the purpose of extending or developing any property or plant now owned or operated by the city or which it may acquire in the future.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 372
SOLKO v. JONES.
 Civ. 7690.

District Court of Appeal, First District, Division 1, California.

Oct. 6, 1931.

Rehearing Denied Nov. 5, 1931. Hearing Denied by Supreme Court Dec. 3, 1931.

1. Negligence ☞93(2).

Contributory negligence of husband driving automobile was imputed to wife who was passenger, barring recovery for wife's injuries, notwithstanding husband died shortly after accident.

After accident had occurred, both husband and wife were living, and under established rule the cause of action accrued to the community, which cause of action, by reason of husband's negligence, was destroyed.

2. Husband and wife ☞260.

Chose in action arising from wife's injuries in automobile accident remains property of community.

3. Husband and wife ⇨272(2).

Husband's death serves only to dissolve community and cannot affect character of property acquired or rights vested before death.

4. Automobiles ⇨171(2).

Statute respecting left turn by automobile at intersection includes all intersections, whether at right angles or otherwise (St. 1923, p. 558, § 129).

California Vehicle Act, § 129 (St. 1923, p. 558), provides that one turning to the left at an intersection shall pass beyond the center of such intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.

5. Automobiles ⇨208.

Deceased automobile driver *held* negligent in making left turn at intersection without passing beyond center of such intersection (St. 1923, p. 558, § 129).

6. Automobiles ⇨226(2).

Negligence of deceased automobile driver in making left turn without passing center of intersection contributed proximately to collision (St. 1923, p. 558, § 129).

7. Negligence ⇨97.

Comparative negligence doctrine is not accepted in California.

8. Automobiles ⇨227(3).

Last clear chance doctrine *held* inapplicable in automobile collision at intersection, where plaintiff's car turned into path of approaching car.

9. Negligence ⇨83.

Elements of last clear chance doctrine stated.

The last clear chance rule presupposes plaintiff has been negligent; that as result thereof he is in danger from which he cannot escape by exercising ordinary care; that defendant is aware of such dangerous situation under such circumstances that he realizes, or ought to realize, plaintiff's inability to escape; that defendant then has clear chance to avoid injury by exercise of ordinary care, and fails to do so.

10. Automobiles ⇨245(80).

Negligence ⇨136(30).

In action for death of automobile driver and injuries to passenger in intersection collision, nonsuit *held* properly granted in view of driver's contributory negligence.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Josephine C. Solko, individually and as executrix of the estate of Joseph E. Solko, deceased, against Edward B. Jones, to recover damages for personal injuries and death resulting from an automobile accident. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

William C. Ring, Faucett & Ring and E. B. Drake, all of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

PARKER, Justice pro tem.

Appeal from judgment of dismissal entered upon the granting of defendant's motion for a nonsuit in an action to recover damages for negligence proximately causing personal injuries to plaintiff and the death of her husband. The questions presented are stated by appellant as follows: (1) If a husband is killed and his wife, while his passenger, suffers personal injuries in the same automobile collision wherein the husband is guilty of contributory negligence, does his said contributory negligence bar her recovery for her own personal injuries? (2) Was plaintiff's husband guilty of contributory negligence proximately causing the accident? (3) If so, should the jury here have been permitted to decide whether, as a matter of fact, defendant had the last clear chance of avoiding the injury, and whether he used due care in that behalf? The questions thus presented will be considered in the same order.

[1, 2] 1. It is well established in this state that the contributory negligence of the husband is imputed to his wife, and the wife is consequently barred from any recovery for her injuries. *Basler v. Sacramento Gas & Electric Company*, 158 Cal. 514-518, 111 P. 530, Ann. Cas. 1912A, 642; *Dunbar v. San Francisco-Oakland T. Rys.*, 54 Cal. App. 15, 201 P. 330; *Giorgetti v. Wollaston*, 83 Cal. App. 358, 257 P. 109. In the last-cited case, at page 362 of 83 Cal. App., 257 P. 109, 111, it is said: "A right of action for personal injuries to the wife is community property (citing cases) and though as provided by statute she may sue alone * * * yet if the negligence of her husband proximately contributed to her injuries, the right of either or both to recover is barred." Appellant disputes this statement of the law and argues that, whatever may have been the former rulings, the more recent construction given by the courts to the doctrine of community rights tends to a contrary conclusion. Without detailing appellant's analytical review of the history of community property law in this jurisdiction, we might concede that the tendency of the later statutes and the decisions construing

the same have been to lessen the husband's sole and arbitrary control of the community property, but the older rules as to what constitutes community property have been little altered, and the law remains to the effect that a chose in action such as the one here being considered remains the property of the community. Then, argues appellant, it cannot be disputed that it is a salutary maxim of the law that where the reason falls the law falls. The argument proceeds on the theory that the husband being killed, the community automatically was dissolved; that, therefore, there being no community, whatever right existed in the wife must necessarily be her separate property. And, continuing, it being the theory of the law that the husband's negligence having caused or contributed to the injury of the wife and any damages recoverable therefor being community property, the husband would profit by his own wrong if the wife could recover pecuniary damages, then obviously such theory can find no support in reason if the husband is killed, inasmuch as he cannot profit after his demise. We have thus detailed the contention of appellant on this point, as it seems to be the important feature of the controversy, and for the further reason that appellant has presented a persuasive argument, well reasoned and supported by abundant authority. Yet, there is one material matter that interrupts the mechanical precision of the approach to the argument. The record before us discloses that the husband was not killed in the accident. It is true that he died as a result of injuries sustained in the said accident and that the interval between the injury and death was but a matter of a few hours.

After the accident had occurred and the events comprising the same had terminated, we find both husband and wife living. We find the wife injured as a result of the negligence of defendant and the contributing negligence of the husband. Therefore, under the established rule, we find a cause of action accruing to the community, which cause of action, by reason of the husband's negligence, is barren and to all intents destroyed. The rule cannot be circumvented through a voluntary conveyance of the community interest by the husband, although such a transfer would in effect tend to overcome the reason often set forth as the sole support of the doctrine. When the law declares that the profits arising from the husband's negligence shall not enrich the community, it is tantamount to saying that no profit or gain shall so arise, for the reason that if any profit did arise it could not be other than community property. The effect of the law's imputation is to charge the wife with the negligence of the husband equally with the latter. His death in no degree absolves him from negligence, nor changes the character of his act. That act, if negli-

gent, remains so; and if, when committed, it was by imputation of law the act of the wife, it still remains her act, unchanged in character.

To sustain appellant's contention, we must hold that the right of the wife, her cause of action, arises immediately upon the happening of the event causing her injury, but remains unenforceable and suspended during the life of the husband, but upon his death revives and becomes vested in the wife. While in the instant case the death of the husband followed within a few hours after the accident, the reasoning would have equal force where death resulted within a year. To hold then that for eleven months the wife was chargeable with negligence defeating her cause of action, but that upon the death of the husband she became completely absolved, would bring about a condition not consistent with any theory of law or reason.

[3] Let us suppose a case where an accident happened, due to the unquestioned negligence of the husband contributing with the negligence of a third party; no other questions being involved. The husband receives no injuries at all, but the wife is injured and in dire straits. If the husband then, remorseful over the fact that the condition is at least partially attributable to his negligence, determines self-destruction and executes the plan, we would have a situation compared to the case at bar. The death of the husband, whatever may be the cause, serves only to dissolve the community; it cannot affect the character of property acquired or rights vested prior to his death.

Without further discussion we hold that the death of the husband some few hours after the accident will not suffice to change or abrogate the rule that the negligence of the husband is imputed to the wife. During the hours of his life, after the accident, the husband was in full possession of all of his legal rights; the fruits of inheritance could attach to him as the result of an ancestor predeceasing him within that time; and in all other respects he would be deemed living. Upon his death the community interest of the wife would become vested and she would become the owner of that portion of the community property allotted to her under the law. This claimed cause of action, denied to the community because of the fault of one of the members thereof, was not vested in the wife prior to the death, nor was it vested in the community. Therefore the wife has never acquired it. We are mindful that the rule of this jurisdiction is in some conflict with the weight of authority elsewhere, and we are not called upon to defend the rule, nor do we attempt to justify its reasoning. We accept the rule of the jurisdiction, now so well established. Given the undisputed

doctrine, we simply determine that the facts of the instant case do not bring it without the rule.

[4-6] 2. The next point urged by appellant goes to the question of the husband's negligence, and whether or not the said negligence, if any, was the proximate cause of the accident. The accident in question happened in the county of Los Angeles, the exact location being at or near the intersection of two streets known as Ventura boulevard and Sepulveda boulevard. Ventura boulevard runs in a general easterly and westerly direction, while Sepulveda boulevard runs in a general northerly and southerly direction. The boulevards named intersect but do not intersect at right angles. Without diagraming the locality, it will be visualized by stating that the northwest corner of the intersection would be a short distance westerly from due north of the southwest corner of the intersection.

On the day of the accident plaintiff and her husband were driving easterly on Ventura boulevard, and defendant was driving westerly on the same; plaintiff was on the southerly side of the road and defendant on the northerly. The evidence discloses, at least sufficiently for all purposes here, that defendant was driving at a speed in excess of that fixed by the statute for intersections, and in this respect was guilty of negligence. When the car of plaintiff approached Sepulveda boulevard, it was the intention of the husband, who was driving, to make a left turn to go northerly into Sepulveda. Accordingly, he gave a signal indicating his intention. This was about fifteen feet west of the point where the westerly line of Sepulveda intersects the southerly line of Ventura. The entire record leaves undisputed the fact that the driver of plaintiff's car, for reasons best known then to himself, decided that it would be a rather roundabout way of getting into Sepulveda if he were to drive on to the southerly intersection and make his turn to the right of the center. Accordingly, the undisputed evidence discloses, when he reached this point some fifteen feet westerly from the southerly intersection, he turned his car northerly and directed his course directly toward the northwest corner of the intersection. In doing this he, according to the testimony, darted swiftly across the street and directly into the line of west-going traffic on Ventura, colliding with the car of defendant and causing the accident. The only justification urged for this act by appellant, is that if the driver went to the intersection and then turned properly around the center point, he would to some extent be retracing his course. Upon analysis, appellant's argument in this behalf is to the effect that it was easier and more direct to make the crossing direct than it was to make it in compliance with the statute. We do not deem it neces-

sary to review the entire law of negligence as each case arises.

The statute (California Vehicle Act [St. 1923, p. 558] § 129) applicable at the time provides, among other things, that one turning to the left at an intersection shall pass beyond the center of such intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. And the statute further provides as follows: "For the purposes of this section the center of such intersection shall mean the meeting point of the medial lines of the highways intersecting each other." The intent of the Legislature is plain. No matter at what angle two streets intersect, the definition given locates and determines the center, and the phrasing of the statute clearly indicates that the Legislature intended to include all intersections, whether at right angles or otherwise. Appellant faintly argues the custom. It is, however, but argument. The record discloses nothing supporting the argument that it was customary for traffic to violate the law, nor does it disclose that this custom, inferentially created through the physical peculiarities of the ground, was known to defendant or that the circumstances shown to exist could charge him with a knowledge thereof. *Reinders v. Olsen*, 60 Cal. App. at page 771, 214 P. 268. The facts incontrovertibly show negligence on the part of the said driver of plaintiff's car. It is needless to repeat that the said driver was the husband of plaintiff. It clearly appears that the driver was guilty of negligence. The turning of his automobile, as he did, directly and suddenly across the street immediately in front of defendant's on-coming automobile, was an act of rashness, which even in the absence of the statute constituted gross negligence and an utter disregard for the safety of himself, the plaintiff, or the defendant. That this negligence contributed proximately to the accident cannot be gainsaid. *Cook v. Miller*, 175 Cal. 497, 166 P. 316, 317, seems clearly to cover the instant case. There it was found that both parties to the accident were at the time violating the law. The court says: "The defendant was under no necessity of 'cutting across the corner.' The ordinance required him to go around to the right of the intersection, and it was legal negligence for him to do otherwise under the circumstances. [Citing cases.] The plaintiff was also violating the ordinance in swerving to the right to pass the laundry wagon instead of to the left. * * * If he had not passed to the right of the wagon he would not have struck the automobile. So, also, if the defendant had turned the corner by going to the right of the intersection, his automobile would not have been struck. * * * The disobedience of the ordinance by both of them brought on this accident. It was the result of their concurrent negligence, the negligence

of each was a proximate cause, and each contributed to the injury."

[7-9] 3. Finally, appellant urges the law of the last clear chance. There seems to be much confusion regarding the application of this doctrine. By quoting excerpts from decisions and shaping up facts to meet these fragmentary statements, there is being developed or there is an effort being made to develop a rule, the true effect of which will be to substitute the rule of comparable or comparative negligence for the rule of last clear chance. Such was never the intent of the courts. In our own state we have declined to accept the comparative negligence idea and as often as it has been offered for approval it has been rejected.

The facts of the instant case do not invoke the application of the last clear chance rule. The elements necessary to be present are outlined in the case of *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36. Quoting from page 700 of 191 Cal., 218 P. 36, 37, we find the following: "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence." And in *Young v. Southern Pacific Company*, 189 Cal. 746, at page 755, 210 P. 259, 262 the court, in discussing the doctrine of last clear chance, says: " * * * The doctrine of last clear chance, excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury." (Citing many authorities.) Applying these decisions to the case at bar, we find nothing which invokes the doctrine of last clear chance. The testimony discloses defendant traveling at a rate of speed of forty miles per hour through the intersection on the northerly side of Ventura boulevard, traveling west; plaintiff's car is traveling east on the south side of the same street. When approximately twenty-five feet apart, plaintiff's car suddenly and swiftly crosses from a point of safety directly in front of the car of defendant. Prior to the happening there was nothing to indicate to defendant any peril sur-

rounding plaintiff, nor was the latter in any place of danger. True, plaintiff's driver had given a signal indicating a turn, but such a signal given within fifty feet of the place designated by law for the turn would indicate nothing more than plaintiff's intention to make a legal turn.

[10] Plaintiff sued to recover for injuries sustained by herself and also, in her capacity as executrix of her husband's estate, to recover damages resulting from his death. A nonsuit was granted as to both causes of action and against plaintiff in both capacities.

We conclude that the action of the trial judge was proper, and therefore the judgment in its entirety is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 321
PEOPLE ex rel. WINCHEL et al. v. CITY OF LOS ANGELES.
 Civ. 6656.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1931.

Rehearing Denied Oct. 30, 1931.

1. Municipal corporations ⇨33(1).

Whether persons living within territory sought to be annexed to city are voters is immaterial in determining whether territory is inhabited.

2. Municipal corporations ⇨33(5).

That petition to annex lands to city must be signed by percentage of resident voters does not require occupancy of entire territory by voters.

3. Municipal corporations ⇨34.

Property owner of territory sought to be annexed to city cannot complain because election ballots referred to bonds constituting lien.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Quo warranto proceeding by the People, on the relation of D. L. Winchel and another, against the City of Los Angeles. From a judgment denying the writ, petitioners appeal.

Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Biby & Biby and John E. Biby, all of Los Angeles, for appellants.

Erwin P. Werner, City Atty., and Jerrell Babb, Deputy City Atty., both of Los Angeles, for respondent.

YORK, J.

This matter came before the Superior Court of Los Angeles county on a petition in "quo warranto" wherein petitioner asked for a judgment that the city of Los Angeles was exercising jurisdiction without right over a certain district alleged to have been illegally annexed to said city. The court found against all contentions of petitioner, whereupon petitioner appealed.

Appellant contends that the evidence is insufficient to sustain the findings and judgment; their main point apparently being that there is no evidence that the property in question, known as "Wiseburn Addition" or "Wiseburn Annexation," is sufficiently inhabited by voters throughout the entire territory to be annexed to the city of Los Angeles in the proceedings which were had for its annexation. The other points of appellant seem to be principally based upon the same contention: That the trial court erred in its conclusions of law and that it erred in the judgment.

[1] The trial court received the evidence, and we find no errors in the admission of such evidence. Among the other findings of the trial court was the finding that the allegations of paragraph 9 of the plaintiff's petition were not true. There was sufficient evidence before the trial court to make this finding, and it is practically determinative of the matter before this court. There was evidence showing to the trial court the exact situation as to the occupancy of the land included within the annexation or addition, and there is nothing in the contention raised by petitioner (which is apparently its principal contention) that a portion of the territory was occupied by Japanese, the petitioner evidently assuming at the time of the trial and now that, because these inhabitants were "Japanese," they were not voters or citizens of the United States. This does not follow. There is no evidence to show whether the so-called "Japs" were born in the United States or whether they were of sufficient age to entitle them to vote, although in relation to the question whether the land was "inhabited" it is of no consequence whether they were voters or not.

[2] The act under which this annexation proceeded merely provided that the petition, to initiate the proceedings to annex lands to a city, must be signed by at least 25 per cent. of the voters residing in the territory sought to be annexed. It is not contended that this was not done, but it is argued that, if the inhabitants were not voters, no peti-

tion could be filed. The contention of the appellant is that the territory as a whole must be inhabited by voters. It is true that by the provisions of the act there must be some voters in the entire territory proposed to be annexed, and that at least 25 per cent. of such voters must sign the petition. But it does not follow that each and every part of the territory must be occupied by voters.

[3] Appellant cannot complain because of the fact that the ballots in the election included reference to certain bonds which the ballots stated would be a lien on the property in the district, if the annexation carried. This could but have an effect against the success of the annexation at the polls, as the people voting for annexation must have thought that it did burden the property with a lien created by such bonds.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 428

COMMERCIAL BLDG. CO. v. SUMMERS.

SAME v. ZOLLARS.

Civ. 7760.

District Court of Appeal, First District, Division 1, California.

Oct. 13, 1931.

Licenses ⇨39.

Stock sales providing for payment nine months subsequent to agreements were unenforceable as violating terms of permit providing for cash sales.

Appeals from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by the Commercial Building Company against R. O. Summers and J. M. Zollars to recover money due on agreements to purchase shares of corporate stock. Judgments for plaintiff, and defendants appeal.

Reversed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

Louis Oneal and Charles E. Luckhardt, both of San Jose, for respondent.

KNIGHT, J.

The Commercial Building Company, a corporation, brought these actions to recover certain sums of money claimed to be due on agreements to purchase a number of shares of the capital stock of said corporation, and

judgments were entered therein against the defendants, from which they have appealed.

The permit issued by the corporation commissioner authorizing said corporation to sell its stock provided that the sales should be made for cash; but the subscription agreements herein sued upon fixed the time of payment some nine months subsequent to the date of the agreements. Defendants contend, therefore, that the sales were made in violation of the terms of the permit, and that consequently the agreements are unenforceable. The same contention, based upon the identical form of subscription agreements here challenged, for the sale of stock by the same corporation under the authority of the same permit, was made and sustained in the case of Commercial Building Co., a corporation, v. Levy, 108 Cal. App. 54, 290 P. 1048, decided since the actions herein were tried. Therefore, upon the authority of that case and for the reasons set forth therein, the judgments in the present cases are reversed.

We concur: TYLER, P. J., and CASHIN, J.

117 Cal.App. 363

UNIVERSAL OIL LAND CO. et al. v. GATES,
Judge, et al.
Civ. 7978.

District Court of Appeal, Second District, Division 1, California.

Oct. 5, 1931.

Corporations — 131.

In action against California resident by foreign sequestration receiver, California court held unauthorized to compel corporations in California to transfer resident's stock.

It appeared that defendant in divorce suit brought in New York resided in California and owned stock in corporations doing business in California; that on such defendant's failure to make monthly payment required by order in divorce suit, New York court, in view of Civil Practice Act N. Y. §§ 1171, 1171-a, authorizing court to sequester personal property and rents and profits of real estate and to appoint receiver, purported to appoint receiver in sequestration, and to authorize him and the plaintiff in the divorce suit to bring action in California against corporations, compelling them to transfer defendant's stock to such receiver; and that this action in California was not founded on any judgment, but rested solely on orders of New York court.

Application by the Universal Oil Land Company and others for a writ of prohibition to prevent Walter S. Gates, Judge of the Superior Court, and the Superior Court in and for the County of Los Angeles, from proceeding with the trial of an action brought against the petitioners by I. Maurice Wormser, as receiver, and another.

Alternative writ made permanent.

Ewell D. Moore and W. H. Douglass, both of Los Angeles, for petitioners.

Canepa & Castruccio, of Los Angeles, for respondents.

HOUSER, J.

In this matter petitioners seek to prohibit the superior court from proceeding with the trial of an action in which the petitioners are defendants and one I. Maurice Wormser, as receiver, and Bessie E. Arnold are plaintiffs.

It appears that in a suit for divorce pending in the Supreme Court of the State of New York, in which the said Bessie E. Arnold is the plaintiff and her husband, Ray H. Arnold is the defendant, the said court made its order by which the said defendant was ordered to make monthly payments to the said plaintiff of a certain sum of money pending the determination of the said action; that thereafter on the failure of the said defendant to make one of such monthly payments to the said plaintiff, the said court made its order by which the said I. Maurice Wormser was appointed receiver in sequestration of all the personal property of the said defendant for the purpose of making the said several monthly payments theretofore ordered to be made by him to the said plaintiff in the action pending its determination. It also appears that the said defendant, who is now a resident of this state, is the owner of certain shares of stock in each of the corporations which are petitioners herein; that each of said corporations has and maintains an office in the city of Los Angeles, state of California, for the transaction of its corporate business; that by further order of the Supreme Court of the State of New York the said receiver and the plaintiff in said action were authorized to commence and prosecute an action in this state against each of said corporations to compel it "to transfer to the name of the receiver," I. Maurice Wormser, the several shares of stock owned by the defendant Ray H. Arnold in each of such corporations; that in pursuance of said authorization the said Wormser, as such receiver, and Bessie E. Arnold did commence an action in the superior court of this state against each of said defendant corporations, wherein the plaintiffs therein sought to have it ordered that the said several shares of stock in each of said corporations then be-

longing to Ray H. Arnold be transferred by it to I. Maurice Wormser, as said receiver; that he be adjudged the lawful owner of said respective shares of stock; and that each of said corporations be enjoined and restrained pending the trial and final determination of the action from transferring on its books to any person any of said shares of stock. It further appears that the defendants in said action both demurred and answered to the complaint therein for want of jurisdiction of said superior court over the cause of action, but that said demurrer was overruled by said court and, on a preliminary hearing of the matter, in effect ordered a temporary injunction pending the final determination of the action to issue as prayed in the complaint. As hereinbefore indicated, for the purpose of preventing further proceedings in said action, on application by the defendants therein to this court, its alternative writ of prohibition has issued; and at this time the question for determination by this court is whether the said superior court has jurisdiction of the action to which reference has been had.

The appointment of the plaintiff Wormser as receiver in sequestration in the divorce action between Bessie E. Arnold and Ray H. Arnold purportedly was authorized by the provisions of sections 1171 and 1171-a of the New York Civil Practice Act. As far as is here pertinent, the substance of such statutes is that, where a husband has failed to make payment to his wife as required by the terms of an order of the court: " * * * *The court may cause his personal property and the rents and profits of his real property to be sequestered, and may appoint a receiver thereof.* The rents and profits and other property so sequestered may be applied, from time to time, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires. * * *

Construing such statute in the case of *Matthews v. Matthews*, 240 N. Y. 28, 147 N. E. 237, 238, 38 A. L. R. 1079, the Court of Appeals of New York in substance declared that the order of sequestration and the appointment of a receiver thereunder was "*a remedy in the nature of an attachment.*" * * * This in effect is the same as attaching the defendant's property and holding it subject to the further order or judgment of the court. * * *

"Wives and children of absconding husbands who have property *within the state*, therefore, have this new and additional *remedy*. The property may be seized and held by the sequestration order, subject to the further provision of the court."

In the annotation of the cited case in 38 A. L. R. 1079, 1084, where the related authorities are reviewed and commented upon, it is said:

" * * * the courts seemingly take the view that the effect of these statutes is practically the same as that of statutes providing for *ordinary attachment* of an absent defendant's property. * * *

"And it has been held that as the remedy provided for, under a statute giving power of sequestering the property of a husband required by a divorce decree to provide for the education or maintenance of his children, or the support of his wife, in the event of his failure to make the payments required, *is in the nature of an execution, and not a judgment*, an amendment extending the provision to final judgments for divorces is retroactive. *Moore v. Moore* (1911) 143 App. Div. 428, 128 N. Y. S. 259, affirmed in (1913) 208 N. Y. 97, 101 N. E. 711."

In the case of *Lynde v. Lynde*, 181 U. S. 183, 21 S. Ct. 555, 557, 45 L. Ed. 810, it appeared that an action for divorce in the state of New Jersey resulted in part in alimony being allowed to the plaintiff therein; and the same not having been paid, a receiver in sequestration was appointed for the purpose of collecting the moneys therefore ordered to be paid by the defendant to the plaintiff. Thereafter the defendant removed to the state of New York. In considering the force and effect in New York of the appointment of the receiver in sequestration by the New Jersey court, in part the United States court said: "*The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation.*"

In the case of *Fall v. Eastin*, 215 U. S. 1, 30 S. Ct. 3, 9, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853, it appeared that in a divorce suit instituted in the state of Washington, the court, having jurisdiction of each of the parties thereto, rendered a decree affecting the title to real property in the state of Nebraska and endeavored through a commissioner appointed by the Washington court to convey title to such land to the plaintiff. In reaching the conclusion that under the provisions of the "full faith and credit" clause of the Federal Constitution, "the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title," with reference to the Washington decree, in part the court quoted with approval from the case of *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. Ed. 177, as follows: "It does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit."

A case directly in point is that of *Dyer v. Dyer*, 231 App. Div. 453, 247 N. Y. S. 540, 541. The action was for "separation." The

defendant was not a resident of the state, but under the provisions of section 1171-a of the New York Civil Practice Act, which relates to nonresident defendants, an order was made "directing the sequestration of his property in this state, tangible and intangible, and appointing a receiver thereof." In rendering its opinion, in part the court said:

"The appeal is from such parts of this order as enjoin defendant from transferring certain stock or registered bonds of Radio Corporation of America owned by him, and enjoin the Radio Corporation of America from transferring upon its books any share or shares of stock, or any registered bond or bonds listed in the name of defendant, and direct said corporation to pay to the receiver all dividends or interest payable upon said stock or said registered bonds listed upon its books in the name of defendant.

"Shares owned by a nonresident defendant in a foreign corporation are not property within the state of New York, even though the corporation be doing business here, unless the stock certificates themselves are found within the state. Certificates of stock as in the case with bonds of foreign companies have been held property subject to the levy of an attachment.

"The court had no jurisdictional basis for any order relating to corporate bonds.

"The order appealed from should be reversed in so far as it relates or purports to relate to any shares of stock of the Radio Corporation of America, to any bonds not actually situated within the state, whether such bonds be of the Radio Corporation of America or of Vreeland Apparatus Company, Inc., and to any property of the defendant which is not located within the state of New York, and the motion in said respect denied.
* * *

It is clear that if, as indicated by the decisions to which reference has been had (particularly to those rendered by the New York courts), the appointment of a receiver in sequestration in a divorce suit is in the nature of an attachment in other actions, and in effect is identical therewith; that the purpose of the enabling act was merely to extend to divorce suits the application of the principle of attachment and to provide a remedy; and that in no sense could such remedy be considered analogous to a judgment—it would follow that although the officer authorized to take possession of the property is designated by the statute as a "receiver," his territorial jurisdiction in the

premises is limited at least to the state of New York.

Considering the fact that the action in the lower court in this state was not founded upon any judgment, but rested solely on the order of sequestration of the New York court, together with its subsequent order by which the receiver in sequestration purportedly was given authority to bring an action in this state, it would seem manifest that the lower court was without jurisdiction in making the order of which petitioners here complain.

It is ordered that the alternative writ of prohibition heretofore issued herein be, and the same is, made permanent.

We concur: CONREY, P. J.; YORK, J.

117 Cal.App. 519

The PEOPLE of the State of California, Plaintiff and Respondent, v. Harold FERGUSON and Clarence Ferguson, Defendants and Appellants.

Cr. 1632.

District Court of Appeal, First District, Division 1, California.

Oct. 17, 1931.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Edward M. McGlade, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., for the People.

TYLER, P. J.

Defendants were accused by the district attorney of the city and county of San Francisco of a felony, to wit, conspiracy to commit robbery. Upon arraignment they pleaded not guilty. They were tried and convicted as charged in the information and sentenced to the state prison at San Quentin. Oral notice of appeal was given, but defendants have failed to file a brief in support of the appeal, nor did they appear by counsel when the case was called for hearing. We have examined the record, and find no grounds for a reversal.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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SECOND SERIES

214 Cal. 125

JANUARY v. RILEY, State Controller.
S. F. 14402.

Supreme Court of California.

Oct. 21, 1931.

1. Pilots ⇐4.

Member of board of pilot commissioners, when once regularly appointed, holds office for four years, unless sooner removed by concurrent action of Governor and Senate (Pol. Code, §§ 2440, 2442).

2. Pilots ⇐4.

Petitioner *held* entitled to office of pilot commissioner and to emoluments thereof where successor was not duly appointed (Pol. Code, §§ 2440, 2442).

In Bank.

Application for writ of mandate by Gerard T. January against Ray L. Riley, as State Controller.

Writ granted.

De Lancey C. Smith and Francis C. Brown, both of San Francisco, for petitioner.

James W. Hickey, of Sacramento, for respondent.

RICHARDS, J.

The petitioner herein applies for a writ of mandate, to be directed against the respondent herein, as controller of the state of California, commanding him to issue a salary warrant, drawn on the state treasury to the petitioner, for the sum of \$555.97, the sum being alleged to be the salary due him for his services during the month of July, 1931, as a member of the board of pilot commissioners, of which board the petitioner has been a member since the 28th day of February, 1929, having been duly appointed and commissioned as such member thereof by the Governor of California, with the advice of the state Senate, under the provisions of section 2440 of the Political Code. The term of office of such commissioners is fixed by section 2442 of the Political Code, which reads as follows: "The commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions."

The salary of said commissioners is fixed by law at the monthly sum, for the payment of which the petitioner herein seeks the issuance of this writ.

On or about July 2, 1931, the Governor of California undertook to appoint one David L. Albert of Piedmont in the place and stead of the petitioner herein as a member of said board of pilot commissioners, and said Albert is alleged to have taken the oath of office as a member thereof and undertaken to replace the petitioner thereon.

The appointment of said Albert was so made without the advice or concurrence of the state Senate, as provided in the section of the Political Code above set forth.

The petitioner herein, notwithstanding the admitted appointment of his successor, has sought to perform the duties, of his office, and has duly made and filed with the state controller, the respondent herein, his demand for the payment of his stated salary for the month of July, 1931, which demand has been refused by said controller, whereupon the petitioner applied for the issuance of an alternative writ of mandate to compel the issuance of said warrant, and which, when issued in response to his application, was made returnable before this court on Tuesday, October 6, 1931.

Upon the hearing thereon, the respondent presented no other return than an oral demurrer to said petition, and it was thereupon stipulated that the matter might be submitted to the court without oral argument and upon the points and authorities cited in the brief of the petitioner accompanying his said application.

[1, 2] These embrace references to section 2440 and section 2442 of the Political Code, as interpreted by this court in the two cases entitled *People v. Freese*, 76 Cal. 633, 18 P. 812, and *People v. Freese*, 83 Cal. 453, 23 P. 378. These two decisions of this court are conclusive upon the right of the petitioner herein to the issuance of the writ of mandate sought by his petition.

By the first of these cases, decided by this court in the year 1888, it was held that a member of the board of pilot commissioners, when duly appointed under the provisions of section 2440 of the Political Code, with the advice and consent of the Senate, could be removed during his term of office by the Governor only with the advice and consent of the Senate, and not otherwise.

In the later case of *People v. Freese*, supra, decided in the year 1890, the foregoing conclusion and interpretation of section 2440 of the Political Code were approved and confirmed.

The foregoing sections of the Political Code relating to the office of pilot commissioner were enacted at the time of the adoption of said Code in the year 1872, and have remained unchanged ever since, and particularly since the interpretation placed upon them by the foregoing decisions of this court.

It may be taken, therefore, to be the settled law of this state that a member of the board of pilot commissioners, when once regularly appointed under the provisions of the foregoing sections of said Code, holds office for the term of four years, unless sooner removed by the concurrent action of the Governor and Senate. The appointment of a successor to

this petitioner not having been thus accomplished, it follows that he was entitled to his said office and to the emoluments thereof during the month of July, 1931, and that the refusal of the respondent herein to issue to him his salary warrant for that period entitles him to the issuance of this writ.

It is therefore ordered that a peremptory writ of mandate issue herein, as prayed for by said petitioner.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

214 Cal. 28

WESTMAN v. DYE.

L. A. 11274.

Supreme Court of California.

Sept. 29, 1931.

1. Usury ☞89.

Parties to usurious transaction are not regarded as in *pari delicto* (Usury Law [St. 1919, p. lxxxiii]).

The parties are not in *pari delicto*, since the borrower is expressly authorized by Usury Law (St. 1919, p. lxxxiii) to sue for the recovery of treble the amount of all interest paid under usurious contract within one year from date of commencement of action while the lender is penalized by the loss of all interest and treble that paid within one year from commencement of action, besides being subject to criminal prosecution.

2. Usury ☞101.

Debtor could have payments of usurious interest set off against principal debt in action brought to collect principal (Usury Law [St. 1919, p. lxxxiii]).

3. Usury ☞6.

Ordinarily, where remedy is given by statute, such as in Usury Law, statutory remedy is cumulative only and does not abrogate common-law remedy (Usury Law [St. 1919, p. lxxxiii]).

4. Usury ☞66, 101.

Taint of usury in original usurious transaction attached to all renewal notes; hence all payments tainted with usury could be offset in action on last renewal note (Usury Law [St. 1919, p. lxxxiii]).

5. Limitation of actions ☞49(8).

Limitation statute *held* not to have run against usurious payment, since payments of

usurious interest must be allocated to principal debt (Usury Law [St. 1919, p. lxxxiii]).

Limitation statute had not run against usurious payment, since payments of usurious interest must be allocated to principal indebtedness, thereby reducing principal indebtedness at instant usurious payment is made; hence the statute begins to run only after the lawful debt has been actually paid, and not from the time of agreement to pay usury.

6. Usury ☞15.

Usurious character of contract is not determined by amount of interest borrower has paid, but amount of interest he has agreed to pay on his indebtedness (Usury Law [St. 1919, p. lxxxiii]).

7. Usury ☞52.

Transaction whereby borrower paid \$125 as bonus for extension of \$2,500 indebtedness for six months, and agreed to pay 8 per cent. interest on principal, *held* usurious (Usury Law [St. 1919, p. lxxxiii]).

In Bank.

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Martha Westman against John T. Dye. From an adverse judgment, defendant appeals.

Judgment modified, and, as so modified, affirmed.

Chas S. McKelvey, of Los Angeles, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

CURTIS, J.

Action to recover on a promissory note for the sum of \$2,500, with interest at 8 per cent. per annum. The note was dated August 27, 1926. The indebtedness represented by said note was created in the first instance on March 18, 1921, on which date a promissory note for the sum of \$2,500, with interest at 8 per cent. per annum, was executed and delivered by the defendant. Thereafter said note was renewed every six months up to the time the note in suit was given, and on the occasion of each renewal the payee therein named exacted, and the defendant paid, the sum of \$125 as a bonus for such renewal.

This action was commenced on the 27th day of June, 1927, and duly prosecuted to judgment. The court rendered judgment in favor of plaintiff in the sum of \$2,300.02, principal, \$230, attorney's fees, and \$9.50, costs, without allowing any interest whatever on the said principal. The court found that the note was duly executed and delivered, and that the

same was usurious by reason of the fact that, in addition to the interest at 8 per cent. per annum called for by the note, the defendant paid the sum of \$125 as a bonus or premium for the extension of the indebtedness for the period of six months. The court further found that within one year immediately prior to the commencement of the action the defendant had paid as interest on said note the sum of \$66.66, which amount the court trebled, and the amount of the trebled interest, or \$199.98, the court deducted from the principal sum of \$2,500, called for by said note, leaving the sum of \$2,300.02 of the principal of said note for which the court rendered judgment, with attorney's fees and costs.

The defendant set up in his answer that during the existence of said indebtedness since its original creation on March 18, 1921, the defendant had paid thereon in interest and bonuses the sum of \$1,793.37, and asked that this sum be set off against the principal sum of \$2,500. The court found these allegations of defendant's answer to be true, but declined to set off any part of said amount, except the interest paid within one year from the date of the commencement of the action, which interest, as before stated, it trebled and deducted the amount of the trebled interest from the principal of said note and rendered judgment for the difference.

Defendant has appealed from the judgment. He frankly states that there is but one question to be determined on this appeal, and that is: "Should the trial court have granted defendant's claim to a rebate in the amount of interest and bonuses paid by him?" He concedes that the relief for which he contends does not arise under any of the provisions of the so-called Usury Law (St. 1919, p. lxxxiii), but claims that it is afforded him under section 1479 of the Civil Code. This section seeks to govern, among other things, the application of payments of money made by a debtor to his creditor when there is subsisting between the parties several obligations. This section is divided into three parts. The first part provides that, when the debtor manifests to the creditor the obligation to which he wishes the payment to be made, it must be so applied. The second part provides how the creditor may apply payments when the debtor fails to manifest an intention or desire that they be applied to any particular obligation. The third part provides how payments are to be applied when neither party makes any application of them.

Defendant in a somewhat extended argument seeks to show that this portion of the Code has not been expressly or by implication repealed by the Usury Law. In this we think he is correct, but we are utterly at a loss to perceive how this section of the Code has any particular bearing upon his defense. In the case of each payment made by the defendant he designated the particular obligation to

which he wished it applied, and it was so applied by the owner of the note. This met the requirement of the first part of said section, and left nothing to be done under the remaining provisions thereof.

Disregarding, however, this section of the Code, has the defendant the right to have the interest payments made by him set off against the amount of the principal of said note? Plaintiff contends that no such right exists, and cites the following cases decided by this court: *Harralson v. Barrett*, 99 Cal. 607, 34 P. 342; *London & San Francisco Bank v. Bandmann*, 120 Cal. 220, 52 P. 583; and *Matthews v. Ormerd*, 140 Cal. 578, 74 P. 136, 137. These cases arose under section 5 of article 13 of the Constitution of this state prior to its repeal in 1906. This section of the Constitution provided that every contract made by which a debtor was obligated to pay the taxes on a loan secured by a mortgage or trust deed, or other lien, should as to any interest specified therein be null and void. The penalty under the Usury Law is strikingly similar to that imposed by this section of the Constitution. The language of the Usury Law upon this subject is as follows: "Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained. * * *" Stats. 1919, p. lxxxlii, § 2. In the three cases just cited the defendants therein sought to have applied as set-offs the interest paid by them under an agreement which was violative of said section of the Constitution, and in each of said cases this court held that no set-off was permissible. The language of said section of the Constitution, like the provisions of the Usury Law, declares any contract violative thereof null and void as to any interest specified therein. In the first of the three cases above cited this court at page 611 of 99 Cal., 34 P. 342, 343 held: "The court found that the sum of \$360 had been paid on account of interest on the note, and appellant claims that this amount should be credited on the principal of the loan, if the court should find, as we do find, that the clause with respect to payment of taxes on the mortgage prevents the plaintiff, under the provision of the constitution quoted above, from recovering interest. The defendants were not bound to pay to the plaintiff any interest on the note. The payment of \$360 was a voluntary payment. If it was made under a mistake of law it cannot be recovered, nor can it be allowed as a credit other than as contemplated when the payment was made. Upon the finding of the court the case stands in this way: There is a clause in the mortgage for the payment by the mortgagors of the mortgage tax. This clause, being invalid under section 5 of article 13 of the constitution, supra, releases the mortgagors from any obligation to pay the in-

terest stipulated in the note. The provision was inserted in the constitution for the benefit of the borrower, but it is a benefit which he may waive if he sees fit, and, if he voluntarily fulfills his promise to pay interest, it is through a mistake of law on his part, or a waiver of a known right. In either case he is bound by his own act."

In the opinion in *Matthews v. Ormerd*, supra, and in the same case reported in 134 Cal. 84, 87, 66 P. 67, 210, this court refers to said constitutional section, and holds: "It is in its essential elements a usury law." Following this holding it applies the rule applicable to cases under usury statutes to said section of the Constitution in the following language: "The doctrine generally applied to usury laws, namely, that they are for the benefit of the borrower, and that he may waive the privilege, and that if he does so and pays the interest he cannot recover it back, is applied to the constitutional provision in question."

From these decisions it is manifest that this court in proceedings, which it must be admitted are in principle much like those involved in the present action, enunciated the rule that payments of interest under agreements which the Constitution declared to be null and void could not be set off as against the amount due on its principal obligation. Furthermore, these decisions were, and especially the last one was, based squarely upon the proposition that the law declaring null and void such agreements was in the nature of a usury statute, and that the doctrine applied to usury laws should be applied to the constitutional provision then under review. It is then stated in the opinion of the case just referred to that usury laws "are for the benefit of the borrower, and that he may waive the privilege, and that if he does so and pays the interest he cannot recover it back." The opinion then holds that, if the borrower under such circumstances cannot recover back payments of usurious interest, he cannot have them set off as against the principal of the indebtedness. In support of its statement that under the usury laws such payments cannot be recovered back or applied as set-offs to the principal indebtedness, the court cited no authority.

Due to the fact that we have had no usury statute, except that governing pawnbrokers, until the act of 1919, the decisions in this state upon this subject have been extremely meager. The question now before us has never before been directly before this court. In other jurisdictions, however, the usury laws have furnished a most fruitful source of litigation. Almost every conceivable question arising under the laws of usury has been the subject of judicial determination on numerous and many occasions. There is no dearth of authorities upon these questions, but the great difficulty is in winnowing from the great

mass of decisions those which appear to state the correct and proper rule, approved by the weight of authority. Upon almost every question of any importance arising under the usury laws we find the courts greatly divided, and well-considered authorities are to be found upon either side of such question.

In 39 Cyc. p. 1028, we find the following statement of the law on the subject of the right to have payments of usurious interest set off against the principal: "When payments have been made by the debtor and received by the creditor with the clear understanding that they shall be applied to usurious interest due, there is much difference of opinion as to the effect given to such application. Many courts hold that it shall not be disturbed. However, the better opinion seems to be that such application, tending as it does to defeat the policy of the usury laws, will be set aside and the payments applied to a reduction of the principal debt; and the rule has been held to apply when separate notes are given for principal and usurious interest. The money paid in discharging the illegal interest note will be applied in reduction of the principal note though there be no usury on its face. Both form one transaction."

"Ordinarily, as long as any part of an usurious debt remains unpaid, the usurious payments made or agreed to be made may be set off against the whole amount contracted to be paid." *Webb on Usury*, § 474, p. 554.

In *Saylor v. Daniels*, 37 Ill. 332, 87 Am. Dec. 250, the rule was stated as follows: "While it is the rule of this court that usurious interest once paid voluntarily cannot be recovered back, yet that rule does not apply where the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. This is not using the usury law as a sword, but strictly as a shield." To the same effect are *Dorothy v. Commonwealth Co.*, 278 Ill. 629, 116 N. E. 143, L. R. A. 1917E, 1110; *Blymyer v. Colvin*, 127 Pa. 114, 17 A. 865; *Yetzer v. Applegate*, 83 Iowa, 726, 50 N. W. 66; *Western Savings Co. v. Houston*, 38 Or. 377, 65 P. 611; *Pacific Bldg. Co. v. Hill*, 40 Or. 280, 67 P. 103, 56 L. R. A. 163, 91 Am. St. Rep. 477.

In *Gladwin State Bank v. Dow*, 212 Mich. 521, 180 N. W. 601, 605, 607, 13 A. L. R. 1233, the Supreme Court of Michigan held: "The rule is well recognized in this jurisdiction that one who voluntarily pays usurious interest may not maintain a suit to recover it while one against whom a usurious contract is sought to be enforced may avail himself of the statute as a defense. The statute is available as a shield, but not as a sword."

In that same case that court also held: "We are satisfied that by the overwhelming weight

of authority in this state and elsewhere two propositions are established, i. e.: (1) That where a renewal note is given containing and providing for usurious interest, or where usurious interest is exacted, the defense of usury, not only in the particular note sued upon, but in all of its predecessors where it exists, if it exists in all, is available to the maker as a defense; and (2) that as between the parties to the transaction or holders with knowledge all payments of usurious interest made on the series of notes will be applied by the law to the extinguishment of the debt, and this even though the parties have treated such payments as payments of interest. To hold otherwise would be but to point a way to the evasion of this beneficent statute."

In a note to this case in 13 A. L. R. p. 1244, is found the statement that: "Under the rule that, where a loan is originally usurious, the defense of usury applies to all renewals thereof, when an action is brought on any renewal no matter how remote, the court will apply all payments of usury as payments pro tanto of the principal." In support of this statement there are cited cases from the states of Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, Texas, and Vermont.

[1] In 39 Cyc., at page 1028, it is stated that many courts hold that payments thus made will not be disturbed, and list decisions from the courts of the following states: Louisiana, New Hampshire, North Carolina, South Carolina, Virginia, Maryland, and also *Carter v. Carusi*, 112 U. S. 478, 5 S. Ct. 281, 28 L. Ed. 820. It is there stated that the rule announced by these latter decisions rests upon the doctrine that, "when the law finds two persons in *pari delicto* it will leave them where it finds them. But the parties to a usurious contract are not deemed to be in *pari delicto*. Hence the analogy fails completely." We might say in this connection that under the usury law of this state the parties to a usurious transaction are not regarded as in *pari delicto*. The borrower is expressly authorized to sue for the recovery of treble the amount of all interest paid under such a contract within one year from the date of the commencement of the action. On the other hand, the lender is penalized by the loss of all interest, and treble that paid within the year, besides being subject to criminal prosecution for violation of the statute prohibiting him from contracting for interest beyond the legal rate fixed therein.

Regarding the case of *Carter v. Carusi*, 112 U. S. 478, 5 S. Ct. 281, 28 L. Ed. 820, referred to above as holding that usurious interest paid cannot be set off against the principal debt, the Court of Appeals of the District of Columbia had occasion to consider the opinion in a later case coming before said court. It held

that the law governing the subject had been so amended that the rule announced in *Carter v. Carusi* was no longer controlling in cases of that character. In its decision the Court of Appeals of the District of Columbia held: "Until the adoption of our Code, usurious interest could only be recovered by a separate action brought within one year. *Carter v. Carusi*, 112 U. S. 478, 28 L. Ed. 820, 5 S. Ct. 281; *Lawrence v. Middle States Loan Bldg. & Constr. Co.*, 7 App. D. C. 161. But now it suit is brought on the principal debt after payment of usurious interest, such usury may be made a valid set-off against the principal debt." *Metropolitan Loan & Trust Co. v. Schafer*, 44 App. D. C. 356, 373.

[2] In view of these decisions of the various courts of this country, we think it is quite apparent that the weight of authority upon this question is in favor of the rule allowing payments of usurious interest to be set off against the principal debt in actions brought to collect the latter.

The decisions may have been to the contrary at the time this court in the three cases cited above construed and applied the provisions of section 5 of article 13 of our Constitution making null and void any agreement to pay interest on a note secured by a mortgage or trust deed in which the borrower had agreed to pay the taxes on the lien created by the mortgage or trust deed. If so, they have manifestly changed to a material extent, and now authorize set-offs in such cases. Under these conditions, we do not feel warranted in extending the doctrine followed by these cases in applying the provisions of said section of the Constitution to transactions violative of the Usury Law of this state. On the other hand, it seems desirable that the courts of this state should in cases of this character, and for that matter in all classes of cases, where the same can be done without running counter to any principles of law established in this state, follow the beaten path trod by the courts in other jurisdictions, and, when there is a conflict in the decisions of these courts, to accept and follow those principles of law approved and sustained by the weight of authority in these jurisdictions if the same appear equitable and right. Acting upon this policy, we are constrained to hold that the defendant in this action is entitled to have set off against the principal of his debt the payments of usurious interest paid by him on said indebtedness. Such a determination we think was foreshadowed by the recent decisions of this court in *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, 621, 254 P. 956, 255 P. 805, 53 A. L. R. 725, and *Ames v. Occidental Life Insurance Co.*, 210 Cal. 271, 291 P. 182.

[3] In some jurisdictions, where a remedy is given by the statute, as there is in the Usury Law of this state, the statutory remedy is

exclusive, and the borrower is relegated to the pursuit of that remedy, and is precluded from any further or additional recovery. However, the better opinion, and that supported by the weight of authority, is that the statutory remedy is cumulative only, and as not abrogating the common-law remedy. 27 R. C. L. p. 272; *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 357, 65 Am. St. Rep. 368; *Wheaton v. Hibbard*, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; *Bexar Bldg., etc., Ass'n v. Robinson*, 78 Tex. 163, 14 S. W. 227, 9 L. R. A. 292, 22 Am. St. Rep. 36; *Lee v. Hillman*, 74 Wash. 408, 133 P. 583, L. R. A. 1918B, 581, Ann. Cas. 1915A, 759; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149, 46 S. E. 817, 2 Ann. Cas. 42.

[4] Having held that the defendant is entitled to set off the payments of usurious interest, the only remaining question, as to this phase of the case, is as to the amount of set-off to which the defendant is entitled. The court found that the defendant had paid in interest and bonuses the sum of \$1,793.37. Of this \$66.66 was paid in two installments within the year immediately prior to the commencement of the action, and the court, after trebling this amount, deducted from the principal the trebled amount. The findings of the court show that defendant paid \$43.75 interest on September 17, 1921, on the original note given by the defendant. This note was not tainted with usury, as it only bore interest at 8 per cent. per annum, and no bonus was involved in its execution. It was not until a renewal note was given by which this original note was taken up and discharged that any bonus was exacted of defendant. Deducting these three payments of interest, the first and the last two amounting to \$110.40, from the sum of \$1,793.37, leaves the sum of \$1,682.97, the amount of usurious interest paid by defendant which the court failed to take into consideration in determining the amount due on the judgment. While these amounts were not all paid upon the note upon which this suit was brought, as said note was given as a renewal of the prior indebtedness, the taint of usury in the original transaction attached to all renewals thereof. *Gladwin State Bank v. Dow*, supra. In that case the court has collected an extensive list of authorities supporting its decision which may be consulted by anyone desiring to pursue the matter. We will only refer to one of such authorities, as it appears to cover the subject completely: "If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced. Every re-

newal of a note given for a usurious loan of money is subject to the defense of usury between the original parties and purchaser with notice; but a renewal in the hands of a bona fide purchaser for value, without notice, is valid." *Webb on Usury*, § 308, pp. 347, 348.

[5] Another question presented is whether statute of limitations has run against any of these usurious payments. The rule governing this subject is stated as follows: "Authorities scarcely need be cited for the proposition that the statute does not begin to run against the right to recover usury paid until the cause of action accrues. And under the statutes generally prevailing, as construed by the courts, the cause of action does not accrue until the usury has been actually paid either in money, or money's equivalent. According to the rule prevailing in some states, that all usurious payments are to be deemed payments upon the principal debt, usury is not paid until after the whole legal debt is satisfied. Hence under this rule the statute begins to run only after the lawful debt has been actually paid, and not from the time of the agreement to pay usury. Under this rule incorporating usurious interest in a renewal note, or in a series of renewals, does not start the statute running so long as any part of the original usurious loan remains unpaid." 39 Cyc. p. 1037. We held in the cases of *Haines v. Commercial Mortgage Co.*, supra, and *Ames v. Occidental Life Insurance Co.*, supra, that payments of usurious interest would be allocated to principal. This means, as we understand the decisions, that the instant a payment is made of usurious interest it is applied to the principal, and the principal indebtedness at the time of such payment is reduced to the extent thereof. Under the rule thus enunciated no part of these usurious payments is barred by the statute of limitations, and the defendant is entitled under the findings of the court to a deduction of the principal indebtedness, in addition to that made by the trial court, in said sum of \$1,682.97. This latter amount deducted from the sum of \$2,300.02, the amount of the principal for which the court gave judgment, would leave the amount of \$617.05 as the true amount of principal for which the plaintiff is entitled to judgment.

[6, 7] Plaintiff makes the contention that the transaction between the parties hereto was not, and never was, usurious. She has made a compilation of figures showing that the actual amount of interest and bonuses paid by the defendant from the date of the execution of the original note to the commencement of this action was \$89.13 less than the maximum amount the payee was permitted under the Usury Law to charge and receive. There is no merit in this contention.

The usurious character of the contract is not determined by the amount of interest the borrower has paid thereon, but by the amount

of interest he has agreed to pay on his said indebtedness. He may not have paid a dollar of interest on his indebtedness, yet, if the contract calls for a greater rate of interest than that permitted by the statute, the transaction is usurious, and no interest can be collected thereon. This point was determined by the case of *Clement Mortgage Co. v. Johnston*, 83 Okl. 153, 201 P. 247, cited by plaintiff, from which we quote as follows: "The test as to whether a contract is 'usurious,' is: Does the interest charge agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal contract rate? If it does exceed such amount, it is usurious; otherwise it is not." From this and many other authorities which might be cited it is held that it is "the interest charge agreed to be paid under the terms of the contract" and not the amount of interest which was actually paid which determines the usurious character of the contract. In each of the renewal notes herein the defendant in the transaction which was the real contract between the parties paid, in addition to 8 per cent. interest, \$125 as a bonus for the use of the principal sum of \$2,500 for the period of six months. The maximum rate of 12 per cent. on this principal sum for the period of six months would produce \$150, interest for the period. The actual amount agreed to be paid by the defendant was 8 per cent. on said principal sum for the period of six months, which would amount to \$100, plus the \$125 bonus, or \$225, showing that there was \$75 usury in each of these renewal notes.

In accordance with the views expressed above, the judgment is modified by deducting therefrom the sum of \$1,682.97, and, as modified, the judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

214 Cal. 67

McCANDLESS v. CITY OF LOS ANGELES.
L. A. 12977.

Supreme Court of California.
Sept. 29, 1931.

1. Municipal corporations ☞669.

Owner of abutting property possesses right to use street in common with all other members of public and easement for ingress and egress.

2. Eminent domain ☞106.

Abutting owner's easement of ingress and egress to street may not be taken away, de-

stroyed, or substantially impaired for public purposes without just compensation (Const. art. 1, § 14).

3. Eminent domain ☞307(2).

Whether infringement of owner's right of ingress and egress to street by pedestrian tunnel was substantial so as to entitle her to compensation for damages *held* fact question (Const. art. 1, § 14).

The city constructed a pedestrian subway from a point in the 20-foot strip constituting sidewalk and parking in front of plaintiff's property to opposite side of street. The approach to subway was an open cut and stairway approximately 20 feet in length and paralleling plaintiff's front property line and about 7 feet distant therefrom, protected by an iron railing. In addition, plaintiff's amended complaint alleged that construction of subway, approach, and railings greatly diminished market and rental value of property which was zoned for general business purposes and greatly interfered with free use by plaintiff of street in front of her property for purposes of ingress and egress.

4. Eminent domain ☞303.

That construction of pedestrian subway constitutes proper street use does not preclude abutting owner from right to recover for damages to easement of ingress and egress.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Elizabeth McCandleless against the City of Los Angeles. Judgment for plaintiff, and defendant appeals.

Reversed. Superseding opinion of District Court of Appeals, 296 P. 895.

Gilbert A. McElroy, Lorrin Andrews, and Porter T. Kerckhoff, all of Los Angeles, for appellant.

Jess E. Stephens, Erwin P. Werner, Frederick Von Schrader, Jerrell Babb, and Sam H. Erwin, all of Los Angeles, for respondent.

Forgy, Reinhaus & Forgy, of Santa Ana, amicus curiae.

SHENK, J.

This is an appeal from a judgment in favor of the defendant in an action for damages to real property.

The plaintiff is the owner of a lot 53.10 feet in width by 145 feet in depth fronting on Sunset boulevard and opposite Cassil place, a public street, terminating at Sunset

boulevard at right angles from the north. Sunset boulevard is an improved public street 100 feet in width, having a paved thoroughfare of 60 feet and a strip on each side thereof 20 feet in width from the property line to the curb used for sidewalk and parking. The plaintiff's property is zoned for general business purposes. Pursuant to proceedings regularly had and taken, the defendant city from August 15, 1927, to January, 1928, constructed a pedestrian subway from a point in the 20-foot strip adjacent to and in front of the plaintiff's property to the opposite side of Sunset boulevard. The southerly approach to the subway is an open cut and stairway approximately 20 feet in length and paralleling the plaintiff's front property line and about 7 feet distant therefrom. To protect the open cut and stairway, iron railings were constructed around the same and above the surface of the sidewalk. The stairway and railings are opposite the center portion of the plaintiff's property.

In addition to the foregoing, it was alleged in the amended complaint that the construction of said pedestrian subway, approach, and railings immediately in front of the plaintiff's property constitute a serious obstruction to the free use by the plaintiff of said street and sidewalk for the purpose of affording passage to and from said premises; that said subway, approach, and railings greatly diminish the market and rental value of said property and greatly interfere with the free use by the plaintiff of the street in front of her property for the purposes of ingress and egress; that no proceedings have been taken by the city to ascertain the extent of said damages or to render unto the plaintiff just or any compensation therefor; that a demand for such compensation duly made to the city council was rejected.

A general and special demurrer to the amended complaint was interposed by the city and was overruled in one department of the superior court. The city answered, and the cause came on for trial before a jury in another department of said court. The city objected to the taking of any evidence on behalf of the plaintiff on the ground that the amended complaint failed to state a cause of action. This objection was overruled, and the plaintiff introduced considerable evidence in support of her complaint; whereupon the defendant renewed its objection and presented a motion on the same ground to dismiss the action. After argument, the objection was sustained, the motion was granted, and the action was dismissed on the ground that the amended complaint failed to state a cause of action. A judgment for the defendant was accordingly entered. The only question presented is whether the amended complaint states a cause of action.

Section 8 of article 1 of the Constitution of 1849 provided that private property

should not be taken for public use without just compensation. Section 14 of article 1 of the Constitution of 1879 enlarged this protection to the property owner by providing that private property shall not be taken or damaged for public use without just compensation. This enlargement of the constitutional provision first came before this court for consideration in *Reardon v. City and County of San Francisco*, 66 Cal. 492, 6 P. 317, 326, 56 Am. Rep. 109, wherein the term "damaged" was held to assure a right to compensation in addition to that theretofore obtaining; that is, "a guaranty against damage where none previously existed." This extension of the constitutional guaranty was recognized and applied in *Eachus v. City of Los Angeles*, 130 Cal. 492, 62 P. 829, 80 Am. St. Rep. 147; *Wilcox v. Engebretsen*, 160 Cal. 288, 116 P. 750; and *Sala v. City of Pasadena*, 162 Cal. 714, 124 P. 539. The foregoing cases involved the right of the owner of property abutting on a public street to protection against damage caused by the change of the grade of the street. When streets are closed, it has been held that the abutting owner has a lawful claim for such damages as he may suffer thereby. *Bigelow v. Ballerino*, 111 Cal. 559, 44 P. 307; *Brown v. Board of Supervisors*, 124 Cal. 274, 57 P. 82. Cases, among others, where damage was caused by an obstruction immediately in front of the abutting owner's property are *Williams v. Los Angeles R. Co.*, 150 Cal. 592, 89 P. 330; *Strong v. Sullivan*, 180 Cal. 331, 181 P. 59, 4 A. L. R. 343. Cases illustrating the rule that an abutting property owner may suffer special damages peculiar to himself and independent of such damage as he sustains in common with other property owners and the public by reason of the construction of railroad tracks in the street adjacent to his property are these: *O'Connor v. Southern Pac. R. Co.*, 122 Cal. 681, 55 P. 688; *Smith v. Southern Pacific R. Co.*, 146 Cal. 164, 79 P. 868, 106 Am. St. Rep. 17; *Fairchild v. Oakland & Bay Shore Ry. Co.*, 176 Cal. 629, 169 P. 388; *Lane v. San Diego Elec. Ry. Co.*, 208 Cal. 29, 280 P. 109. In *Geurkink v. City of Petaluma*, 112 Cal. 306, 44 P. 570, it was held that the owner of property abutting upon a city street was entitled to relief against the city on account of damages caused by the action of the city in so changing a natural water course as to interfere with his free access to and use of the street.

A similar situation was involved in *Genazzi v. County of Marin*, 88 Cal. App. 545, 263 P. 825, wherein it was held that a general demurrer was properly sustained to the amended complaint in that action. The decision recognized the protection afforded by the law to an abutting property owner in the event his free and convenient means of ingress and egress were substantially interfered with, and that in proper cases injunction re-

He should be granted until damages were paid where the public improvement substantially interfered with the right of access to land. Any language in that decision which would seem to run counter to the holding in *Geurkink v. City of Petaluma*, supra, and in the present case must be disregarded.

In *Brown v. Board of Supervisors*, 124 Cal. 274, at page 280, 57 P. 82, 83, the court said: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. Dill. Mun. Corp., § 712. In *Eachus v. Los Angeles Ry. Co.*, 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149, the right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation."

[1-3] In the case at bar it cannot be questioned that the plaintiff, as an abutting property owner on Sunset boulevard, possesses not only the right to the use of the street in common with all other members of the public, but also a private right or easement for the purposes of ingress and egress to and from her lot, which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor. Whether the infringement of her right is special and peculiar to the plaintiff's property and has resulted in a substantial impairment of her right, is a question of fact, and we think the complaint is sufficient in alleging not only the special and peculiar nature of the infringement as applied to said property, but also the substantial impairment of that right. At least it may not be said as a matter of law that the plaintiff under her allegations has suffered no damage. The free right of ingress and egress in the case of said business lot or a lot zoned for that purpose would seem to be a substantial right. As alleged, the plaintiff is cut off from that right to the extent of about one-third of her frontage because of the improvement complained of. We do not mean to express an opinion as to the extent of the damage suffered by her, but merely to declare that the infringement of her rights is substantial under the allegations of her complaint. We arrive at this

conclusion without intimating, as counsel for the defendant apprehend, that the construction of a lamp post or electroliner in front of private property would constitute a special and peculiar and substantial impairment of a private right.

[4] It may be assumed and may not be denied that the use to which the city has put this portion of the street for a pedestrian subway for public use is a proper street use, but such assumption, deemed incontrovertible for the purposes of this case, does not answer the requirements of the Constitution. The plaintiff may nevertheless be damaged by reason of such a proper public use to which the street or a portion thereof may be put, just as the raising or the lowering of the grade in front of private property may be a legitimate public improvement, but, when the same causes special and peculiar damages to the abutting property owner, the Constitution must be obeyed.

The defendant places great reliance upon the case of *Hayes v. Handley*, 182 Cal. 273, 187 P. 952, wherein it was held that a traffic tunnel constructed beneath a street was a proper street use, and, as such, a use contemplated for public street purposes when the property was acquired for street purposes. But that decision does not go to the length of holding that, in the construction of the tunnel, the city could create or impose upon an abutting property owner a special damage or injury to his property not shared by the public or other property owners similarly situated, such as is shown in the case at bar, without providing compensation therefor.

The case of *Colegrove W. Co. v. City of Hollywood*, 151 Cal. 425, 90 P. 1053, 13 L. R. A. (N. S.) 904, also relied upon by the defendant, is not authority for its contention. In that case it was held that the owner of the fee, subject to the easement for street purposes, might use the property over which the right of way exists for any purpose not inconsistent with the full and free enjoyment of the easement for street purposes, but that this right of the owner might diminish from time to time as the needs of the public in the use of the easement for street purposes would increase.

Likewise the case of *Montgomery v. Railway Company*, 104 Cal. 186, 37 P. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89, is not in point for the reason that the question of special damages to an abutting property owner resulting from a legitimate and proper street use was not involved. The same is true of the case of *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577, where the question of damages to abutting property owners for the construction of a street improvement for a proper street use was not before the court. The case of *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 25 L.

Ed. 336, involved the right of an abutting property owner to damages resulting from a temporary obstruction to free use of the street during the construction of a tunnel beneath the street. The case arose in Illinois before the adoption in that state of its Constitution in 1870 (article 2, § 13) extending protection to the property owner to include damages where no taking was accomplished, and is not in point in a case where a right to compensation for damages is guaranteed.

Further notice of decisions from other states would not be especially helpful. In states whose constitutions guarantee compensation for "damages" as well as for "taking," we find a general uniformity of opinion that a substantial impairment of the private right must be compensated for. Where those Constitutions provide for compensation for "taking" only, the damages without a taking are generally held to be not compensable.

We are satisfied that the complaint herein states a cause of action and that the extent of the alleged damages is a question of fact.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.

214 Cal. 128

WHITTINGHAM v. CALIFORNIA TRUST CO.

L. A. 12928.

Supreme Court of California.

Oct. 23, 1931.

Rehearing Denied Nov. 19, 1931.

1. Executors and administrators ☞315(6).

Decree with reference to terms of trust and not will is measure of rights of beneficiaries.

2. Executors and administrators ☞315(6).

Where no appeal was taken from decree of distribution, interpretation given therein to terms of will was conclusive on all interested parties.

3. Executors and administrators ☞315(5).

Where will provided that principal of trust should be paid to beneficiaries when all children surviving testator should reach certain age, silence of decree of distribution with respect to distribution of that portion of trust estate to which adult daughter was entitled held to show construction of will by court excluding daughter from survivorship provisions.

4. Trusts ☞61(1).

Court could order distribution to beneficiary of one-third share of her portion of trust estate where, under decree of distribution, she was only person beneficially interested.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould and Douglas L. Edmonds, Judges.

Action by Edna B. Whittingham against the California Trust Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Crail, Shutt, Penprase & Crail, of Los Angeles, for appellant.

George W. Fenimore and Samuel J. Carter, both of Los Angeles, for respondent.

PER CURIAM.

The California Trust Company appeals from a judgment of the superior court of Los Angeles county directing said Trust Company, as trustee of a trust estate created by the will of Edwin P. Benjamin, the father of said plaintiff, to pay over and deliver to the plaintiff a sum equal to a one-third part of the corpus of the trust created by the will of said Edwin P. Benjamin for her benefit, which sum would amount to approximately \$5,000. This relief was sought and secured by the plaintiff upon the ground that by reason of a change in her circumstances there has come into existence a situation which was not anticipated by the testator, and that this situation is of such gravity as to warrant a distribution to her of a portion of the principal of the trust estate, despite the fact that the time for the expiration of the trust, as declared by the will, has not yet arrived. In her complaint, plaintiff alleged that by the provision of the will of her father and the decree of distribution, "the decedent, Edwin P. Benjamin created, and intended to create, a trust in favor of his daughter, the plaintiff herein, in one-sixth of all the property of which he should die possessed; that the net value of the corpus of said trust for the benefit of plaintiff is in excess of \$15,000; that plaintiff is now a person of mature years, to-wit: of the age of forty-one years, and is fully capable and competent to handle and administer her own property; that plaintiff was, at the time of the execution of said will, in good health and able-bodied, and fully able to be self-supporting; but since that time, plaintiff has become sick and infirm, and is now a chronic invalid suffering from internal disorders, which have required, and will require the performance of a series of operations upon plaintiff; that by reason of her physical condition, as aforesaid, plaintiff

is unable at the present time to earn her own living and be self-supporting, and has no means or income aside from that produced by the probate estate." The complaint also sets out the fact that the plaintiff is financially unable to meet the payments of installments due on the incumbrances upon her home, and that the holders of said incumbrances are threatening to foreclose the same and put the plaintiff out of possession.

The appellant trust company does not deny that the condition of the plaintiff is so necessitous as to warrant the interposition of a court of equity, and in fact expressly concedes that at the trial the plaintiff satisfactorily established her need. It bases its opposition to a distribution of a portion of the trust estate upon the ground that, as it interprets the will of said testator, the plaintiff is entitled only to the income from one-sixth of the property of said trust estate, and that her interest in the corpus or principal of the trust estate is contingent upon her surviving until the youngest minor child of said testator shall have attained the age of thirty-five years, at which time the trust estate is to be distributed, and that inasmuch as there are other persons who have an interest in the corpus of said trust estate, in the event of the death of the plaintiff prior to the time for the termination of the trust, the court was without power to decree a distribution to plaintiff of any part of the corpus of the trust estate without the consent of such persons.

At the time of the execution of the will, the testator's family consisted of one adult daughter, plaintiff herein, and two adult sons, Walter and Charles, by his first wife, and three minor children by his second wife, Palmer, Rowena, and Howard, of the ages of 12, 10, and 7 years, respectively, and his second wife, Gertrude Benjamin. After making a specific bequest to his two adult sons, the testator in the fifth paragraph of his will made the following provision: "All the rest, residue and remainder of my estate, both real and personal, of every kind, nature and description and wheresoever the same is situated or found, including all property over which I may have any power of testamentary appointment, I hereby give, devise and bequeath to my executors, hereinafter named in trust, however, for the following uses and purposes." Then follows the provision giving to the trustees named the management and control of the trust estate, followed by these provisions: "2nd. The net income arising from the trust fund hereby created shall during the continuance thereof be paid in equal quarterly payments during each year, if possible, by said executors and trustees as follows: 1/3 of said net income shall be paid to my wife, Gertrude Benjamin; 1/6th of said net income shall be paid to my daughter, F. Edna Benjamin [plaintiff herein]; the

balance of said net income shall be expended by my said executors and trustees during the continuance of lifetime of said trust for the support and education of such of my children that shall be minors at the time of the execution of this will and such of my children as may be born after the execution of this will.

* * * 4th. In the case of the death of my said wife or *any of the children*, the proportion of the net income of said trust fund hereinbefore provided to be paid to her or to them as the case may be, shall be paid after such death for the support and education of my said children who are now minors and those who may be born after the execution of this will, except that if *any of my children* die leaving a child or children, the proportion of income previously paid to such deceased child, as hereafter provided shall be paid and distributed share and share alike among the lawful issue of such deceased child or children, such issue to take, however, per stirpes and not per capita. 5th. When all my children which shall survive me shall have become the full age of 35 years then my said executors and trustees shall distribute the principal of said trust fund to the same persons and in the same proportion in which the net income thereof was payable immediately preceding the date of the termination of said trust." (Italics ours.)

It is argued by appellant that plaintiff, the adult daughter, was intended to be included by the testator in those provisions of the will providing for the disposal of the income of the trust estate in case of the death of any of the children and that, therefore, by this provision, upon the death of plaintiff, she being one of the children, prior to the termination of the trust estate, the income from her one-sixth interest would go to her issue, and, failing issue, the same would go to the support and education of testator's children who were minors at the time of the execution of the will, it being conceded that these children were Palmer, Rowena, and Howard, and as a consequence of such provision necessarily the unborn issue of plaintiff, and failing such issue, the minor children of the testator, Palmer, Rowena, and Howard, have an interest in such income, and in the principal of the trust estate.

Respondent points out the fact that there has been a decree of distribution in said estate, in which no mention is made as to the disposal of the one-sixth portion of the principal of the trust estate in the event of the death of respondent prior to the termination of the entire trust, and insists that, as there is no provision in the decree of distribution indicating that there is any other person beneficially interested in this one-sixth portion of the trust estate, no one has a right to complain of the distribution to her of a one-third share of her interest prior to the termination of the entire trust estate.

[1] It is well settled that the decree of court with reference to the terms of a trust, and not the will, is the measure of the rights of the beneficiaries. In *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681, 63 Am. St. Rep. 145, the court said: "Where no appeal is taken from the decree by the trustees, it becomes conclusive upon them, and they can no longer contend for a different construction from that which is imported by the terms of the decree, which must be regarded as a construction by the court of the testator's intention, and is to be treated as if he had created the trust in the terms of the decree." And in *McKenzie v. Budd*, 125 Cal. 600, 58 P. 199, 200, the court said: "The decree of distribution becomes the measure of the rights of all claimants to the estate, and their rights are to be determined by the terms of this decree." See, also, *Miller v. Pitman*, 180 Cal. 540, 182 P. 50; *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 P. 247; *Keating v. Smith*, 154 Cal. 186, 97 P. 300; *Moor v. Vawter*, 84 Cal. App. 678, 258 P. 622.

Appellant concedes that this is the general rule, and also grants respondent's contention that the principal follows the income, and that an unrestricted gift of the income to respondent constitutes a gift of the corpus by implication. *Estate of Franck*, 190 Cal. 28, 210 P. 417. It is appellant's theory, however, that the decree of distribution being silent with respect to the distribution of the income from that portion of the trust estate, equaling one-sixth from which the respondent receives the income, its distribution is to be governed by the terms of the will itself, which was incorporated by apt language into the decree of distribution. *Goldtree v. Thompson*, 79 Cal. 613, 22 P. 50; *Goad v. Montgomery*, supra; *Estate of Merchant*, 143 Cal. 537, 77 P. 475; *Estate of Blake*, 157 Cal. 448, 108 P. 287.

[2-3] An examination of the parallel provisions of the will and of the decree of distribution convinces us that the contention of appellant is not tenable. By the decree of distribution, the property was distributed to the trustees in the following language: "To said Gertrude Benjamin and Egerton Shore * * * in trust for Gertrude Benjamin, widow of the said deceased, F. Edna Benjamin Pearce, formerly F. Edna Benjamin [plaintiff herein], daughter of said deceased, Palmer Benjamin, minor son of said deceased, Rowena Benjamin, the minor daughter of said deceased, and Howard Benjamin, minor son of said deceased, or the lawful issue of such of the said Palmer Benjamin, Rowena Benjamin, or Howard Benjamin as may die leaving said lawful issue before the termination of the trusts by the said will created." The provisions of the will relative to the distribution of the income of the estate in the event of the death of the testator's wife or any of the children is construed by the decree

as follows: "In case of the death of the said Gertrude Benjamin, or any of the said minor children, Palmer Benjamin, Rowena Benjamin and Howard Benjamin, the proportion of the net income of said trust fund hereinbefore provided to be paid to the said Gertrude Benjamin or expended for the said Palmer Benjamin, Rowena Benjamin and Howard Benjamin, as the case may be, shall be paid, after said death for the support and education of the said Palmer Benjamin, Rowena Benjamin or Howard Benjamin, except that if any of said Palmer Benjamin, Rowena Benjamin or Howard Benjamin die leaving a child or children, the proportion of income previously paid to said deceased child, as hereinafter provided, shall be paid and distributed, share and share alike, among the lawful issue of said deceased child or children, such issue to take, however, per stirpes et non per capita." The provision of the will, with reference to the distribution of the corpus of the estate, was embodied in the decree of distribution in the following language: "When all of the said Palmer Benjamin, Rowena Benjamin and Howard Benjamin, or the survivor or survivors of them, shall become the full age of thirty-five years, then the said trustees shall distribute the principal of said trust fund to the same persons and in the proportions in which the net income thereof was immediately prior thereto, payable." (Italics ours.)

It is possible that it may have been the testator's intention to use the word, "children" in paragraph 4th of said trust clause, as designating not only his minor children, who by virtue of their age would necessarily be thought of as children, but also his adult daughter; or it may have been his intention merely to designate his minor children. However, it is apparent, we think, from a most cursory perusal of the decree of distribution, that the court in said decree, by specifically enumerating the three minor children of the testator in those provisions of the decree which correspond to the provisions of the will with reference to the death of any of the children of the testator, interpreted the word "children" to mean only the minor children of said testator, and, by the omission of the adult daughter from such enumeration, thereby intentionally excluded her from these survivorship provisions. It follows, therefore, that the decree of distribution was silent with respect to the distribution of the one-sixth portion of the income and principal of the trust estate, not inadvertently or through an oversight on the part of the draftsman of the decree of distribution, but by virtue of the fact that, the survivorship provisions of the will having been interpreted to apply only to the minor children of the testator, there was no provision of the will governing and controlling the disposition of this one-sixth portion of the trust estate. No appeal was taken

from this decree. Therefore the interpretation given therein to the terms of the will is conclusive on all interested parties.

[4] The only question involved upon this appeal being the question of whether or not the respondent was the only person beneficially interested in this one-sixth portion of the income and principal of the trust estate, and it being apparent from the decree of distribution that she is the only person interested, the court had the power to order a distribution to her of a one-third share of her portion of the trust estate. *Fletcher v. Los Angeles Trust, etc., Bank*, 182 Cal. 177, 187 P. 425; *Moor v. Vawter*, supra.

The trial court expressly found that "the corpus of the trust funds as now held by the defendant as trustee consists of a large number of mortgages and trust deeds and mortgage guarantee certificates of the average value of about \$4,000.00 each, that the corpus of the trust for the benefit of plaintiff, as held by the defendant as trustee, may be segregated and divided from the remainder of the trust funds held by the defendant as trustee, without impairing or affecting the value of said remaining trust funds." No difficulty is therefore to be anticipated in the carrying out of the judgment by the trustees.

The judgment is affirmed.

214 Cal. 791

RITTER v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE.

S. F. 13343.

Supreme Court of California.

Oct. 17, 1931.

Insurance ☞514.

Action for personal injuries having abated by assured's death, no liability attaches against insurer under policy to pay final judgment against assured.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Edith S. Ritter (formerly Edith S. Mack) against the California Highway Indemnity Exchange. From a judgment against it, defendant appeals.

Reversed.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

PER CURIAM.

The sole question presented on this appeal is whether or not plaintiff has a cause of action directly against the defendant insurance carrier for personal injuries received by her while riding as a passenger in the jitney bus of one Sam Euphrat, under the terms of an insurance policy carried by Euphrat and under the provisions of a certain ordinance of the city and county of San Francisco. Euphrat died as a result of injuries received in the accident, so that any cause of action against him abated with his death.

The very question here presented, involving the same insurance policy and growing out of the same accident, has recently been decided by the District Court of Appeal. *Severns v. California Highway Indemnity Exchange*, 100 Cal. App. 384, 280 P. 213.

In that case it was held that the insurance policy carried by Euphrat was simply an undertaking to pay any final judgment which the injured person might obtain against the assured, and that the obtaining of such final judgment constituted a condition precedent to any action which the injured person might have against the insurance carrier.

We are in entire accord with this conclusion and the reasoning by which it was reached. It would serve no useful purpose to repeat in this opinion what was said by the District Court of Appeal in the *Severns Case*.

On the authority and reasoning found in *Severns v. California Highway Indemnity Exchange*, supra, the judgment appealed from is reversed.

214 Cal. 89

KAHLE v. STEPHENS et al.

S. F. 13465.

Supreme Court of California.

Sept. 30, 1931.

1. Corporations ☞99(1).

Licenses ☞39.

Stock held void because issued in violation of corporation commissioner's permit and without consideration (Const. art. 12, § 11).

2. Corporations ☞376.

Sale of its capital stock to corporation held illegal.

3. Corporations ☞314(3).

Director who, with other members of corporation's executive committee, purchased stock in other corporation which they later re-

sold to own corporation at artificially enhanced price, could not retain such secret profit.

4. Bankruptcy ⚡303(5).

In action by corporation's bankruptcy trustee against directors, evidence *held* to show injury resulted from transaction involving defendants, although they were sole stockholders.

Record showed that at time of transaction there were subscribers who had paid for a number of shares and had received interim certificates evidencing their rights in stock to be issued.

5. Corporations ⚡316(1).

Assent of directors did not validate illegal transaction, nor was it important where corporation was almost completely dominated by director sued for accounting.

6. Bankruptcy ⚡282.

Subsequent creditors are entitled to recover against corporation's directors for fraud, and corporation's bankruptcy trustee is party authorized to sue on their behalf.

7. Corporations ⚡316(1).

Director was bound to act with utmost good faith in dealing with corporation.

8. Bankruptcy ⚡303(5).

In action by corporation's bankruptcy trustee against directors and stockholders for accounting, to declare trusts and for other equitable relief, evidence *held* to sustain granting relief to plaintiff.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Richard F. Kahle, as trustee in bankruptcy of Stephens & Co., against George C. Stephens and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

W. F. Williamson and W. R. Wallace, Jr., both of San Francisco, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, and H. A. Frank, of Oakland, for respondent.

PER CURIAM.

This is an action by the trustee in bankruptcy of a bankrupt corporation against several defendants, for an accounting, to declare a trust in certain securities, and for other equitable relief. The principal defendant is George C. Stephens, its former president. The trial court rendered judgment in favor of plaintiff for the relief demanded, and de-

fendants brought this appeal, chiefly on the ground that the record does not support the findings and judgment. A study of the record, however, reveals ample evidence in support thereof.

The essential facts are as follows: Prior to 1919, defendant George C. Stephens and R. D. Spicer were the members of Stephens & Co., a partnership dealing in stocks and bonds. They were also the sole stockholders, apart from one other director's qualifying share, of a California corporation of the same name, which dealt in street bonds and property sold for delinquent assessments. In 1919, they commenced a series of transactions which eventually led to this action. The first of these, which may be called the 1919 transaction, was ostensibly designed to increase the capitalization of the corporation so as to expand its business. Appellant's version of this deal, based upon entries in the corporate books, is, in substance, that the capital stock of the corporation was increased, and that Stephens and Spicer purchased 1,860 shares of the preferred stock of a par value of \$100 per share, for \$186,000. What the record actually shows is quite different. The corporation directors adopted a resolution to transfer the assets and liabilities of the corporation to Stephens and Spicer individually, in return for which they were to surrender all of the stock for cancellation. They then organized a corporation called the Public Lien & Realty Company, to which they had these assets transferred. In return for this they received 995 shares of its capital stock, all save directors' qualifying shares. They surrendered their stock in Stephens & Co. for cancellation. The authorized capital stock of Stephens & Co. was increased from \$100,000 to \$1,000,000. Thereupon Stephens and Spicer transferred to Stephens & Co., the corporation, the stock of Public Lien & Realty Company, and the assets and liabilities of the partnership. For this they received 1,860 shares of the preferred stock of the corporation.

The permit of the commissioner of corporations authorized sale of the preferred stock for cash at its par value. Obviously the above procedure was not a sale for cash. The consideration was the stock of Public Lien & Realty Company and the assets of the partnership. To give it the appearance of a cash sale, other steps were introduced. When the 995 shares of Public Lien & Realty Company stock were transferred to the corporation, a check for \$160,000 was drawn in favor of Stephens and Spicer. This check they indorsed back to the corporation. The other \$26,000, to make the total of \$186,000, represents the ostensible net worth of the partnership. However, at the time the check was drawn, there was less than \$10,000 in

the account, and the delivery and indorsement of it represented no transfer of cash. The net worth of the partnership was likewise imaginary. It was derived from books showing assets of \$1,854,111.89, and liabilities of \$1,828,111.89. Included in the assets were various items which were subsequently written off the books as losses. The said losses occurred in 1919, the time of the transaction. The value of the Public Lien & Realty Company stock was also inflated. The books showed an item of \$40,116.60 for "organization expense," which expense, according to testimony, only amounted to \$116. The witness Stowell, former secretary of the corporation, testified to the various facts, and his computations showed that the corporation actually received nothing for the stock, but took over liabilities of more than \$45,000.

The second transaction took place in 1922. Defendants' version is that Stephens and Spicer, through the agency of Public Lien & Realty Company, sold their 1,860 shares of preferred stock to various purchasers, received \$186,000, which they permitted to remain on deposit with Stephens & Co., the corporation, drawing interest at 7 per cent. What the court found from sufficient evidence was that Public Lien & Realty Company had sold to the public more shares of preferred stock than were available, and pending a further increase in capitalization, a sale of 1,860 shares from Stephens & Co. to Public Lien & Realty Company was entered in the books of Stephens & Co., and ultimately a credit of \$186,000 in favor of Stephens and Spicer appeared on said books. The court found that Public Lien & Realty Company, which had no separate offices, business, or cash, acted merely as a dummy, that the purchase by it was a subterfuge designed to cover up the actual transaction, which was a sale by Stephens and Spicer to the corporation of its own stock.

[1, 2] So far it appears that the stock originally issued to them as above described was void because of violation of the terms of the permit (National Stone, etc., Corp. v. Voorheis, 93 Cal. App. 738, 270 P. 286) and for the further reason that it was issued without consideration, in violation of article 12, § 11, of the California Constitution, then in effect. Hence they had actually no stock to sell. But the credit of \$93,000 apiece which they received on the books of the corporation was void for the additional reason that the stock was sold to the corporation, and the sale was plainly illegal. See *Stevens v. Boyes Hot Springs Co.* (Cal. App.) 298 P. 508.

The third transaction was the liquidation of Stephens' credit in 1924. For it he took

certain securities owned by the corporation, the value of which was found by the court to be far in excess of \$93,000, being approximately \$116,395. During this time the corporation was in financial difficulties. Shortly after he obtained the securities, he transferred them to his wife. In 1926 the corporation went into bankruptcy, showing an excess of about \$2,500,000 of liabilities over assets.

[3] The court gave judgment for the return of the securities or their value, and adjudged the transfer to Mrs. Stephens to be without consideration and void. It was also established that Stephens and others members of the executive committee of the corporation had formed a syndicate to purchase stock of Arizona Power Company, which they later resold at an artificially enhanced price to the corporation. Judgment was therefore rendered against Stephens in the additional sum of about \$2,060, representing the profit thus made. That such a secret profit cannot be retained by a corporation director is, of course, well settled. See *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243.

[4-6] It is contended that no injury resulted from the transactions in 1919 because all of the stock was owned by Stephens and Spicer. But the record shows that in October of that year, at the time of the transfer, there were subscribers who had paid for 304 shares and had received interim certificates evidencing their rights in the stock to be issued. Likewise the fact that the directors of the corporation assented to the various illegal transactions does not make them legal, nor is it of any importance in view of the almost complete domination of the corporation by Stephens. The argument that the trustee cannot bring this action on behalf of creditors whose claims were not in existence at the time of the fraud is also without merit. Subsequent creditors are entitled to recover (*Sherman v. S. K. D. Oil Co.*, 185 Cal. 534, 197 P. 799; *Clark v. Tompkins*, 205 Cal. 373, 270 P. 946), and the trustee is a party authorized to sue on their behalf. *Schroeter v. Abbott*, 185 Cal. 146, 196 P. 39; *Dean v. Shingle*, 198 Cal. 653, 246 P. 1049, 46 A. L. R. 1156.

[7, 8] It must be remembered that Stephens occupied a fiduciary relationship to the corporation, and was bound to act with the utmost good faith. The evidence shows that he did not, and the trial court in its findings correctly interpreted the complex negotiations. The judgment finds abundant support in the record and the authorities, and we deem it unnecessary to indulge in any lengthy discussion of either.

The judgment is affirmed.

214 Cal. 138

In re BROOKS' ESTATE.

S. F. 14083.

Supreme Court of California.

Oct. 24, 1931.

1. Wills ⇨130.

Instrument offered as holographic will must be complete and executed document.

2. Wills ⇨133.

Signature on holographic will found elsewhere than at end may be signature of execution, but evidence warranting this conclusion must be found in instrument itself.

3. Wills ⇨386.

Appellate court may set aside findings of court or jury on whether instrument presented is holographic will only when findings are not sustained by adequate evidence.

4. Wills ⇨384.

On appeal, evidence on whether instrument was intended as will must be regarded in light most favorable to support of judgment.

5. Wills ⇨130.

Trial court *held* warranted in finding instrument with testator's signature in first line and without period at end was holographic will.

The will began, "This is my will—E. R. B.," and then followed provisions giving certain property to certain persons. There was no period at end, and after expression giving legacy to certain person the writer left two blank lines and there was no residuary legacy clause and no executor named.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Phil C. Katz, special administrator of the estate of Elizabeth Ryan Brooks, also called Elizabeth R. Brooks, deceased, and another, filed an application for the probate of the will of deceased, opposed by Joseph Ryan and another. From a judgment admitting the will to probate, contestants appeal.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 297 P. 621.

Charles S. Wheeler, Charles S. Wheeler, Jr., Walter Slack, and Brice Toole, all of San Francisco, for appellants.

Henry F. Boyen, of San Francisco, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration we are satisfied with the disposition of the cause made by said court, and we hereby adopt the opinion of Mr. Justice Sturtevant as the opinion of this court. It reads as follows:

The public administrator of San Francisco filed a petition asking that a purported will be admitted to probate and that he be appointed administrator with the will annexed. After due notice certain heirs appeared and filed a written opposition. To that pleading the administrator filed an answer and on the issues so made a trial was had before the trial court. It made findings of fact in favor of the public administrator, and in its conclusion of law it found that the purported will was the last will and testament of the deceased and that the public administrator was entitled to letters of administration with the will annexed. From a judgment entered thereon two of the heirs have appealed and have brought up a bill of exceptions. The bill of exceptions shows that the only evidence introduced in the trial court consisted of a showing as to the will being in the handwriting of the deceased and evidence as to the kith and kin of the deceased and evidence identifying the beneficiaries named in the will.

On this appeal there is but one point made. The contestants claim that the trial court erred in applying the law to the purported will and ordering it admitted to probate. The public administrator claims that the trial court made no error. A photographic copy of the purported will is contained in the transcript. It is as follows:

"Sept 12—1929

"This is my will—Elizabeth Ryan Brooks

"To my sister—Mrs. W L Perkins—857—Lincoln Ave. St. Paul Minesoto—I give five Shares of A. T. T. Stock—

"To Miss Alice Newman 641 O'Farrall St. S. F I give five Shares of A. T. T Stock—

"To Miss Elizabeth Susan O'Brien 857—Lincoln Ave St-Paul Minn—five Shares of Great Western Power Stock—

"To Mrs Joseph Ryan, 2426 Howard N. Seattle Wash. Twenty Shares of Calif Edison Stock—

"To Mrs Mary Springer Allen 2100 Bay St —S. F four Shares of Paraffin Stock

"To my Sister Mary Elen Ryan Chicago I give \$1.00

"To my brother T. A Ryan \$1.00"

[1, 2] It will be noted that the writer did not end the instrument with a period. However, it will also be noted that with few exceptions numerous periods and punctuation marks are omitted. The will does not contain a residuary clause nor does it show that

the decedent possessed any other properties than those mentioned in the will. On the face of the document between the expression giving a legacy to Mrs. Mary Springer Allen and the expression giving a legacy to Mary Ellen Ryan the writer left two blank lines. The ending is abrupt and without a period. The first line, "This is my will—Elizabeth Ryan Brooks," is quite out of the ordinary. If it had been the last expression instead of the first there would be no question remaining in the case to be determined. The respective counsel cite and rely on the decisions in recent cases. As to some points both counsel cite the same case. It is now well settled that in determining whether a certain writing is an holographic will the fact "must be established upon the face of the offered instrument that it is a complete and executed document; that notwithstanding that the usual place of signing and so of evidencing this execution and completeness is at the end of the instrument, the signature of the testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and on the instrument itself. * * *" Estate of McMahon, 174 Cal. 423, 424, 163 P. 669, L. R. A. 1917D, 778. In applying the rule in some cases the court found that the instrument before the court contained words showing that the writer had done everything that he intended to do. Estate of McMahon, supra; Estate of Morgan, 200 Cal. 400, 253 P. 702; Estate of England, 85 Cal. App. 486, 259 P. 956; Estate of Sullivan, 94 Cal. App. 674, 677, 271 P. 753. At least one of the cases turned on the fact that the signature was at the top and not at the end of the purported will, but there was no room on the paper for the writer to sign at the end. Estate of Streeton, 183 Cal. 284, 288, 191 P. 16. Some other cases turned on the fact that there was on the face of the instrument something showing affirmatively that the writer had not finished doing the things he intended to do. Estate of Manchester, 174 Cal. 417, 418, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of Devlin, 198 Cal. 721, 726, 247 P. 577. Again some cases turned on the fact that on the face of the instrument there was nothing showing affirmatively that the writing of his name by the writer in the exordium was by him intended as a signature. Estate of Bernard, 197 Cal. 36, 40, 239 P. 404; Estate of Hurley, 178 Cal. 713, 714, 174 P. 669.

[3-5] We think the instrument before us falls partly under each of the classes just enumerated. The first sentence, "This is my will—Elizabeth Ryan Brooks," has probative force to uphold the inference that the name of the decedent was written with the intention of evidencing the fact that the document was her fully executed completed will. The gap

or unwritten space mentioned above, the absence of a period at the end, the omission of a residuary legacy clause, and the failure to name an executor are facts on which an inference may be founded that the document was not intended as a will. Now it will be conceded, as contended by the respondent, that "it is the peculiar and exclusive province of the trial court or trial jury in the first instance to make such finding of fact, and it is especially the right of every litigant to have all facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence. Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753. Estate of Streeton, 183 Cal. 284, 289, 191 P. 16, applies that rule to such cases as the one before us. Then in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A. L. R. 123, the court said: "In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment." Under the circumstances mentioned we are unable, as a matter of law, to say the trial court erred by drawing the wrong inference.

The order is affirmed.

CLARK v. McCLURG. *

L. A. 11184.

Supreme Court of California.

Sept. 25, 1931.

Rehearing Granted Oct. 24, 1931.

1. Damages ⇨87(1), 91(1).

Exemplary damages are not recoverable as matter of right, and may be awarded only under evidence of fraud, malice, or oppression (Civ. Code, § 3294).

2. Damages ⇨87(2).

Ordinarily, exemplary damages are not recoverable in absence of showing of actual damages (Civ. Code, § 3294).

This is true, since exemplary damages are mere incidents to the cause of action and can never constitute basis thereof.

3. Appeal and error ⇨1070(1).

Where plaintiff established right to compensatory damages in action for libel and slander, fact that jury assessed entire damages as exemplary constitutes error of form only.

4. Appeal and error ⇐930(2).

Reviewing court assumes jury gave heed to instructions.

5. Libel and slander ⇐33.

Law presumes general damages follow from utterance or publication of matter slanderous or libelous per se.

For this reason, where publication is slanderous or libelous per se and is false and unprivileged, a cause of action for actual or compensatory damages is conclusively established.

6. Libel and slander ⇐125.

Where plaintiff established right to compensatory damages for libel and slander, verdict assessing entire damages as exemplary held liberally construed as general verdict covering all damages, both actual and punitive.

The jury inadvertently or by some mischance assessed the entire damages as exemplary instead of segregating them, but reviewing court construed the verdict liberally rather than strictly as an erroneous verdict.

7. Appeal and error ⇐1170(10).

Judgment should not be reversed because of form of verdict (Const. art. 6, § 4½).

8. Libel and slander ⇐123(8).

In action for libel and slander, defendant was not entitled to nonsuit on ground of privilege in view of evidence showing malice.

Assuming that publication was privileged, evidence was sufficient to justify submission of question whether privilege was deemed to have been lost by reason of fact that libel was published maliciously and without reasonable or probable cause for believing it constituted true statement.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Margaret Clark against Lillian Sanford McClurg for damages for libel and slander. From an adverse judgment, defendant appeals.

Affirmed. Appeal from order denying motion for new trial dismissed.

Superseding opinion in 295 P. 1038.

Wolfson & Swarthe, Louis L. Swarthe, Burnett Wolfson, and Earl I. Swetow, all of Los Angeles, for appellant.

Grant B. Cooper, H. D. Greenschlag, and Cooper & Collings, all of Los Angeles, for defendant.

WASTE, C. J.

In this action for damages, the first count of the complaint is based on an alleged slander asserted to have been uttered by the defendant of and concerning the plaintiff, while the second count sounds in libel. The jury brought in the following verdict: "We, the jury in the above entitled action, find for the plaintiff and assess her damages in the sum of ——— (\$——) Dollars as actual damages and the sum of Five Thousand (\$5,000.00) Dollars as punitive damages, making a total of Five Thousand (\$5,000.00) Dollars, this 20th day of September, 1928." From the judgment entered the defendant prosecuted this appeal, urging, among other things, that the verdict is contrary to law and void. This point was presented to the court below by means of various motions, each of which was denied.

[1, 2] Citing section 3294 of the Civil Code and decisions of the courts of this and other jurisdictions, the appellant contends that a finding of exemplary or punitive damages must be predicated upon and bear a reasonable proportion to a finding of actual or compensatory damages, and that it necessarily follows that the judgment in the instant case, based as it is solely on a finding of exemplary damages, must be reversed. The respondent concedes the rule to be "that exemplary damages cannot be recovered in the absence of a showing that actual damages were suffered," but argues that there is a legal presumption that actual damages follow a publication which is libelous per se. The utterances and printed statements constituting the basis of this action are, if false and unprivileged, slanderous and libelous per se.

Exemplary or punitive damages are not recoverable as matter of right. Their allowance rests entirely in the discretion of the jury, and they may be awarded only where there is some evidence of fraud, malice, express or implied, or oppression. Such damages are mere incidents to the cause of action and can never constitute the basis thereof. This being so, it is generally held that exemplary damages are not recoverable in the absence of a showing of actual damages. The authorities are substantially in accord on the foregoing propositions. 8 R. C. L. 590-594; 17 Cor. Jur. 968-974; 8 Cal. Jur. 861-866. Section 3294 of the Civil Code concisely states the law of California in this particular. It reads: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[3-5] Actual damages being shown, it becomes essential to determine whether the money extent thereof must be found in order to sustain a finding of punitive damages. Upon this proposition the decisions are in hopeless conflict. 8 R. C. L. 593, § 137; 33 A. L. R. 384-417; 2 Sutherland on Damages, 1321-1327, § 406. The following cases are cited as illustrative of this lack of uniformity:

In *Gilham v. Devereaux*, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381, it is held that: "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be *found* as a predicate for exemplary damages. This is the rule announced in many authorities. * * *" (Italics ours.)

The contrary rule finds expression in *McConathy v. Deck*, 34 Colo. 461, 83 P. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896, wherein it is declared: "If actual damage is shown, even though its amount is *not shown or found*, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded. In other words, after actual damage is shown it is unnecessary to show its money extent to sustain a judgment for exemplary damages."

Research has failed to disclose any California case in which this point was directly involved. There are expressions in some of our decisions tending to support the rule represented by the Montana case above cited, while others contain declarations apparently favorable to the Colorado rule. To illustrate: It is stated in *Lewis v. Hayes*, 165 Cal. 527, 533, 132 P. 1022, 1024, Ann. Cas. 1914D, 148, that, "A plaintiff is entitled to such [punitive] damages *only after the jury*, in the exercise of its untrammelled discretion, *has made the award*." (Italics added.) See, also, *Davis v. Hearst*, 160 Cal. 143, 173, 116 P. 530, and *Wright v. Baldwin*, 47 Cal. App. 147, 149, 190 P. 377. On the other hand, the following cases contain expressions which appear to support the rule that an award of exemplary damages may stand if plaintiff merely establishes his right to compensatory damages: *Chavez v. Times-Mirror Co.*, 72 Cal. App. 694, 696, 237 P. 1085; *Pickwick Stages v. Board of Trustees*, 54 Cal. App. 730, 731, 215 P. 558; *Warfield v. Krueger*, 96 Cal. App. 671, 274 P. 764, 765.

Upon the subject of damages, the court below properly instructed the jury in this case as follows: "You are instructed that it is not necessary to a recovery by the plaintiff that she should have proved specific damages if she has otherwise suffered actionable wrong at the hands of the defendant; nor is

it necessary that plaintiff should have shown any actual intent or desire on the part of the defendant to injure plaintiff by the publication in question. In other words, where the false words complained of are slanderous and actionable per se, and there is no proof of express malice on defendant's part, the jury may render a verdict in favor of the plaintiff, even though she has not proved any special damage unless it be shown that the publication was privileged as elsewhere explained in these instructions, the jury may infer the existence of malice from proof of the publication of false and unprivileged actionable words. * * * You are instructed that in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff in addition to the actual damages may in the discretion of the jury recover damages for the sake of example and by way of punishing the defendant. The award of exemplary damages depends directly and solely upon the presence of malice in fact in the mind of the defendant. If it was present they may be given. If it was absent, they cannot be allowed. * * *"

We must assume that the jury gave heed to these instructions. From the fact that it awarded punitive damages to the plaintiff, the conclusion necessarily follows that it must have found that with "malice in fact" the appellant gave utterance to the slander and published the libel complained of. In other words, the jury by its verdict has impliedly found that the appellant maliciously uttered and published certain false and unprivileged statements of and concerning the respondent, which statements, as we have already indicated, were respectively slanderous and libelous per se. The law presumes that general damages follow from the utterance or publication of matter slanderous or libelous per se. Hence where, as here, the publication is slanderous or libelous per se, and is false and unprivileged, a cause of action for actual or compensatory damages is conclusively established. *Lewis v. Hayes*, 177 Cal. 587, 591, 171 P. 293; *Dunn v. Hearst*, 139 Cal. 239, 240, 73 P. 138; *Childers v. Mercury P. & P. Co.*, 105 Cal. 284, 289, 38 P. 903, 45 Am. St. Rep. 40; 1 Sutherland on Damages, 4541, § 1216; 33 A. L. R. 414. Respondent must, therefore, be held to have established her right to compensatory damages, and the fact that the jury, inadvertently or by some mischance, assessed the entire damages as exemplary, instead of segregating them, constitutes an error of form rather than of substance. In *Courtney v. Blackwell*, 150 Mo. 245, 272, 51 S. W. 668, 676, the court declares: "The jury did find for the plaintiff, and in so doing found that the defendant had published the slander with which he was charged; and upon that finding the plaintiff

was entitled to have actual damages assessed in her favor, the slander being of that character from which the law implies such damages. They also found, as is apparent on the face of the verdict, when read in connection with the instructions, that the slander had been wantonly and maliciously published; and it was also within their province to assess exemplary damages therefor in her favor. So that there was in fact a basis under the instructions for the assessment of both actual and exemplary damages. But, by some mischance, in the form of the verdict which was given to the jury no place was left therein for the separate assessment of the actual damages, and the whole was returned in a lump sum, according to the form, as exemplary damages. This was an error of form, and not of substance, and as, under the facts and circumstances of the case, the assessment was reasonable and just, we do not think the judgment ought to be reversed for this error." The cited case and the case at bar, in each of which the jury either inadvertently or by some mischance omitted to assess the compensatory damages, are clearly distinguishable from the cases of *Hoagland v. Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740, and *Gilham v. Devereaux*, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381, for in the latter cases the jury, by its verdict, expressly found and determined that the respective plaintiffs had not suffered any actual damages.

[6, 7] We are disposed to liberally construe the verdict in this case as a general verdict covering all of respondent's damages, both actual and punitive, rather than strictly as an erroneous verdict. The judgment should not be reversed because of the form of the verdict. Const. art. 6, § 4½.

This cause was taken over after decision by the District Court of Appeal, Second Appellate District, Division 1, in order that we might fully consider the foregoing point of law. We adopt as and for the remainder of the decision of this court the following portion of the opinion prepared by Mr. Justice Houser of the District Court of Appeal:

[8] "On the trial of the action, after plaintiff had rested her case in chief, defendant presented a motion to the trial court to the effect that an order of nonsuit be entered as against the plaintiff. The ground of the motion was that as to each count contained in the complaint the communication or publication respectively alleged to have been uttered or published by defendant was privileged within the provisions of section 47 of the Civil Code. The motion was denied, and ap-

pellant herein presents for consideration of this court the question of whether, in making such ruling, prejudicial error was committed by the trial court.

"As to the first count in the complaint, since the answer thereto contained no defense that the communication of which complaint was made was privileged, it is plain that no error occurred in the order to which attention has been directed. Besides which condition the circumstances shown by the evidence were such that no privilege could attach to the situation in question. Relating to the second count, and as to which the defense of privilege was presented in the answer, on examination of the record herein it is equally clear that the contention of appellant cannot prevail. Assuming that the alleged libel was of such a character that, within the terms of the statute, its publication was privileged, nevertheless, because of the facts and circumstances surrounding its publication, the evidence was sufficient to justify the submission to the jury of the question of whether the privilege accorded to defendant was deemed to have been lost by reason of the fact that the libel was published by defendant maliciously and without reasonable or probable cause for believing that such publication constituted a true statement of facts.

"Regarding the further contention by appellant that the verdict was for an excessive amount, and consequently must have been rendered under the influence of passion and prejudice, it need only be said that, considering the evidence relating to each of the two counts in the action, together with that part of the evidence which disclosed the social and financial standing of each of the parties to the litigation, it cannot be said that 'the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice.' *Wilson v. Fitch*, 41 Cal. 363, 386."

We agree with the District Court of Appeal that the assessment of damages in this case is just and reasonable. See *Meyers v. Berg* (Cal. Sup.) 298 P. 806.

Our examination of the record satisfies us that the evidence is amply sufficient to warrant a recovery by the plaintiff. The denial of appellant's motion for a directed verdict was proper. We have found nothing requiring a reversal.

The judgment is affirmed. The appeal from the order denying the motion for new trial is dismissed.

. We concur: SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

214 Cal. 115

In re YALE'S ESTATE.

YALE et al. v. BRIGGS et al.

L. A. 11409.

Supreme Court of California.

Oct. 19, 1931.

Rehearing Denied Nov. 16, 1931.

1. Wills ⇨324(3).

Whether execution of will was procured through undue influence of chief beneficiaries held for jury.

2. Judgment ⇨199(1).

Motion for judgment notwithstanding verdict lies only when motion for directed verdict has been denied, but should have been granted (Code Civ. Proc. § 629).

3. Trial ⇨168.

Power of court to direct verdict is, touching state of evidence, the same as right to grant nonsuit at conclusion of evidence.

4. Appeal and error ⇨977(3).

Order granting new trial will not be disturbed on appeal except in face of clear abuse of discretion.

5. New trial ⇨170.

General order granting new trial reopens all issues made between the parties.

In Bank.

Appeals from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by Harold L. Yale and others against William E. Briggs and others to contest the will of Charles Yale, deceased, and for the revocation of the probate thereof. From the judgment and order granted, both parties appeal.

Affirmed in part, and in part reversed.

Superseding opinion in 293 P. 894.

Woodruff, Musick & Hartke, of Los Angeles, for contestants.

Harry A. Chamberlin, of Los Angeles, for William E. Briggs, Claude F. Peters, and William E. Briggs as executor.

Farrand & Slosson, of Los Angeles, for Ralph B. Hardacre.

PER CURIAM.

Charles Yale died in the county of Los Angeles on September 6, 1927, at the age of 81 and leaving an estate of approximately \$200,000. Two days later William E. Briggs, as the executor named therein, filed with the county clerk documents purporting to be the will of the decedent, dated August 21, 1927, and a codicil thereto dated September 3, 1927.

On September 27, 1927, an order was made admitting the will and codicil to probate and letters testamentary were thereupon issued. By the terms of the will the sum of \$100 each was bequeathed to a brother and certain nephews and the sum of \$1,000 each to two other nephews of the decedent. The specific bequests to relatives did not exceed the sum of \$4,000. The residuary estate was left equally to said William E. Briggs, a banker of Minneapolis, and Ralph B. Hardacre of Los Angeles. By the third clause of the will a debt owed to the decedent by Dr. Claude F. Peters, the decedent's attending physician, was released and forgiven.

The will nominated the Security Trust & Savings Bank as executor. By reason of the fact that Ralph B. Hardacre was one of its vice presidents, the bank, being apprised before the death of the decedent that it had been named as executor, announced its refusal to act as such. The codicil merely substituted William E. Briggs as executor in the place and stead of the bank.

On January 13, 1928, the brother an incompetent sister, and the nephews and nieces instituted a contest of the will and filed a petition for the revocation of the probate thereof on four grounds: (1) Want of testamentary capacity on the part of the decedent both as to the will and the codicil; (2) undue influence exercised over the decedent on the part of the two bankers and the physician; (3) fraud on the part of the three last named in the procurement of the will; and (4) lack of the formalities required by law in the execution of the instruments.

At the close of the contestants' case in chief, the court denied the proponents' motions for a nonsuit as to grounds 1 and 2 and granted their motions for a nonsuit as to grounds 3 and 4. At the close of the introduction of all the evidence the court granted a renewed motion for a nonsuit as to the second ground of contest and denied a similar motion as to the first ground. The proponents' motion for a dismissal of the contest as to the contestants Jennie Ethelyn Grisier and Richard Miller on the ground that they were not parties entitled to contest for the reason that they are children of a contestant, Mary J. Miller, a living sister of the decedent, was granted. The only issue presented to the jury was that of the testamentary capacity of the decedent. Special verdicts were returned in favor of the contestants on this issue both as to the will and the codicil. A motion for a judgment in favor of the proponents, notwithstanding the verdict, was denied. A judgment embodying all of the foregoing rulings and on the verdicts was entered. A motion for a new trial on behalf of the proponents was

granted on the ground of insufficiency of the evidence to support the verdicts.

Cross-appeals are presented. By the contestants, from that part of the judgment granting motions for nonsuit, and from the order granting a new trial. By the proponents, from that part of the judgment denying the motion for a judgment notwithstanding the verdict. The appeals involving the orders granting nonsuits as to grounds 3 and 4 and the dismissal of the contest as to the contestants Grisier and Richard Miller may be disposed of briefly. But the disposition of the appeals from the order granting the nonsuit on the second ground of contest, from the order denying the motion for judgment notwithstanding the verdict, and from the order granting a new trial, will require more extended discussion.

As above noted, the second ground of contest was that in the execution of the will and codicil the decedent was acting under the undue influence of the principal beneficiaries of the will, and that said instruments were therefore not the product of the decedent's free will.

The decedent had been engaged in the banking business for many years in Iowa. Late in 1900 he went to Los Angeles and continued to reside there until his death. He accumulated a fortune estimated some years before his death to be in the neighborhood of \$500,000. The inventory and appraisal filed in the matter of his estate shows his property at that time to be of the value of approximately \$200,000, consisting for the most part of securities of stable value. He appears to have been liberal with his relatives and friends. His desire for many years was to dispose of his property in such a way as not to require administration of his estate upon his death and he was always averse to the making of a will. His expressed intention was that whatever property he possessed should be disposed of by a so-called living trust. His relatives were numerous. The next of kin, however, consisted of a brother, Bruce Yale, residing in Minnesota, a sister, Mary J. Miller, confined as a hopelessly insane patient at a sanatorium near Glendale, and some fifteen nephews and nieces, with all of whom he was on affectionate or at least pleasant terms. In 1924 he presented \$1,000 to each of his nephews and nieces with the exception of the two who were left \$1,000 in the will. Shortly before his death he forgave a debt slightly in excess of \$25,000 owing to him by his brother Bruce, and he expressed solicitude for the future care and maintenance of his incompetent sister. When in business in Iowa he formed the acquaintance of the proponent William E. Briggs, who was an official in a Minneapolis bank. His friendship with Briggs was of a specially close and confidential nature.

In the spring of 1927 Mr. Briggs visited the decedent at Los Angeles. At this time Mr. Yale was in poor health and Mr. Briggs attempted to assist him in getting his affairs in shape, going so far as to prepare a list of his securities and a list of his relatives. Mr. Hardacre was an officer of the Security Trust & Savings Bank in Los Angeles where Mr. Yale kept his bank account and otherwise did his banking business. The friendship of the latter two arose and continued by reason of business relationship and was not social in character.

In May, 1927, when Mr. Briggs was in Los Angeles, the three men, Briggs, Hardacre, and the decedent, visited the safe deposit vault in said bank where the decedent kept his securities. At this time the decedent presented to each of Briggs and Hardacre securities of the value of \$10,000. The decedent had theretofore presented to Briggs money or securities to the value of about \$5,000.

Before he left for Minnesota, Mr. Briggs instructed Annie Jordan, the decedent's housekeeper, to notify Mr. Hardacre in case anything should happen to the decedent. On Friday, August 19, 1927, the decedent suffered a stroke, denominated by the physician as cerebral thrombosis, a clotting of the blood vessels of the brain. On that day he had been taken to the city by a business acquaintance, a bond salesman, and had visited his attorney, John H. Wellman, who had attended to the decedent's legal business for some thirteen or fourteen years. When returning to his home on a street car, the decedent had suffered the stroke. He was not entirely incapacitated thereby and refused on arriving at his home to have a physician called. The housekeeper, however, being apprehensive of the decedent's condition, called Dr. Peters, respondent herein; also, following the instructions of Mr. Briggs, she notified Mr. Hardacre of the condition of the decedent. Dr. Peters had attended the decedent professionally from time to time since the fall of 1926. For many months prior to the stroke the decedent had been afflicted with myocarditis, chronic nephritis, arteriosclerosis, Parker's palsy, and senility. He was also unable to control the action of his bowels and kidneys to such an extent that he required the attention of a child on the part of his housekeeper. Dr. Peters attended the decedent on the evening of August 19th or on August 20th, and prescribed the administration of sedatives to quiet the nerves of the patient. Mr. Hardacre went out to see the patient on Saturday evening, August 20th, and had a conversation with him with reference to the disposition of his property; the decedent still insisting that he desired to dispose of his property in trust. Mr. Hardacre stated to the decedent that it would be wise to have some one from the

trust department of the bank come out and advise the decedent. Mr. Hardacre endeavored to locate a vice president, who was the chief trust officer of the bank, on Saturday evening, but learned that said attorney was out of the city and would not return until the following Monday, but was advised by some one in the trust department of the bank that Mr. Chamberlin, an attorney who had transacted legal business for the bank, but who was a stranger to the decedent, might be available. Mr. Hardacre then arranged with Mr. Chamberlin to have the latter visit the decedent on Sunday, August 21, and advise him with reference to his affairs. Mr. Chamberlin took his typewriter with him. Mr. Hardacre had preceded Mr. Chamberlin to the sick room and spent a half hour or so with decedent before Mr. Chamberlin was presented to the decedent as the attorney who had been recommended by the bank to come out and advise as to the disposition or settlement of his affairs. During the conference that ensued Dr. Peters was in attendance and the decedent was in bed. Mr. Hardacre, for the most part, stayed in an adjoining room. The decedent expressed a desire to provide for a disposition of his property in trust, but on the advice of Mr. Chamberlin consented to make a will. A draft was prepared there at the house specifying the bank as the executor. When the draft was completed the decedent was asleep and it was decided not to disturb him. Mr. Chamberlin took the draft to his office and had it retyped. About 3 o'clock in the afternoon he returned to the sick room, the decedent was propped up in bed by means of a chair placed at his back with the assistance of Dr. Peters. The will was then signed, the nurse and Mr. Chamberlin subscribing as witnesses. The next morning, Mr. Chamberlin delivered the will to an officer of the bank. On the same day, Monday, the decedent caused his housekeeper to request his attorney, John H. Wellman, to come out to the house for consultation. Mr. Wellman was unable to go that day but did go out on Wednesday and had a talk with the decedent, at which time the decedent told Mr. Wellman that he wanted him to write his will; that he had a will but was not satisfied with it and wanted to change it. The decedent was so agitated and weak at the time that Mr. Wellman declined to go ahead with the preparation of a will for the reason that, in his opinion, the decedent was not in a mental or physical condition to make a will at the time.

Some months before the fatal illness of the decedent, Mr. Briggs had requested Mr. Hardacre to notify him if anything should happen to Charles Yale. Shortly after the decedent suffered the first stroke, Mr. Hardacre telegraphed and telephoned to Minnesota to Mr. Briggs notifying the latter of the decedent's condition. Mr. Briggs arrived in

Los Angeles on August 30 and immediately took charge of the decedent's affairs, even going to the extent of having the decedent execute, under date of September 2, 1927, a general power of attorney in his favor and at the same time a special power of attorney authorizing Mr. Briggs to assign and set over to the Title Insurance & Trust Company all of the property of the decedent of whatever kind. On the same day a trust officer of that company was sent out to the home of the decedent upon information that Mr. Yale desired to execute a trust. Upon his arrival and his observation of the condition of the decedent, in the presence of Mr. Briggs, this officer refused to proceed further with the execution of the trust on the ground that in his opinion the decedent was not mentally competent to transact business.

When the bank refused to act as the executor, Mr. Hardacre immediately notified Mr. Briggs at Minneapolis of that fact by telephone, at which time it was agreed between the two men that Mr. Briggs should be substituted as executor in the place and stead of the bank. A codicil to that effect was prepared by Mr. Chamberlin and on September 3d was signed by the decedent, by his mark, Mr. Chamberlin and one of his office associates acting as the witnesses thereto. After Mr. Briggs arrived on the scene he took complete charge of the decedent's affairs, directed what should be done with reference to the decedent's properties, and went even to the length of endeavoring to prevail upon Seth Yale to keep the other relations away from the house. This he appears to have succeeded in doing to an unwarranted extent.

[1] It is unnecessary to detail further the evidence on which the contestants rely as establishing a prima facie case of undue influence and thus demonstrate that the order granting the nonsuit as to this ground of contest was erroneous. It is enough to say that the record sufficiently shows that from the time the decedent suffered his first stroke until his death he was under the active and complete domination and control of the chief beneficiaries of the will or their agents. At the time the will was executed the attending physician, Dr. Peters, one of the chief beneficiaries, actively assisted in propping his patient up in bed so that he might sign the document. On the record before us we are satisfied that the following indicia of undue influence were present: (1) The provisions of the will were unnatural. It cut off from any substantial bequests the natural objects of the decedent's bounty. (2) The dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an op-

portunity to control the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed. In addition to these indicia, a confidential relationship existed between one or more of the chief beneficiaries of the will and the decedent. Altogether they were sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury. See *Estate of Graves*, 202 Cal. 258, 259 P. 935; *Estate of Relph*, 192 Cal. 451, 465, 221 P. 361; *Estate of Nutt*, 181 Cal. 522, 526, 185 P. 393; *Estate of Baird*, 176 Cal. 381, 384, 168 P. 561; *Estate of Pack-er*, 164 Cal. 525, 129 P. 778; *Estate of Lavin-burg*, 161 Cal. 536, 119 P. 915; *Estate of Ricks*, 160 Cal. 450, 117 P. 532; *Estate of Gallo*, 61 Cal. App. 163, 175, 214 P. 496; 26 Cal. Jur., pp. 647 et seq.

We must conclude, therefore, on the record here, that the trial court erred in taking from the jury the issue of undue influence and that the motion for nonsuit on that ground of contest should have been denied.

As to the propriety of the order granting the motion for a new trial on the first ground of contest, viz., want of testamentary capacity, the evidence was greatly in conflict. We do not feel disposed or required further to discuss the evidence on this issue, contained in a voluminous record, in order to demonstrate that the preponderance was one way or the other or that a verdict for the contestants would or would not be supported by sufficient evidence. All that is necessary to say is that the case is so balanced on this issue that it cannot be said that the trial court was guilty of such an abuse of discretion as to require a reversal of its order granting the new trial.

[2-4] On the appeal from the order denying the motion for judgment, notwithstanding the verdict, the contentions of the proponents and appellants are equally without merit. We cannot say that their motion for a nonsuit at the conclusion of the evidence, made on the ground that the contestants' showing on the issue of testamentary incapacity was insufficient to entitle it to go to the jury, should have been granted. There was substantial evidence in favor of the contestants on this issue and the motion for a nonsuit was properly denied. Furthermore, there is support for the statement that a motion for judgment, notwithstanding the verdict, will lie only when a motion for a directed verdict has been denied, but should have been granted (section 629, Code Civ. Proc.; *Estate of Fleming*, 199 Cal. 750, 251

P. 637; *Cushman v. Cliff House*, 79 Cal. App. 572, 250 P. 575), and it does not appear that a motion for a directed verdict was made by the proponents. But the power of the court to direct a verdict is, touching the state of the evidence, the same as the right of the court to grant a nonsuit at the conclusion of the evidence. *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427, 264 P. 756; *Estate of Caspar*, 172 Cal. 147, 155 P. 631. For the purpose of this case only, the record has been considered as though a motion for a directed verdict had been made and denied. However, the rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. *Estate of Caspar*, supra. On the contrary, the rule is too well settled to require a citation of authority that an order granting a new trial will not be disturbed except in the face of a clear abuse of discretion.

We are not convinced of the merit of the appeal from the order granting the nonsuit on the issue of lack of due execution of the testamentary documents. In fact, this ground has not been stressed on the presentation of these appeals. Nor have the contestants, in our opinion, presented substantial evidence relating to the charge of conspiracy on the part of the chief beneficiaries under the will beyond that which may be said to cast a suspicion in their direction.

[5] Neither in the motion for a new trial nor in the order granting the motion was there placed any limitation as to the issues to be affected thereby. Under these circumstances it has been held that the general order granting the new trial reopens all of the issues made between the parties and it may be said that an affirmance of the order herein would have that effect. Nevertheless, in order that the new trial may be directed only to the determination of the real and substantial issues in the case, viz., want of testamentary capacity and undue influence, an order should be made as to each appeal.

The orders granting the motions for a nonsuit on the third and fourth grounds of contest, viz., fraud and conspiracy, and lack of the formalities required by law in the execution of the instruments, are affirmed. The order granting the motion for a nonsuit on the second ground of contest, viz., undue influence exercised over the decedent on the part of the chief beneficiaries of the will, is reversed. The order granting the motion for a new trial on the first ground of contest, viz., want of testamentary capacity on the part of the decedent, both as to the will and the codicil, is affirmed. The order denying the motion for judgment notwithstanding the verdict is affirmed.

213 Cal. 164

COOMBES v. FRANKLIN et al.

S. F. 13939.

Supreme Court of California.

Oct. 23, 1931.

Constitutional law ⇨305.

Remedy under constitutional provision respecting corporate directors' liability was not vested property right, and repeal did not constitute denial of due process (Const. art. 12, §§ 1, 3).

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 1 P.(2d) 992.

Gavin McNab, Schmulowitz, Wyman, Atkins & Brune, and McKinstry, Haber & Firebaugh, all of San Francisco, for appellant.

Lawler & Degnan, of Los Angeles, and Pillsbury, Madison & Sutro, of San Francisco (Alfred Sutro and Eugene M. Prince, both of San Francisco, of counsel), for respondent.

PER CURIAM.

A rehearing was sought in this case and denied by this court on August 21, 1931, and this opinion was to follow.

The contention was again made that the decision of the court impairs the obligation of contracts and thereby violates the Constitution of the United States. We are satisfied that it does not, and we find nothing in the authorities presented to us to change our conclusion in that regard.

It has, of course, been held in this state that the particular type of directors' liability established by this section of our Constitution is contractual in its nature. *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156. This being so, it undoubtedly entered into and became a part of every contract between the creditors and the corporation as a matter of law. But it is equally true that another section of the California Constitution was incorporated by law into such contracts. It is that section which provides broadly for the reserved power over corporation laws, and which reads in part: "All laws now in force in the state concerning corporations and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." Cal. Const. art. 12, § 1. A similar provision was contained in the Constitution of 1849 (article 4, § 31). See discussion in *Ballantine, California Corporation Laws* (1931) p. 7 et seq.

Its effect is, we think, perfectly clear; the repeal of the provision for directors' liability was a contingency which was known at the time the contract was made, and that contingency was as much a part of the contract as was the liability. Several prior decisions of this court have so interpreted these provisions. *Market, etc., Co. v. Hellman*, 109 Cal. 571, 42 P. 225; *McGowan v. McDonald*, 111 Cal. 57, 43 P. 418, 52 Am. St. Rep. 149; *Spring Valley, etc., v. San Francisco*, 61 Cal. 3; *Matter of College, etc., Ass'n*, 157 Cal. 596, 108 P. 681.

It is true that the reserved power, however broad, cannot be exercised so as to impair a vested property right (*Western Union v. Hopkins*, 160 Cal. 106, 116 P. 557), but the remedy formerly given by the section in question was not such a right, and its repeal did not therefore constitute a denial of due process of law.

LANGDON, J.

I dissent. I think that the reserved power to alter and repeal laws concerning corporations, expressed in article 12, section 11 of the California Constitution, has been given too wide a scope by this decision. I am by no means convinced that in its reference to "laws now in force" and "laws that may be hereafter passed pursuant to this section" it was intended to apply to another section of the Constitution, such as section 3 of article 12, involved herein. It is true that a self-executing provision of the Constitution may have the force and effect of a statutory enactment; but it is not so clear that another provision of a Constitution is a law "hereafter passed pursuant" to a prior section.

Furthermore, while the right to alter or repeal such a provision as article 12, § 3, is undeniable, it does not necessarily follow that a contractual right gained under it falls with the repeal. We have heretofore unequivocally held, and the majority opinion concedes, that the right given to the creditors by said section is a contractual right. When a cause of action based upon it arises, I do not think it is going too far to say that the right is vested, and if so, it becomes entitled to the protection of the due process clause. See *Western Union Telegraph Co. v. Hopkins*, 160 Cal. 106, 116 P. 557. The analogy of stockholders' liability cannot be ignored, and the cases which have held such liability unaffected by repeals are very persuasive. See *Harrison v. Remington Paper Co. (C. C. A.)* 140 F. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Bernheimer v. Converse*, 206 U. S. 516, 27 S. Ct. 755, 51 L. Ed. 1163; *Thompson on Corporations* (3d Ed.) pp. 462, 465.

The order dismissing the appeal was, in my judgment, erroneous.

214 Cal. 93

TAKATA v. RILEY.

S. F. 14424.

Supreme Court of California.

Oct. 8, 1931.

Statutes $\Rightarrow$ 119(3).

Title of statute appropriating money out of highway maintenance fund to pay claim against state *held* sufficient to satisfy constitutional requirements (St. 1931, p. 996; Const. art. 4, § 24).

St. 1931, p. 996, is entitled "An act making an appropriation to pay the claim of Grace Takata against the state of California."

In Bank.

Application by Grace Takata for writ of mandate against Ray L. Riley, as state controller, to compel him to pay claim of petitioner out of highway maintenance fund in the state treasury.

Writ granted.

St. 1931, c. 444, p. 996, referred to in the opinion, follows:

An act making an appropriation to pay the claim of Grace Takata against the State of California.

[Approved by the Governor, May 28, 1931.]

The people of the State of California do enact as follows:

Section 1. The sum of six thousand five hundred forty-two dollars is hereby appropriated out of any moneys in the highway maintenance fund in the state treasury, to pay the claim of Grace Takata against the State of California.

Sullivan, Roche, Johnson & Barry and Brobeck, Phleger & Harrison, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Ralph O. Maron, Deputy Atty. Gen., for respondent.

PER CURIAM.

At the close of oral argument, the CHIEF JUSTICE announced the decision of the court as follows:

The question involved is not new. We have examined it a great many times. On the authority of *Estate of Wellings*, 192 Cal. 506, 519, 221 P. 628; *Heron v. Riley*, 209 Cal. 507, 289 P. 160; *Frank v. Maguire*, 201 Cal. 414, 257 P. 515; *Buelke v. Levenstadt*, 190 Cal. 684, 214 P. 42, and cases referred to therein, we are of the view that the title of this act is sufficient to satisfy the requirements of the Constitution, art. 4, § 24. The writ will issue.

117 Cal.App. 450

AUGUST BELMONT & CO. et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8166.

District Court of Appeal, First District, Division 1, California.

Oct. 14, 1931.

1. Prohibition $\Rightarrow$ 3(3).

Prohibition does not lie against superior court for erroneous refusal to quash service upon commissioner of corporations in action not founded upon actual fraud, since appeal lies.

2. Prohibition $\Rightarrow$ 3(2).

Prohibition is unavailable where error below can be corrected by appeal affording adequate and complete remedy.

Application for writ of prohibition by August Belmont & Company and others against the Superior Court of the State of California in and for the City and County of San Francisco; Honorable Lile T. Jacks and Honorable Daniel C. Deasy, Judges thereof.

Writ denied.

Thomas E. Davis, of San Francisco, for petitioners.

PER CURIAM.

The application alleges in substance that petitioners are copartners and residents of the state of New York; that in a certain action brought in this state against petitioners a summons was issued which, together with a copy of the complaint, was served on the commissioner of corporations; that said commissioner was not authorized to accept such service except in actions arising out of or founded upon actual fraud, and the action was not one of this character. A motion to quash the service was made and denied. The present proceeding followed.

[1, 2] While we are at a loss to understand under what authority the commissioner of corporations accepted service, a writ of prohibition is not the proper remedy for relief. The error of the superior court in denying petitioners' motion to quash the service of summons may be reviewed on appeal from any adverse judgment rendered. It is well settled that where a person has a right of appeal and such appeal will afford an adequate and complete remedy, such error can be corrected on appeal and the writ does not lie. *Lumas Film Corp. v. Superior Court*, 89 Cal. App. 384, 386, 264 P. 792; *Bullard v. Superior Court*, 106 Cal. App. 513, 516, 288 P. 629; 21 Cal. Jur. 587.

The application for the writ is denied.

In re SWEITZER'S ESTATE.*

SWEITZER v. BANK OF AMERICA OF CALIFORNIA.

Civ. 339.

District Court of Appeal, Fourth District, California.

Oct. 16, 1931.

Rehearing Denied Nov. 14, 1931. Hearing Granted by Supreme Court Dec. 14, 1931.

1. Deeds ⇨56(2).

Effectual delivery of deed depends upon intention of grantor, to be discovered from all evidence bearing thereon.

2. Deeds ⇨61.

Depositing deeds under instructions to hand deeds to grantee after grantor's death, with intention that title should pass immediately to grantee, constitutes valid delivery.

3. Deeds ⇨60.

Manual tradition of deeds to depository, with instructions to return in event grantor should not die, *held* to show there was no legal delivery.

Grantor's declaration at time of putting instruments in hands of depository, when grantor was in hospital, 17 days prior to grantor's death, with instruction to turn over instruments only in event of grantor's death and to return them if grantor should not die, indicated conclusively that at time of such deposit grantor did not intend that title should then pass to grantee.

4. Evidence ⇨269(3).

Subsequent declarations of grantor are admitted for purpose of discovering intention when delivering deed to depository.

5. Deeds ⇨208(7).

Where intention that title should pass only in event of contingency is apparent from instructions given depository at time of manual tradition of deeds, evidence of subsequent declarations indicating intention to pass title absolutely must be clear, specific, and unequivocal to justify finding of valid delivery.

6. Deeds ⇨208(1).

Grantor's declaration to third persons that he deeded everything to wife *held* insufficient to sustain finding of absolute delivery, where unequivocal intention to make delivery qualified was manifested at time of manual tradition to depository.

7. Descent and distribution ⇨75.

Title to intestate's realty vests in heirs immediately upon death.

8. Tenancy in common ⇨15(1).

Tenant in common acquiring title by descent may be divested thereof through cotenant's adverse possession during pendency of administration proceedings.

9. Husband and wife ⇨274(1).

Upon husband's death in 1916, descendants became cotenants of community property with widow (Civ. Code, § 1402).

10. Adverse possession ⇨85(4).

Circumstances showed title of husband's descendants to community property was divested through adverse possession of widow.

Circumstances disclosed that from date of husband's death until widow's death, a period of almost 14 years, she had exclusive possession of property into which she had entered under a deed which purported to convey to her whole of property. During this period she paid taxes, paid off certain incumbrances, and retained rents and profits for entire period under claim of exclusive ownership.

11. Appeal and error ⇨1071(5).

Immaterial finding could be disregarded on appeal.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

In the matter of the estate of Emma Sweitzer, sometimes known as Emma Switzer, deceased. From an order denying the petition of Jesse Sweitzer and granting the petition of the Bank of America of California for appointment as administrator, he appeals.

Affirmed.

J. R. Dorsey and Matthew S. Platz, both of Bakersfield, for appellant.

Borton & Petrini and Glen Aldrich, all of Bakersfield, for respondent.

JENNINGS, J.

From an order of the superior court denying appellant's petition for appointment as administrator of the estate of decedent and granting the petition of respondent for appointment as such administrator, appellant prosecutes this appeal.

Decedent, Emma Sweitzer, died intestate and without issue on May 19, 1930. At the time of her death, she was the widow of Sam Sweitzer, who had died on August 11, 1916. At the time of his death, Sam Sweitzer left surviving him four sons by a former marriage. Appellant is one of these sons. Respondent is the nominee of two of the heirs of decedent.

On July 25, 1916, Sam Sweitzer was a patient in a hospital, suffering from an in-

curable malady from which he died seventeen days later. On the 25th of July, 1916, he executed two deeds conveying certain real property of which he was the legal owner and a bill of sale transferring certain personal property. The grantee named in the deeds to the real property was his wife, Emma Sweitzer. She was likewise named as the vendee in the bill of sale. Following the execution of these instruments, they were handed by Sam Sweitzer to a friend of long standing with instructions hereinafter described. On the day on which Sam Sweitzer died, the deeds and bill of sale were delivered by the depositary to Emma Sweitzer, who immediately proceeded to have them recorded. Sam Sweitzer died intestate and there was no administration of his estate.

In determining the issues, the court made no express findings. Appellant makes no point of this, but makes the observation that it might have conduced to a clearer elucidation of matters herein to be considered had express findings been made. However, in the very full and complete order made by the court wherein respondent's petition for letters of administration was granted, are incorporated what amounts to findings on the matters of fact which are in dispute between the parties to this proceeding.

That portion of the court's order which is made the object of special attack by appellant reads as follows: "That no portion of the estate of Emma Sweitzer was the separate property of said deceased spouse, Sam Sweitzer, while living, and no portion of said estate of said Emma Sweitzer came to said decedent Emma Sweitzer, from said deceased spouse by descent, devise or bequest. That no portion of the estate of the said Emma Sweitzer was common property of said decedent and her said deceased spouse, while such spouse was living. That the estate of said Emma Sweitzer, deceased, and the whole thereof at the time of her death, was her sole and separate property and that no part thereof was community property of the said Emma Sweitzer, deceased, and her said deceased spouse, Sam Sweitzer during his lifetime."

[1-3] This amounts to a finding by the court that the estate of decedent consisted entirely of separate property of decedent. The correctness of this finding depends, first, upon whether there was valid delivery of the deeds and bill of sale, and, second, whether, if there was no valid delivery, the right of appellant and his brothers to succeed to a portion of their father's estate was divested by the adverse possession of decedent, since it conclusively appears from the evidence produced at the trial that the property attempted to be conveyed by the instruments was acquired subsequent to the marriage of decedent and her deceased husband. The prob-

lem of determining whether or not there was effectual delivery of the instruments transferring title to the property depends upon the intention of the grantor at the time he parted with possession of the conveyances. The intention of the grantor is an essential fact to be discovered from a consideration of all the evidence bearing upon it. *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. If the grantor, when he deposited the deeds with the third party under instructions that they should be handed to the grantee after his death, intended that title should pass immediately to the grantee, the law is clear that valid delivery of the instruments was accomplished. *Hefner v. Sealey*, 175 Cal. 18, 164 P. 898; *Stone v. Daily*, 181 Cal. 571, 185 P. 665. It is therefore necessary to consider the evidence relating to the circumstances attending the deposit of the instruments by the grantor with the third party and particularly the declarations of the grantor, for the purpose of determining the question of whether or not there was a valid delivery of the instruments by Sam Sweitzer. The evidence relating to this vital feature is undisputed. It appears that after the grantor had executed the deeds and bill of sale, he handed them to one F. G. Sarnow with the instruction that they were to be handed to the grantee in the event of his death, but that if he did not die, the instruments were to be returned to the grantor. The testimony indicates that the grantor emphasized his intention that the instruments were to be given to the grantee only in case of his death, for he declared that if his wife obtained possession of the property during his lifetime she would put him out. One witness, the wife of the depositary, testified that at the time the instruments were given to the depositary, the grantor said that the instruments were to be recorded as soon as possible after his death. It is to be borne in mind that the above-described transaction took place seventeen days prior to the death of the grantor, who, at the time, was a patient in a hospital where he had undergone one operation and that a second operation was performed a week or ten days subsequent to the date on which the instruments were executed and handed to the depositary. The above-mentioned evidence indicates conclusively that at the time of the deposit of the instruments with the third party, the grantor did not intend that title should then pass to the grantee for he specifically directed the depositary to turn over the instruments only in the event of his death and left no doubt of his intention by the further qualification that the instruments should be returned to him if he did not die. At the time of the manual tradition of the instruments to the depositary it is therefore clear that there was no legal delivery of them. *McCully v. McArthur*, 187 Cal. 191,

198, 201 P. 323; *Moore v. Trott*, 156 Cal. 353, 104 P. 578, 134 Am. St. Rep. 131.

[4-6] It is, however, urged by respondent that evidence produced during the hearing of the petitions of respondent and appellant for letters of administration indicates that the grantor made a new, independent, and complete delivery of the instruments subsequent to the date on which he handed them to the depository under the circumstances and with the direction hereinabove narrated. The evidence upon which respondent relies as showing valid delivery consists of the testimony of three witnesses to the effect that at various times subsequent to the date on which the grantor had handed the instruments to the depository he stated to each of them that he had deeded or signed over everything to his wife. This testimony is likewise undisputed and the problem is thus presented of discovering whether this undisputed testimony is sufficient to sustain the implied finding of the court that valid delivery of the instruments was made by the grantor.

In support of its contention that the testimony of subsequent declarations of the grantor manifests a new and complete delivery of the instruments of title despite the obviously qualified and limited tradition to the depository, respondent relies upon the language in *Williams v. Kidd*, supra, to the effect that the intention of the grantor is the all-important factor in determining whether or not delivery has been made, and certain decisions of our courts bearing upon the problem. Particular emphasis is laid upon the decision in *Moore v. Trott*, 162 Cal. 268, 122 P. 462, wherein the facts are similar to those herein presented. In considering the effect of this decision, it is necessary to consider also the earlier case of *Moore v. Trott*, 156 Cal. 353, 104 P. 578, 134 Am. St. Rep. 131. From the facts appearing in the earlier case of *Moore v. Trott*, it appears that the grantor sent certain deeds to a depository, accompanied by a letter of instruction in which he stated that he was about to enter a hospital for the purpose of an operation and that the depository should lock the deeds in his safe and in case he should die should immediately hand them to the grantees named in the deeds, advising such grantees to place them of record as soon as possible. The trial court found that there had been valid delivery of the instruments. On appeal the determination of the superior court that there was a valid delivery was reversed by the Supreme Court, which held that the language of the letter of instruction clearly indicated that it was not the intention of the grantor to convey the property immediately and absolutely, but only in the event of his death, and that therefore no valid delivery had been established. From the facts appearing in the later decision in the same case reported in

162 Cal. at page 268, 122 P. 462, it appears that there was a retrial of the cause at which additional evidence was produced. This additional evidence consisted of declarations of the grantor to various persons subsequent to his return from the hospital. These declarations were to the effect that he had deeded a great deal of his property; that the deeds would be delivered when "he would not be here"; that he had left the deeds with the depository to be delivered when he should pass away; that he had left deeds to his property so that there would not be any "lawing over it after he had passed away." It was further proven that prior to entering the hospital he had told a grantee named in one of the deeds that he intended to deed her certain property and that subsequent to his return from the hospital he stated to the same grantee that he had given her a deed to the land which he had told her he would, that he had left the deed with a named depository who would give her the deed after his death, and that she should have the deed recorded immediately. It further appeared that the grantor had been advised by the attorney who drew the deeds that in order to make a valid delivery of them the deeds must be placed beyond his control and that the grantor replied that he understood that to be the law. At the conclusion of the second hearing the trial court found there was a valid delivery of the deeds. This determination was sustained on appeal, the Supreme Court holding that the inference of a new, independent, and complete delivery subsequent to the writing of the letter of instruction accompanying the deeds was a permissible inference supported by the evidence produced, and that since it was a permissible inference, it was sufficient to support the court's finding that valid delivery was effectuated. It must be conceded that this decision is authority strongly supporting respondent's contention that it was permissible for the trial court to draw the inference from the evidence of declarations of the grantor subsequent to the manual tradition of the instruments that the grantor changed his intent and made a new, independent, and complete delivery and that such an inference being permissible the court's implied finding of delivery should not be upset on appeal. But where undisputed evidence conclusively shows that a grantor at the time manual tradition to a depository is accomplished manifests an unequivocal intention that instruments of title shall not become immediately effective, but shall operate to convey title only in the event of a future contingency, evidence of subsequent acts and declarations must be most persuasive to warrant the drawing of an inference of a changed intention supporting a new and independent delivery. It is significant that the Supreme Court in *Moore v. Trott*, 162 Cal. 268, 122 P. 462, at the very conclusion of its de-

cision, adverted to the fact that the grantor after returning from the hospital and finding himself in failing health expressed to the grantee his intention that the deeds should be delivered absolutely without power of revocation on his part. There is no evidence appearing in the record herein showing that the grantor at any time expressed to his grantee an intention that the instruments should be absolutely delivered without power of revocation on his part. It is true that he did state to various persons that he had deeded his property to his wife, that she was good and had worked hard, that he had given her everything he had, and that she got "mostly debts." But under the decision in *DeCou v. Howell*, 190 Cal. 741, 750, 214 P. 444, 448, it is said: "The law is clearly settled that subsequent declarations and acts of the grantor are admissible to show the intention of the grantor *at the time the deed was made.*" (Italics ours.) To the same effect are the decisions in *Smith v. Smith*, 173 Cal. 725, 161 P. 495, 496; *Dona-hue v. Sweeney*, 171 Cal. 388, 153 P. 708; *Williams v. Kidd*, supra; *Watt v. Copeland*, 92 Cal. App. 161, 267 P. 928; *Blackledge v. McIntosh*, 85 Cal. App. 475, 259 P. 770; *Hodoian v. Garabedian*, 79 Cal. App. 762, 251 P. 227. In *Smith v. Smith*, supra, it is said: "The solution of the question of delivery or nondelivery in each case is based upon the intention of the grantor *at the time of passing the deed to a third person.*" (Italics ours.)

It is to be remembered that the subsequent declarations of the grantor in the instant case were merely to the effect that he had deeded everything to his wife as indeed he had done and that such declarations were not made to his wife whom he particularly desired not to have the deeds, since he stated that her possession of them would result in his being turned out. Declarations of this character made as suggested are admitted in evidence for the purpose of discovering the intention of the grantor at the time when the deeds were passed to the depository. Where the intention that title should pass only in the event of the happening of a certain contingency is apparent from the instructions given at the time of manual tradition, evidence of subsequent declarations indicating an intention to pass title absolutely, would have to be clear, specific, and unequivocal to justify the court in finding that a valid delivery was effected.

[7-11] Respondent further contends that its intestate acquired title by adverse possession even though it should appear that there was no delivery of the instruments of title. It was stipulated during the trial: "That from the date of the death of Sam Sweitzer until her death, Mrs. Sweitzer occupied either by herself or by tenants who recognized her and toward whom she pre-

tended to occupy the position of landlord, the two pieces of property here, receiving the income and generally managing and controlling them, and that during all of that period of time she was in receipt of the income from both pieces of property, and that they were income-producing property." The evidence further disclosed that during her occupancy of the property she paid the taxes assessed against it. So far as appears, no objection was made to her possession, nor is there any evidence that she ever by words or conduct recognized any rights in the property of the heirs at law of her deceased husband. It is urged that she thus fulfilled every requirement of adverse possession. It is pointed out that under the provisions of section 1402 of the Civil Code as this section read at the time Sam Sweitzer died in 1916, the decedent, his surviving wife, was entitled to succeed to one-half of the community property and his descendants to one-half, in the absence of testamentary disposition by him; that therefore his children by a former marriage acquired a present, vested interest in such community property of their father upon his death and were entitled to exercise rights of ownership, which interest they might and it is contended that they did lose by the adverse possession of his surviving wife for a period of fourteen years. Appellant contends that the right of the descendants of Sam Sweitzer to succeed to his estate was not a vested interest, but merely a right of expectancy depending upon certain facts at the time of the death of the last surviving spouse. It has been held, contrary to appellant's contention, that title to the real estate of a deceased intestate vests immediately in his heirs (*Phelps v. Grady*, 168 Cal. 73, 75, 141 P. 926), and that a tenant in common, who has acquired his title by descent, may be divested of it through adverse possession by his cotenant during pendency of proceedings in administration (*Smith v. Barrick*, 41 Cal. App. 28, 182 P. 56). Upon the death of Sam Sweitzer his descendants became cotenants with his surviving wife, of the community property owned by Sam Sweitzer and his surviving wife. His widow subsequent to his death entered into exclusive possession of the property under a deed which purported to convey to her the whole of the property. This possession she retained for almost fourteen years, during which time the evidence shows she paid the taxes, paid off certain incumbrances that were on the property, and retained the rents and profits for the entire period under claim of exclusive ownership. Under these circumstances we are of the opinion that the title of Sam Sweitzer's descendants was divested through the adverse possession of the cotenant. But it is said that the court found that the estate of Emma Sweitzer was her sole and separate property at the time of her death and that no part of her estate was community proper-

ty of herself and her deceased spouse during the latter's lifetime, and that therefore the decedent Emma Sweitzer did not take the property under section 1402 of the Civil Code, and that the court by its finding that the property was not community property but was separate property of decedent has eliminated any claim of adverse possession by respondent. The declaration contained in the order granting respondent's petition for letters of administration was no doubt incorporated on the theory that there was valid delivery of the deeds by Sam Sweitzer prior to his death since if there had been valid delivery the property attempted to be conveyed would have become separate property of the grantee. The declaration in the order that no part of the estate of Emma Sweitzer was community property of decedent and her deceased spouse during his lifetime finds no support in the evidence. This is the very contention most vigorously asserted by appellant for it is only in the event that the property of decedent's estate was community property of decedent and her predeceased spouse during his lifetime that the provisions of subdivision 8 of section 1386 of the Civil Code could have any application and invest him with a claim of right to succeed to the estate of decedent. But the so-called finding that no part of decedent's estate was community property of decedent and her predeceased spouse is immaterial to the order granting respondent's petition and denying the petition of appellant and may be disregarded. Estate of Funkenstein, 170 Cal. 594, 150 P. 987.

The order was correct, and for the reasons herein given is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

NATIONAL CITY FINANCE CO. et al. v.
LEWIS et al. (FRYMIER et al.,
Interveners). *
Civ. 6702.

District Court of Appeal, Second District, Division 1, California.
Oct. 20, 1931.

Hearing Granted by Supreme Court Nov. 19, 1931.

1. Corporations ⇨123(5).

Proof that plaintiffs made promise to some one other than defendant to hold stock as collateral is not proof that promise was made to defendant.

2. Corporations ⇨123(14).

That plaintiffs had sold stock as authorized by pledge contract established no defense in action on note.

3. Corporations ⇨123(22).

Failure of plaintiffs suing on note to return pledged stock when defendant tendered payment did not change transaction.

4. Appeal and error ⇨1177(6).

Where defendant was entitled at most to damages for conversion, but defense of conversion was not set up, general reversal of judgment for defendant was only course.

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 3 P.(2d) 316.

Samuel A. Miller and Paul J. Ziegler, both of Los Angeles, for appellants.

Euler & Subith, Louis J. Euler, and Fred E. Subith, all of Los Angeles, for respondent.

Roy Maggart and Walter J. Richards, both of Los Angeles, for intervenor Keefe.

BISHOP, Justice pro tem.

[1] On this petition for a rehearing, reliance is again placed on two bits of evidence, as supporting defendant's claim that he had been defrauded by a promise. Of course, if the evidence referred to supported the conclusion that such a promise had been made, the conclusion would be binding on us, even in the face of contrary evidence. But it does not support the conclusion. Proof, however complete, that the plaintiffs made a promise to some one other than defendant, is not proof, nor does it justify an inference, that such a promise was made to the defendant. Nor is it sufficient to show that, some time after the notes were signed, the defendant had a conversation with one of the plaintiffs in which statements were made which, if made before the notes had been given, might be construed as establishing such a promise. It is worthy of consideration, too, that the testimony relied on, giving the conversation had between defendant and Junod some time after the notes were executed, came out on cross-examination. The purpose in eliciting it, therefore, was not to prove a pre-execution promise. Nor was that its effect.

[2-4] Proof that plaintiffs had sold defendant's stock established no defense. That sale was expressly authorized by their contract of pledge. "Personal property may be pledged [etc.] upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case." Hyatt v. Argenti (1853) 3 Cal. 151. The failure of the plaintiffs to return the stock when payment was tendered by the defendant did not result

in changing the transaction from one of pledge, with right of sale and substitution, to one wherein the identical property pledged must be held. It gave rise, at most, to an action in conversion. *Loughborough v. McNevin* (1887) 74 Cal. 250, 14 P. 369, 15 P. 773, 5 Am. St. Rep. 435; *Kullman v. Greenebaum* (1891) 92 Cal. 403, 28 P. 674, 27 Am. St. Rep. 150; and see *Hawley Bros. Hardware Co. v. Brownstone* (1899) 123 Cal. 643, 56 P. 468; *Bell v. Bank of California* (1908) 153 Cal. 234, 94 P. 889; *Hudgens v. Chamberlain* (1911) 161 Cal. 710, 120 P. 422; *Lem v. Wilson* (1915) 27 Cal. App. 512, 150 P. 641. But no such defense as conversion and its damages was set up as an offset (see *Gay v. Moss* [1867] 34 Cal. 125; *Vanderslice v. Matthews* [1889] 79 Cal. 273, 21 P. 748), nor is there evidence from which a finding could be made by us. A general reversal is therefore our only course.

The petition for a rehearing is denied.

We concur: HOUSER, Acting P. J.; YORK, J.



117 Cal.App. 574

In re ROSS' ESTATE.

ROSS et al. v. ROSS et al.

Civ. 586.

District Court of Appeal, Fourth District, California.

Oct. 20, 1931.

Rehearing denied Nov. 10, 1931. Hearing denied by Supreme Court Dec. 18, 1931.

1. Wills ☞ 166(1).

That testatrix preferred daughter-in-law over blood relation in will held not sufficient to establish undue influence.

2. Wills ☞ 164(1).

To revoke probate of codicil on ground of undue influence, contestants must show sort of pressure which overpowered mind and mastered volition of testatrix at execution.

3. Wills ☞ 155(1).

Undue influence which will avoid will must be such as operates at time of execution, and also be influence relating to will itself.

4. Wills ☞ 163(2).

Confidential relation existing between testatrix and proponents was not sufficient to raise presumption of undue influence, in absence of activity on part of proponents.

5. Wills ☞ 166(1).

In probate contest, evidence held insufficient to show undue influence on part of proponents.

Evidence disclosed that prior to execution of codicil in question proponent, at request of deceased, called an attorney with whom deceased was acquainted, to come to her home and prepare for her a new codicil; that attorney went to home of deceased and proponents and was instructed by deceased concerning certain changes she desired to make in her will; that attorney there prepared codicil and in presence of friends, who were present at her request to act as witnesses, read codicil over to her several times, and after being approved by her it was executed; that there was no act or word on part of any of those present at execution of codicil that influenced testatrix in disposition of her property.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by William H. Ross and another to revoke probate of will and codicils thereto of Mary Louise Ross, deceased, opposed by Charles C. Ross, executor, and another. From a judgment revoking probate of will and codicils thereto, proponents appeal.

Reversed and remanded.

Joseph Scott, of Los Angeles, and R. Goer, of Whittier, for appellants.

Albert Launer and Harold A. McCabe, both of Fullerton, for respondents.

ALLISON, Justice pro tem.

This is an action to revoke the probate of the will and codicils thereto of deceased, upon the grounds that the codicils in question were procured through the undue influence of Charles C. Ross and Sarah E. Ross, that the codicils in question were procured through the fraud of Charles C. Ross and Sarah E. Ross, and that the deceased was of unsound mind at the time of the execution of the codicils in question. A jury was impaneled to try the case.

It appears that on the 14th day of April, 1930, the deceased executed the last of three codicils to her will. At that time she was about 70 years of age. She died on the 28th day of May, 1930, at the home of her son Charles C. Ross and Sarah E. Ross, his wife, proponents and appellants herein. The deceased had lived in and near La Habra for approximately twenty-three years next preceding her death, and for about six months immediately prior to her death she had resided with her son Charles C. Ross and his wife. William H. Ross, one of the contest-

ants, is also a son of the deceased. Dorothy Yvonne Louise Wilson, the other contestant, is a granddaughter of the deceased, the child of a deceased daughter. Up to the time of her death deceased was active in business, saw to the collection of her rents, and was mentally keen on business propositions.

Prior to the execution of the codicil of April 14, 1930, proponent Sarah E. Ross, at the request of the deceased, called Mr. R. Goer, an attorney with whom the deceased was acquainted and who had on previous occasions at her request called at her home and consulted with her concerning her business affairs, to come to her home and prepare for her a new codicil. Mr. Goer went to the home of the deceased and proponents and appellants herein, and was instructed by the deceased concerning certain changes she desired to make in her will. Mr. Goer took with him a typewriter and there prepared the codicil, and in the presence of friends who were present at her request to act as witnesses, read the codicil over to her several times, and after being approved by her, it was executed. By the terms of the codicil in question Charles C. Ross and his wife take the bulk of the estate. The only material difference between this codicil and a codicil executed by the deceased on April 12, 1930, is that Sarah E. Ross is named as an executrix in the event of the death of Charles C. Ross. On January 21, 1930, both the deceased and her husband, who was then living, made codicils to their respective wills, leaving their estate to the proponents and appellants. The will and codicils were kept in a safety deposit box owned jointly by Charles C. Ross and his father. At the time of executing the codicil of April 14, in referring thereto, the deceased stated: "Now, these are the provisions just as I desire them. I have three legal heirs. To one heir I have willed one hundred dollars, to another heir I have willed one hundred dollars and the rest of the estate, according to my desire, goes to Charlie and Sadie Ross. They have taken good care of us since we have been in La Habra. They have been kind and generous to us. They ought to have all that is coming to them. * * * I will soon be before my Maker and my God and I want to leave everything just in the right way, according as I see that is right." On the 12th day of April, 1930, said deceased executed a codicil in substantially the same form as the codicil of April 14, except that she named Charles C. Ross as the sole executor, and on the 2nd day of January, 1930, said deceased executed a codicil in substantially the same form as the one in question, except as to certain phraseology concerning the property bequeathed, and again naming Charles C. Ross as the sole executor. After the death of Mrs. Ross the will and codicils were offered and admitted to probate. Thereafter a petition to revoke the probate thereof was filed by the contestants. Upon

the trial of the case the court granted a motion for nonsuit as to the first and second grounds of contest, namely, that the codicils here in question were procured through the fraud of Charles C. and Sarah E. Ross, and that the deceased was of unsound mind at the time of the execution of the codicil in question, and withdrew those two issues from the jury, leaving as the only issue to be submitted to the jury the question whether or not the codicils had been procured by undue influence. On that issue the jury returned a verdict finding that the execution of the codicil of April 14, 1930, was procured by undue influence, and upon which verdict a judgment was entered revoking the probate thereof. In due time a motion for a new trial was made and by the court denied, and from said judgment proponents appeal.

It is contended that the court erred in refusing to grant proponents' motion for a nonsuit as to the third ground of contest, namely, that the codicil was procured by undue influence and that the evidence is insufficient to justify the verdict and judgment, and that the judgment is erroneous in awarding costs to respondents. The respondents insist that the circumstances surrounding the execution of the codicil in question show a sufficient activity on the part of the beneficiaries in the matter of the preparation and execution of the codicil, to create a presumption of undue influence sufficient to sustain the verdict and judgment. An examination of the evidence at once leads the unprejudiced mind to the conclusion that if the verdict is to be sustained, it must find its support in such presumptions as the facts and circumstances in this case may reasonably create. There is no direct testimony or any evidence of any kind of any pressure being brought to bear upon the testatrix which overpowered her mind or overcame her volition at the time the codicil was made, and unless the evidence can reasonably be said to have produced this result upon the will and volition of the testatrix, the verdict is without support in the record.

[1-5] Our attention has been called to the fact that the deceased was living with the chief beneficiaries; that she was in poor bodily health; that she was being cared for by the proponents; that they were present at the execution of the codicil in question; and that the witness Goer had at some time been employed by the proponents in a professional capacity. It is to be borne in mind that the attorney as well as the witnesses were all called to the home of the testatrix by Sarah E. Ross at the request of the testatrix. Our attention has not been called to any act or word on the part of any of those present at the execution of the codicil, that is claimed or was intended to or did influence the testatrix in the disposition of her property. Stress is laid upon the unnatural feature of the will, in that Sarah E. Ross should be preferred

over the blood relation of the testatrix. This, however, is not sufficient to establish undue influence unless there be an actual showing of the sort of pressure which overpowered the mind and mastered the volition of the testator at the moment of the execution. This is a well-settled general rule. *Estate of Baird*, 176 Cal. 381, 168 P. 561, and cases there cited. The undue influence which will avoid a will must be such as operates at the time of making the will, and also be an influence relating to the will itself. *Estate of Kilborn*, 162 Cal. 4, 120 P. 762. Assuming that there was a confidential relation existing between the testatrix and the proponents, this, in itself, would not be sufficient to raise a presumption of undue influence, in the absence of evidence of activity on the part of proponents. *Estate of Ricks*, 160 Cal. 450, 117 P. 532. We are of the opinion that the evidence is insufficient to sustain the verdict and the judgment. In view of this conclusion, the order allowing respondents their costs should be reversed, the matter of awarding costs to await the final determination of the pending contest.

Judgment reversed, and the cause remanded for new trial.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 584

STANDARD CABINET WORKS v. NATHAN
et al.
Civ. 6806.

District Court of Appeal, Second District,
Division 1, California.
Oct. 21, 1931.

1. Sales §359(2).

In recovering for faulty work in remodeling fashion shop, evidence showing mirrors imperfect did not show they had no value.

2. Contracts §324(1).

Action for balance on contract to remodel fashion shop held governed by law of contracts, not sales.

3. Contracts §295(1).

Contractor, substantially performing contract to remodel fashion shop, held entitled to total contract price, less payments and damage through failure to completely comply with contract.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the Standard Cabinet Works against S. W. Nathan and others, to recover

balance due on contract, in which S. W. Nathan and another filed a cross-complaint. From the judgment, plaintiff appeals.

Reversed, with instructions.

Loewenthal, Lissner, Roth & Gunter, of Los Angeles, for appellant.

Todd, Pawson & Watkins and Robert W. Anderson, all of Long Beach, for respondents.

BISHOP, Justice pro tem.

[1] The judgment, which plaintiff recovered in this action, was for the balance due on its contract to remodel a fashion shop, less deductions made because of the faulty quality of the work done. The bone of contention on this appeal is an item of \$350 which was deducted because of the installation of imperfect mirrors. The court found that there were "twenty-six defective mirrors, which are valueless and cannot be repaired," and that by reason thereof defendants had been damaged in the sum of \$350. Plaintiff contends, rightly we think, that the evidence does not support this finding.

Both appellant and respondent have argued the case upon the theory that the principles applicable are to be found in the law of sales. They are agreed, as expressed in respondent's brief, "if the thing retained has any value, the recovery of the respondents for damages may and should be reduced accordingly." We have looked through the bill of exceptions for evidence which would support the finding that these twenty-six mirrors, which were retained, have no value, by which should be understood "market value," of course. *Dean v. Hawes* (1916) 29 Cal. App. 689, 693, 157 P. 558. They may be so imperfect as to be valueless to the respondent, for its purposes, and yet possess a value on the market for less exacting needs. There is no evidence from which the court could fix that value, and none that the mirrors had no value.

[2, 3] Because, if there is a retrial, the court will be called upon to decide whether or not there were defective mirrors, and, if so, what damages resulted, we express our opinion that the law of contracts and not sales is applicable here. The ultimate results may, or may not, be the same. The situation presented is that of a contract to furnish labor and material in fitting over a storeroom for defendants' use as a style shop. It is evident that the contract has been substantially performed. In such a case the contractor is entitled to the total contract price, in this case \$35,500, less payments already made and less the damage, suffered by the owner, occasioned by the contractor's failure to comply completely with his contract. *Thomas Haverly Co. v. Jones* (1921) 185 Cal. 285, 197 P. 105; *Norton v. Meyers* (1929) 98 Cal. App. 175, 276 P. 611. For the principles governing the

measure of damages, we refer to *Pence v. Dennie* (1919) 41 Cal. App. 428, 182 P. 980; *J. Musto, etc., Co. v. Pacific States Corp.* (1920) 48 Cal. App. 452, 192 P. 138; *Thomas Haverly Co. v. Jones*, supra.

The finding which must be set aside is referable not to an issue raised by the pleadings, but by the evidence. It may be that, when the remittitur goes down, defendants will be content to stand on the pleadings they now have, which make no mention of these twenty-six defective mirrors. Hence we make this order: The judgment is reversed, with instructions to the trial court to amend the findings of fact, conclusions of law, and judgment so that no deduction shall be made for the twenty-six defective mirrors, unless, within twenty days after the remittitur is filed with the clerk of the trial court, defendants file an amended pleading setting up as an offset to the sum found due to plaintiff, a claim for damages due to defective mirrors, in which event a new trial shall be had on that issue only and a new judgment rendered, based on the present findings with the finding made as a result of such new trial substituted for subparagraph 1 of paragraph II of the findings relative to the defendant's answer and counterclaim.

We concur: CONREY, P. J.; HOUSER, J.

stock of the Consumers' Salt Company during the pendency of an appeal from the judgment in an action entitled *McAlvay v. The Consumers' Salt Co. et al.* The appeal in the latter action was finally determined by judgment of the District Court of Appeal entered March 9, 1931, affirming the judgment of the lower court, which confirmed and quieted the title of *McAlvay* in the stock in issue. *McAlvay v. The Consumers' Salt Co.* (Cal. App.) 297 P. 135. The respondent in the present action now moves that the appeal herein be dismissed upon the ground that all the issues involved herein have become moot because of said decision of the Appellate Court.

The motion should be granted upon the well-settled rule that when the controversy between the parties is ended the appeal should not be entertained solely for the purpose of entering an academic discussion of the legal questions presented. 2 Cal. Jur. p. 749; *Foster v. Smith*, 115 Cal. 611, 612, 47 P. 591; In the Matter of the Guardianship of *Amrose*, 170 Cal. 160, 164, 149 P. 43.

The appeal is dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

SECHES v. BARD et al. *
Civ. 6966.

117 Cal.App. 583

STOCKWELL et al. v. McALVAY.
Civ. 8047.

District Court of Appeal, First District, Division 2, California.
Oct. 21, 1931.

Appeal and error § 781(1).

When controversy is ended, appeal should not be entertained solely for purpose of academic discussion of legal questions presented.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by B. C. Stockwell and others against B. D. McAlvay. From the judgment, plaintiffs appeal. Motion to dismiss the appeal.

Appeal dismissed.

Newby & Newby, of Los Angeles, for appellants.

Harry M. Irwin and Andrew H. Rose, both of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiffs sued for an injunction restraining defendant from voting certain shares of

District Court of Appeal, Second District, Division 2, California.
Oct. 19, 1931.

Rehearing Denied Nov. 18, 1931. Hearing Granted by Supreme Court Dec. 17, 1931.

1. Corporations § 30(1).

Agreement to make and assign theater leases and sell personality to corporation to be organized, held construable as entirety.

Such agreement, under which a theater, wherein one of two brothers had interest, was to be leased, or lease thereof assigned to corporation and under which leases of three other theaters in which both brothers had interest were likewise to be assigned to such corporation, and which provided for sale and delivery to corporation of certain equipment and personal property in consideration of certain cash, assumption of obligations owing by brothers and shares of stock based on past earnings of one of theaters and estimated future earnings of three other theaters, was to be considered as an entirety, and one part could not be separated from others. Agreement had as its object consolidation of number of theaters, and pro-

visions as to three new theaters, and stock issued for their leases could not be severed from balance of contract.

2. Corporations ⇨30(1).

Where consideration for transfer of theater leases and personalty by brothers to corporation to be organized was, in part, corporate stock, amount whereof was based on earnings or estimated earnings of respective theaters, *held* shares applicable to one group of theaters was to be considered of same value as shares for other.

All shares were part of entire consideration given to brothers for entire consideration moving from them to corporation; entire block of shares being at time considered to be of equal value, and hence, where one of brothers, when returning all shares to corporation under settlement agreement, received therefor certain cash and equivalent, other brother was entitled to proportion attributable to number of shares based on estimated earnings of theaters in which he had interest.

3. Corporations ⇨99(2).

Leases *held* valid consideration for corporate stock, though amount of stock was determined on basis of prospective profits.

4. Evidence ⇨588.

In nonjury case, trial judge may accept part and reject balance of same witness' testimony.

Trial court is judge of weight and credibility of testimony, and may accept and act upon that part of witness' testimony which he believes, even though he may not believe some of testimony.

5. Money received ⇨2.

Action for money received lies for specific property agreed to be treated as money, or which has been converted into money.

6. Money received ⇨3.

Action for money received will not lie, where defendant received note as such.

Such action will not lie where property received by defendant was note, received not as cash, but as note, with knowledge and consent of both parties.

7. Money received ⇨19(4).

That part of money, not received until after trial, cannot be included in computing amount due plaintiff in action for money received.

Appeal from Superior Court, Los Angeles County; V. N. Thompson, Judge.

Action by M. Seches against Louis L. Bard and another. From a judgment in favor of plaintiff, defendants appeal.

Modified, and, as modified, affirmed.

Rehearing denied; CRAIG, J., dissenting.

Philip Cohen, of Los Angeles, for appellants.

H. H. Harris and David E. Field, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Arthur Bard, one of plaintiff's assignors, and Louis L. Bard, one of appellants, were interested in the building of three theaters. Louis L. Bard was the owner of several other theaters and half owner in Bard's Hollywood Theatre, which had been in operation for several years, and in which Arthur Bard had no interest. While the first three mentioned theaters were under construction the two Bards, who were brothers, together with one Fred Miller, also a theater owner, on August 6, 1925, entered into a contract (Exhibit 1) with Motion Picture Capital Corporation to organize a corporation to acquire motion picture theaters, the Bard interests to lease or assign to such corporation the lease of the Hollywood Theatre and the leases of the three theaters under construction, and to sell and deliver to such corporation all equipment and personal property in said three theaters and a half interest in the equipment and personal property in the Hollywood Theatre. "In full consideration of all the sales, transfers, leases and good will," the corporation was to give to the Bards upon delivery of the leases, assignments, and bills of sale, certain cash sums equal to the costs of equipment in said theaters, agreed to assume further obligations incurred for such equipment, and agreed to give preferred stock equal at part to the earnings of said three new theaters for the period of three years commencing the following first day of January (1926), and 563 shares of preferred stock of the aggregate par value of \$56,300, representing one and one-half times the net earnings of the Hollywood Theatre for the year ending the preceding first day of June, and to pay certain interest or dividends on such stock. The first delivery of stock was to be 1,140 shares, the 563 shares above referred to, and 577 shares based upon an estimated twenty per cent. of the earnings of the three new theaters during the said three-year period. Additional shares (not here involved) based upon actual earnings of the three theaters were to be delivered. The contract also provided that after all of the shares provided for should be delivered, and the total number of shares due the Bards was determined, the corporation should deliver to the Bards any additional shares which they were entitled to receive, or, if the number of shares already delivered exceeded such amount, the Bards were to ei-

ther return or pay in cash for the excess. Provision was also made that Miller and Louis L. Bard, one of appellants, should be employed by the new corporation at certain specified salaries; Bard to manage and supervise the said four theaters, and not to enter into any competing occupation. Provision was also made that, if the three new theaters or either of them failed to show a net income for said three-year period, such property might be returned to the Bards, who were to repay the sum paid by the corporation for the equipment, less depreciation.

It was also agreed that all cash and stock deliverable to the Bards under the contract in connection with the Hollywood Theatre should be payable to or upon the order of Louis L. Bard, and all other cash and stock should go to Louis L. Bard and Arthur Bard Company, in equal amount. While there was common stock involved in the transactions, it is conceded to have had no value and does not affect the issues, and is here treated as though it had no existence. The stock applicable to the payment on the Hollywood Theatre was later reduced by an adjustment to 530 shares, which latter amount of stock was ultimately turned over to appellants, together with the 577 shares. Subsequent to this agreement Arthur Bard, one of respondent's assignors, and Louis L. Bard each purchased 125 shares of stock in the corporation for \$12,500.

As the result of three actions between respondent's assignors, appellants, and Far West Theatre Corporation, a settlement agreement (Exhibit 5) was entered into between said parties litigant on December 13, 1928. By this agreement, Far West Theatre Company agreed to pay Louis L. Bard \$30,000 in cash and twelve negotiable promissory notes in the sum of \$4,000 each, the notes maturing one each month after December 13, 1928, and bearing interest at 6 per cent. per annum until paid; the parties agreed to the dismissal of the actions pending and gave certain releases, and Louis L. Bard agreed to transfer to Far West Theatre Company all of the stock heretofore referred to, to wit:

530 shares preferred, on Hollywood Theatre,
125 shares purchased by Louis L. Bard,
125 shares purchased by Arthur Bard,
577 shares on Adams, Pasadena and Glendale
(the new) theaters.

1,357.

After receiving the cash and notes, Louis C. Bard, appellant, paid Arthur Bard, respondent's assignor, \$12,500, and contends that no part of the balance of the cash and notes was ever due respondent's assignor. There is no dispute as to the stock bought for cash by the parties, or that the cash and notes representing the 530 shares on the

Hollywood Theatre belongs to appellants. The dispute is as to the 577 shares; appellant contending that these shares are of no value, and respondent asserting that they were of the same value as all other shares and that, since respondent's assignors previously held 125 shares in addition to 288 of the 577 shares, respondent is entitled to share in the \$78,000 in the ratio of 413 to 1,357, the total number of shares, less a deduction of \$3,125 due appellants by reason of a counterclaim, and less \$12,500 already paid. The latter conclusion was that of the trial court.

[1, 2] (1) Appellants claim that the evidence does not support the findings and judgment. This contention is urged on the theory that the 577 shares were issued for estimated earnings, and that all or a part of such shares and any other shares issued on estimated earnings would have to be returned, if earnings by the three theaters were less than estimated. Such return, however, was not called for by the contract, Exhibit 1, until a time subsequent to the execution of the contract, Exhibit 5, so that there was no time when the obligation to make a return, assuming that the profits were less than estimated, was reached.

Under the August 6, 1925, contract, the Bards agreed to make certain leases and assignments of leases, to sell and deliver certain personal property, and the consideration therefor was the amount of cash stated, the assumption of certain obligations owing by the Bards and the shares of stock based on the past earnings of the Hollywood Theatre, and the estimated earnings of the three new theaters. Paragraph 8 of the contract provides that the delivery of installments of preferred stock shall be accompanied by interest, except that if dividends were passed, the amount of interest be paid in preferred stock, a provision which can only apply to stock delivered after October 1, 1925, and to stock based on estimated net earnings, thus indicating that the parties to Exhibit 1 considered such stock of full participating value. The entire number of shares, including the 577 shares, were part of the consideration going to the Bards, and, while computed separately as to the four theaters, were delivered at the same time as one block (Exhibit 1). The contract, Exhibit 1, must be considered as an entirety. One part cannot be separated from the other. The agreement had as its object the consolidation of a number of theaters, and the provisions as to the three new theaters and the stock issued for their leases cannot be severed from the balance of the contract. The shares computed on the basis of expected earnings were not given in consideration for the leases on the new theaters alone, but were a part of the entire consideration given to the Bards for the entire consideration moving from them to the corporation. The contract

was made with full knowledge of all facts by the parties thereto, and the considerations were agreed upon. Can it be said that the corporation could have complied with the agreement by turning over the cash and the 563 shares of stock, without also turning over the 577 shares? The entire block of 1,107 shares was at the time considered, and must now be considered, to be of equal value. That the 577 shares were considered of a value no different than the other shares is also evidenced by the provisions in the December 13, 1928, contract (Exhibit 5), for here again these shares are transferred as a part of the consideration flowing from Louis L. Bard, the shares are not segregated or mentioned as being of different classes, but the entire amount of preferred stock (plus common stock not here involved and considered of no value) is treated as one block of 4,041 shares. The fact that at the end of the test period some or even all of the stock might have to be returned or paid for was not considered and does not alter the situation. That time never arrived. The Far West Theatre Company took back its stock under the contract, Exhibit 5, as part of the consideration. Had it been considered that the 577 shares were returnable under subdivision e, paragraph sixth of Exhibit 1, one would expect the settlement contract, Exhibit 5, so to provide. Furthermore, said subdivision e by its terms would not become effective to require a return of, or payment for, any stock until "After all of the shares provided by subdivisions b, c, and d, of the same paragraph, have been delivered," said subdivisions providing for additional stock equal to 80 per cent. of the net earnings of the three theaters for 1926, 1927, and 1928, a condition which never arose.

The testimony of Charles A. Buckley as to the opinion expressed by him to Louis L. Bard that the 577 shares were valueless, if admissible for any purpose, is no more than a conclusion, and cannot be accepted as determinative in any degree.

[3] (2) Appellants' contention that the 577 shares of stock was void is met by the preceding comments. The contention that the stock was issued merely for prospective profits overlooks the fact that these shares and the other shares of stock were given in consideration of property transferred by the Bards. The leases transferred were valid consideration for the stock. That the leases on the new theaters were valued on a basis of prospective profits does not affect this conclusion. It is quite natural that the value of a lease should depend upon future returns from the property. The parties to the agreement, with the available data before them, agreed upon this valuation. If they placed

too high a value on some of the leases, they did so knowingly, and are bound thereby.

[4] (3) The third point, that a witness false in one part of his testimony is to be distrusted in others, is without merit. The trial court is judge of the weight and credibility of the testimony of a witness, and may accept and act upon that part of his testimony which he believes, even though he may not believe some of his testimony.

[5-7] (4) Appellants' final contention is that the judgment for money and interest is erroneous because, at the time of the trial, five of the notes received under the settlement agreement were not yet due and were unpaid.

An action for money received will lie not only as to money, but as to some specific property agreed to be treated as money, or which has been converted into money. *Ehrman v. Rosenthal*, 117 Cal. 491, 496, 49 P. 460. But an action will not lie for money had and received, where the property received by the defendant was a promissory note, received, not as cash, but as a promissory note, with the knowledge and consent of both parties.

Where such an action was commenced prematurely, prior to the receipt by defendant of the money, but the money is received thereafter and prior to the trial, it has been held that the premature bringing of the action was not prejudicial, and the judgment should not be reversed. *Cavanagh v. Shaver*, 56 Cal. App. 758, 762, 207 P. 275. Where, however, as here, part of the money was not received until after the trial, such money cannot be included in a computation of the amount due the plaintiff in an action for money received. The money received by appellants, so far as this action is concerned, was not \$78,000, but \$30,000, received December 13, 1928, in cash, and \$4,000 received in cash in each of the seven months preceding the trial, a total of \$58,000, and respondent was entitled to share in this amount in the ratio of 413 to 1,357, a sum of \$17,652.17, and was entitled to judgment for this amount less \$12,500 already paid, and less the further deduction of \$3,125, leaving as the net amount due respondent the sum of \$2,027.17, with interest at 7 per cent. on 413/1357 of the sums received by defendants and appellants from the date when such sums were received as shown by the record, otherwise such interest to date from July 16, 1929.

For these reasons, it is ordered that the judgment herein be modified by reducing the amount of the recovery to \$2,027.17 and interest, and, as so modified, the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

117 Cal.App. 553

Ex parte VITALIE.

Cr. 1174.

District Court of Appeal, Third District, California.

Oct. 19, 1931.

1. Fish ☞13(2).

Shad fisherman's catching striped bass in net in district 12b on August 30 *held* illegal (Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592; Const. art. 4, § 25½).

Pen. Code, § 628a, as amended by St. 1931, p. 2592, prohibits, by paragraph 1, the sale of striped bass during certain months; paragraph 2 prohibits catching of bass at any time except by hook and line; paragraph 3 prohibits catching of bass in certain fish and game districts during specified months, excluding August, but provides that any striped bass of specified length accidentally taken in shad nets with shad in district 12b between March 15 and May 1 may be sold during that period; and paragraph 4 regulates catching of shad.

2. Habeas corpus ☞92(1).

Function of habeas corpus is to inquire into court's jurisdiction and validity of proceedings on their face.

3. Habeas corpus ☞32.

Person restrained of his liberty on charge under unconstitutional statute may be discharged on habeas corpus either before or after conviction.

4. Fish ☞8.

Migratory fish inhabiting California waters are *feræ naturæ*, and catching thereof is subject to reasonable legislative regulation (Const. art. 4, § 25½).

5. Criminal law ☞13.

Fish ☞9.

Statute *held* not ambiguous or unconstitutional because one paragraph prohibits catching of striped bass except by hook and line, whereas another paragraph permits sale of bass accidentally taken in shad nets in specified district during particular time (Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592; Const. art. 4, § 25½).

6. Criminal law ☞13.

Fish ☞9.

Statute prohibiting catching striped bass in nets *held* not ambiguous or unconstitutional merely because fisherman lawfully seining for shad may be unable to prevent bass from entering net (Pen. Code, § 628a, pars. 1-4, as

amended by St. 1931, p. 2592; Const. art. 4, § 25½).

The fact that fisherman may be unable to prevent bass from entering net when he is lawfully seining for shad does not render Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592, unreasonable or unconstitutional, since, if he may not lawfully catch shad without unlawfully taking bass, the permit to fish for shad might be inoperative, inasmuch as intent of Legislature to restrict catching of bass is clear.

7. Constitutional law ☞48.

Statute prohibiting catching bass in nets should be construed, if possible, as constitutional (Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592).

8. Constitutional law ☞48.

Without contrary evidence, court must assume that difference in statutory regulations concerning fishing for shad and bass is founded on good reason (Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592).

9. Habeas corpus ☞92(1).

Whether fisherman was fishing *bona fide* for shad and his illegally catching bass was accidental *held* defensive matters not affecting jurisdictional question, precluding their consideration on habeas corpus (Pen. Code, § 628a, pars. 1-4, as amended by St. 1931, p. 2592).

Petition by Frank Vitalie for a writ of habeas corpus against the Sheriff of Solano County.

Writ discharged, and petitioner remanded.

Cleveland R. Wright, of San Francisco, and Hugh H. Donovan, of Pittsburg, for petitioner

Eugene D. Bennett, of San Francisco, for respondent.

R. L. THOMPSON, J.

This is a petition for a writ of habeas corpus.

The petitioner is charged by a complaint filed in Montezuma township, Solano county, with the misdemeanor of catching striped bass by means of a net, in violation of section 628a of the Penal Code as amended by St. 1931, p. 2592. The complaint contains the following charge: "That said Frank Vitalie * * * on or about the 30th day of August, A. D. 1931, at and in Sacramento River, in the said County of Solano, did then and there wilfully and unlawfully take and catch and kill striped bass other than with hook and line and in the manner commonly known as angling and did further then and there wilful-

ly and unlawfully take, catch and kill more than five striped bass during said day."

Upon this charge the petitioner was taken into custody by the sheriff and is restrained of his liberty. The case has not been tried. This petition for a writ of habeas corpus was then instituted.

[1] The petitioner claims he is entitled to be discharged from custody for the reason that the court is without jurisdiction to try the cause on the ground that section 628a, supra, is ambiguous and unconstitutional, since: (1) It prohibits the catching of striped bass with a net, but authorizes the taking of shad by that same means, whereas a fisherman is unable to prevent bass from entering his net while he is lawfully seining for shad; (2) it absolutely prohibits the catching of bass with a net, but authorizes the sale of bass under certain specified conditions.

It appears the petitioner was engaged on August 30, 1931, in fishing for shad, with a lawful net, in open season therefor, at the mouth of Broad slough in Solano county, in Fish and Game District No. 12b. He was apprehended and arrested by the game warden for unlawfully catching striped bass. When his net was drawn in the presence of the game warden, it was found to contain forty striped bass, together with some shad.

The first paragraph of section 628a of the Penal Code relates to the marketing of striped bass. It prohibits the buying or selling of bass between May 1st and July 31st of any year. It prohibits the marketing at any time of bass which are less than twenty inches in length.

The second paragraph of this section of the Code prohibits the taking, catching, or killing of bass at any time during the year, except by means of a hook and line. This provision necessarily excludes the privilege of catching bass by means of a net. This paragraph also limits the catch of bass to five in number in a single day. It further prohibits the taking of bass which are less than twelve inches in length.

The third paragraph of this section of the Code prohibits the catching of bass in Fish and Game Districts 1, 3, and 12a, between May 1st and July 31st of each year. It then provides that: "Any striped bass at least twenty inches in length * * * *accidentally taken* in shad nets with shad in district twelve 'B' between March 15 and May 1, * * * may be sold during said period anywhere in this state."

The fourth paragraph of this section of the Code designates certain open seasons during which it is lawful to catch shad by means of a hook and line or with a net. The length of the shad which may be lawfully caught is specified. The character of the net which may be used is described. Other restrictions

and provisions applicable to the catching of shad are enumerated.

It will be observed the statute absolutely prohibits the catching of striped bass at any time during the year by any means except that of angling with a hook and line, unless it may be said that the latter portion of the third paragraph of section 628a, supra, modifies the previous provision by authorizing the retaining of bass which accidentally get into the shad nets in district 12b during the period of time between March 15th and May 1st. The petitioner is not charged with catching bass in this last-mentioned season. Upon the contrary, he is charged with taking bass on August 30th. No provision of law authorizes the catching of bass by means of a net on this date. The complaint therefore states a good cause of action against the petitioner, unless the statute referred to is deemed to be unconstitutional.

[2-4] The function of the writ of habeas corpus is to inquire into the jurisdiction of the court from which the process is issued under which the accused is held, and to pass upon the validity of the proceedings upon their face. 13 Cal. Jur. 218, § 4. One who is restrained of his liberty on a charge which is founded on an unconstitutional statute is entitled to be discharged upon his application for a writ of habeas corpus either before or after conviction. 13 Cal. Jur. 225, § 8; 28 C. J. 35, § 23; In re Gilstrap, 171 Cal. 108, 152 P. 42, Ann. Cas. 1917A, 1086; Church on Habeas Corpus (2d Ed.) 346, § 245a. Migratory fish inhabiting the waters under the jurisdiction of California are deemed to be *feræ naturæ*, the catching of which is subject to reasonable regulation by the legislature. For this purpose the Legislature is empowered to divide the state into fish and game districts and to enact reasonable laws for their protection appropriate to the respective districts. 12 Cal. Jur. 545, §§ 2-8; 26 C. J. 623, § 42; article 4, § 25½, Const. of Calif.

[5] Section 628a of the Penal Code is not ambiguous or unconstitutional because paragraph 2 prohibits the catching of striped bass by means other than by the use of a hook and line, while the latter portion of the following paragraph permits the sale of such bass in a specified district, during a designated period of time, which are "accidentally taken" while lawfully seining for shad. This entire section of the Code was enacted at the same time. The latter portion of the third paragraph appears to be an express exception to the general provisions of the preceding paragraph. It does not appear to be an unreasonable regulation of the industry of fishing for bass.

[6-8] Neither is the act ambiguous or unconstitutional because it permits fishing for shad by means of a net during a portion of the same time when seining for striped bass is prohibited, for the reason that a shad fisher-

man is unable to keep the bass from his net. The fact that one may be unable to prevent bass from entering his net when he is lawfully seining for shad does not render the law unreasonable or unconstitutional. If one may not lawfully catch shad without unlawfully taking bass, the result might render the shad permit inoperative. The intent of the Legislature to restrict the catching of bass is clear. The statute should be construed so as to uphold the law if reasonably possible. Shad and bass belong to distinct families of fish. There is no evidence they follow the same habits in regard to time and place of spawning, or that they swim in the same school. Both of these families of fish have been transplanted to the waters of the Pacific Coast. No doubt the Legislature has wisely restricted the fishing for striped bass to prevent their extermination. In the absence of evidence to the contrary, we must assume the difference in the rules for regulating fishing for shad and for bass are founded upon good reason.

It is argued that bass become entangled in the mesh of the net when one is lawfully engaged in fishing for shad, and that they die after a lapse of several hours. If this be true, there appears no good reason why fishermen may not haul in their nets more frequently to prevent the bass from dying, and then return them to the water.

[9] The question as to whether the petitioner was engaged in fishing for shad in good faith, and was not responsible for the illegal catching of bass, are matters of defense. Mere matters of defense which do not go to the question of jurisdiction will not avail to discharge a petitioner on habeas corpus, but must be presented on the merits to the trial court. 13 Cal. Jur. 238, § 19; 29 C. J. 44, § 36.

The writ is discharged and the petitioner in remanded.

We concur: PLUMMER, J.; PRESTON, P. J.

117 Cal.App. 439

PEOPLE v. FOSTER.
Cr. 1171.

District Court of Appeal, Third District, California.

Oct. 13, 1931.

1. Indictment and information ⇨176.

Although information for statutory rape charged commission of offense on September 8, 1930, conviction for offense committed on July 8 held not fatal variance (Pen. Code, § 261).

Circumstances disclosed that, after the jury had been impaneled, the district attorney in opening argument stated he elected to try defendant for offense committed on or about July 8, 1930; that at conclusion of trial court instructed jury that they could find defendant guilty only if they believed beyond reasonable doubt that offense was committed on date selected by district attorney; that no claim was made that defendant was taken by surprise; and that defendant did not ask for postponement of trial.

2. Criminal law ⇨369(8).

In prosecution for statutory rape, evidence of offenses before and after date of one charged in information is admissible to corroborate main charge (Pen. Code, § 261).

3. Criminal law ⇨678(1).

Although evidence of similar offenses is admissible in prosecution for statutory rape, prosecuting attorney must elect date of offense on which conviction is asked (Pen. Code, § 261).

4. Indictment and information ⇨171.

Main test of variance is whether offense is designated with sufficient particularity so that no further prosecution can be had for same crime.

5. Criminal law ⇨1186(4).

Introducing defendant's declaration when arrested that he had had sexual intercourse with so many girls he did not know which one complained held not reversible error, where jury could not have returned verdict other than one finding defendant guilty of statutory rape (Const. art. 6, § 4½; Pen. Code, § 261).

6. Witnesses ⇨388(2).

Excluding prosecutrix' testimony given at preliminary examination of accused held not error, where prosecutrix was not questioned regarding previous testimony.

7. Criminal law ⇨807(1).

Instruction in statutory rape prosecution held properly refused as being argumentative (Pen. Code, § 261).

The requested instruction was to the effect that the crime belonged to that class of offenses of which it has been often said that charge is easy to make and hard to disprove, and that in such cases the jurors are sometimes moved by abhorrence of the offense to convict on slight evidence, but that there must be some substantial evidence to warrant a verdict of guilty.

8. Rape ⇨59(3).

Instruction regarding conviction for rape on prosecutrix' testimony held properly refused under evidence (Pen. Code, § 261).

Instruction that the prosecution relied for conviction of defendant on testimony of prosecutrix alone and in such cases jury should view testimony with great caution was properly refused as overlooking testimony as to parties being at dance testified to by prosecutrix, and also the fact that the prosecutrix gave birth to child, showing that some one had had sexual intercourse with her.

9. Criminal law ☞807(1).

Instruction that defendant charged with rape should not be convicted at all if he could not be fairly convicted *held* properly refused as being argumentative (Pen. Code, § 261).

10. Criminal law ☞829(1).

Refusing requested instructions *held* not error, where instructions given by court covered every phase of case.

11. Rape ☞38(2).

There being no testimony in prosecution for statutory rape showing violence, testimony as to actual consent of prosecutrix *held* inadmissible (Pen. Code, § 261).

Testimony was inadmissible either to mitigate or accentuate punishment.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

John Foster was convicted of statutory rape, and he appeals.

Affirmed.

Hugo McKinley and L. B. Schlingheyde, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant, a married man, was tried and convicted of the offense of statutory rape, committed upon the person of one Margaret McGregor, a female of the age of 15 years, and not the wife of the defendant.

The information upon which the defendant was tried charged the commission of the offense in the county of El Dorado on or about the 8th day of September, 1930. The record shows that, beginning some time during the month of June and continuing up to and including some time during the month of September, 1930, the defendant had sexual relations with the minor female named in the information. After the jury had been impaneled, the district attorney, in his opening statement to the jury, stated he elected to try the defendant for the commission of such an offense perpetrated upon the person of the minor female, as and of about the 8th day of

July, 1930. At the conclusion of the trial the court instructed the jury that the prosecution had elected to stand upon the offense charged as having been committed in the month of July, on or about the date named, and instructed the jury that the date mentioned in the information, to wit, the 8th day of September, 1930, was immaterial, and they could only find the defendant guilty if satisfied beyond a reasonable doubt that the offense was committed by the defendant upon the date selected by the district attorney.

The record in the case at bar shows that the defendant and the minor during the period between early in the month of June, 1930, to and including a portion of the month of September, 1930, were in friendly contact, that they had gone to different places of amusement together, and some of the testimony indicated that they were on very friendly terms. The prosecuting witness detailed at length the various occurrences, giving the places and circumstances when the various offenses were committed. It is true that the testimony of the prosecutrix was a little bit indefinite as to the exact date in July, but other circumstances introduced in testimony indicated that the circumstances and events surrounding and coincident with the events took place on or about the date selected by the district attorney, or the offense upon which the district attorney elected to stand and upon which the people asked for a verdict of conviction. The circumstances were such as parties and dances, to the events of which other witnesses testified.

[1] Upon this appeal the first point made for reversal is that there is a variance between the date of the offense charged in the information and the date upon which the people elected to stand as the time of the commission of the offense upon which conviction would be asked. No claim is made that the defendant was taken by surprise by reason of the selection of the district attorney of a date different from that mentioned in the information, nor was any postponement of the trial asked that the defendant might more readily present any defense he might have concerning the alleged occurrences and the date thereof, upon which the district attorney elected to stand.

In support of the contention made by the appellant, several cases are cited in which, under the circumstances of the particular incidents or facts presented to the court, verdicts were set aside by reason of proof as to different offenses than the one mentioned in the information, or the one alleged in the information as occurring upon a particular date. These cases, however, instead of supporting the contention of appellant, directly and emphatically support the course pursued by the district attorney in the trial of this case.

In *People v. Hatch*, 13 Cal. App. 521, 109 P. 1097, 1102, the facts recited in the opinion show that the defendant was proven guilty of several distinct embezzlements. Under such circumstances the court, in speaking of the duty of the district attorney, said: "Where several substantive offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction." Again, in *People v. Williams*, 133 Cal. 165, 65 P. 323, where an offense similar to the one involved in this case was the basis of the prosecution, the court (as summarized in the syllabi) held: "Though the failure to prove an offense of the exact date charged in the complaint is not a fatal variance, yet the main charge cannot be dispensed with for that reason, and should be selected and notified to the defendant at the commencement of the trial, as the offense upon which the prosecution intends to rely. * * * Upon a charge of crime involving sexual intercourse by consent, other incidents may be proved, not primarily to prove habitual or continuous criminality, or other offenses, but merely as tending to prove the one specific offense for the alleged commission of which the defendant is on trial."

[2, 3] All the cases referred to lay down the rule that, in sexual cases, offenses before and after the date of the one charged in the information may be offered in testimony, but it is incumbent upon the district attorney to elect the date of the offense upon which conviction is asked. Testimony as to other offenses are introduced only to corroborate the main charge. In the case at bar, by the opening statement of the district attorney, it appears that the rule laid down in the cases relied upon by appellant for reversal was strictly followed.

[4] The defendant had notice of the offense for which he was being charged, and the record, as made, discloses the offense for which he was being tried, and, being convicted of that charge, it stands as a bar to any further or other prosecution for such offense, and answers every requirement of the test of variance; the main test being whether the offense was designated with sufficient particularity so that no further prosecution can be had for the crime of which the defendant stands convicted. What we have just said in relation to the introduction of testimony of different acts in sexual cases and the election of the district attorney to stand upon a particular charge as sufficient is supported by the following cases: *People v. Castro*, 133 Cal. 11, 65 P. 13, *People v. Koller*, 142 Cal. 621, 76 P. 500, and *People v. Malley*, 49 Cal. App. 597, 194 P. 48. In some of these cases the court in its instructions limited the right to convict to a

particular act, just as appears to have been the course followed in the instant case.

[5] It is next insisted that incurable misconduct occurs in the record by reason of the district attorney asking as to a conversation had by the arresting officer with the defendant. While this witness was on the stand the following occurred: "The defendant asked me who signed the complaint. I remarked, 'why, you must know who signed it. You have been in Placerville.' 'Well,' he said, 'sure, I have been in Placerville. When I was there I had (sexual intercourse) with so many girls I don't know which one squealed.'" We have eliminated the foul word used and for the purpose of keeping this record as clean as the circumstances will permit, and inserted the words "sexual intercourse." This testimony, after some argument, was stricken out by order of the court, and the jury directed not to consider it in their deliberations. Notwithstanding this fact, it is insisted by the appellant that the introduction of this testimony constituted such a degree of error as to render the instruction of the court nugatory, and that from the time of the introduction of such testimony, the jurors would be so prejudiced against the defendant that it would be impossible for them to give the defendant a fair trial, and that the error is of such a nature that section 4½ of article 6 of the Constitution cannot be relied upon to sustain the verdict.

If the testimony in this case were not of such a clear and positive character as to all the events and circumstances surrounding the offense, the place where it occurred, the time when it occurred, and the facts shown by the witnesses that the defendant and the minor were together upon such day, we would be inclined to hold that the conduct of the district attorney in eliciting the answer referred to was highly prejudicial. But, in this case, in view of what we have said and of the fact that the female in this case thereafter gave birth to a child at a time indicating, as the testimony shows, that some one had had sexual intercourse with her at or about the time testified to, reversible error is not shown. No attempt was made to show that the female had been intimate with any other person. The only defense offered by the defendant was his plea of not guilty and the testimony of a few witnesses as to good character. No explanation or testimony contradicting the testimony of the female was offered further or other than related to some incidental matters, as, for example, whether the female had or had not asked the defendant to take her to a dance.

A reading of the testimony and the record as it stands, excluding the objectionable question and answer to which we have referred, leads to the conclusion that no jury, having a

due regard for their oaths, could return other than a verdict of guilty.

We do not set forth the details of the various instances testified to by the prosecutrix, as they stand forth in the record unexplained and undenied on the part of the defendant other than by his simple plea of not guilty, which relieves us, we think, from recounting the testimony to show that really no defense existed.

[6] It is further urged that the court erred in the exclusion of the testimony given by the prosecutrix at the preliminary examination of the defendant. A reference to the transcript shows that there is no merit in the contention. We quote therefrom as follows:

"Mr. Lyon: That refers to a different time, if your honor please; incompetent, irrelevant and immaterial.

"Mr. McKinley of counsel for the defendant: If your honor please, there wasn't a word said about any act being committed in September, in the direct examination in the preliminary examination of this defendant, and that was all brought out by me in cross-examination, and at this time I offer in evidence, as defendant's exhibit Number One, the testimony taken at the preliminary examination of Margaret McGregor.

"The Court: The offer, as made, will be overruled at this time."

No citation of authorities nor argument is necessary to show the correctness of the court's ruling. The only way in which the testimony of the witness Margaret McGregor could be introduced would be by asking Margaret McGregor upon the witness stand if she had not testified in such and such a manner at the preliminary examination, showing to her the record of her testimony, and, if she answered "No," then and in that event to read into the record the testimony as given by Margaret McGregor at the preliminary examination.

That this method might require several questions as to whether the witness had testified in a certain manner and a number of answers does not obviate the necessity of calling the witness' attention to the testimony given in answers to questions at the preliminary examination or justify the blanket procedure adopted by appellant in this case.

[7] As an additional reason for reversing, it is urged upon this appeal that the court committed error in its instructions to the jury and in its refusal to give certain instructions requested by the defendant. The refused instructions relied upon by appellant are as follows:

Instruction No. 8. "You are instructed that 'this crime belongs to that class of offenses of which it has been often said that the charge is easy to make and hard to disprove. In such cases the jurors are sometimes moved by ab-

horrence of the offense to convict upon slight evidence;' but I charge that there must be 'some substantial evidence to warrant a verdict of guilty.'" In support of this instruction the appellant cites the case of *People v. Stouter*, 142 Cal. 146, 75 P. 780. A reference to that case shows that the language as set forth in the instruction was used by the court in its opinion. However, the appellant fails to distinguish between language used by the court in its opinion and in reasons or arguments advanced for its conclusions and what constitutes a proper instruction to the jury. A reading only of the instruction proposed shows that it is simply an argument of the court and not a statement of an instruction which should be given to the jury.

[8] Again, in defendant's proposed instruction No. 24, which reads: "Where, as in this case, the prosecution relies for conviction of the defendant upon the testimony of the prosecutrix alone, and no other witnesses are called by the state to testify directly as to the time or place or circumstances of the alleged offense, then, and in such case, you should view such testimony with great caution, and it is the duty of the court to warn the jury of the danger of conviction upon such testimony"—citing *People v. Von Perhacs*, 20 Cal. App. 48, 127 P. 1048. A reference to this case shows that the proposed instruction only included a part of that which was approved in the case relied upon. It also overlooks the fact that there was testimony in this case as to the parties being at the dance testified to by the prosecuting witness; also overlooks the fact that the minor gave birth to a child, showing that some person had had sexual relations with her.

[9, 10] The defendant's proposed instruction No. 25 reads: "You are instructed that the defendant here is charged with rape, in that he is charged with having sexual intercourse with said minor (Pen. Code, § 261) and if he cannot be fairly convicted he should not be convicted at all; to convict him unfairly would provide ways and means for conviction of innocence." This, of course, is objectionable on account of its argumentative character and is covered by proper instructions telling the jury the basis for their action, as we more specifically show.

Defendant's instruction No. 26 is an excerpt taken from the opinion of the court in the case of *People v. Cruse*, 24 Cal. App. 497, the excerpt being found on page 501, 141 P. 936, 938, which, again, is only a part of the reasoning indulged in by the court in that case, and is in no sense a statement of what the court considered a proper instruction or a statement of the law to be given to the jury.

Proposed instruction No. 28 reads as follows: "You are instructed that in a prosecution of this character, it is dangerous to convict the accused upon the sole testimony of

the prosecutrix, and in a case where the testimony of the prosecutrix is not corroborated by other evidence, the testimony of the prosecutrix should be carefully scanned." We do not need to comment upon the argumentative character of this instruction or point out that the court in giving its instructions should not assume the position of a partisan for either the people or the defendant, but will content ourselves with referring to the instructions given by the court, which cover every phase of the case and leave nothing of which appellant can complain.

To show that the cautionary instructions given by the court were abundantly sufficient without giving argumentative instructions, we quote the following instructions as given by the court:

"You are here for the purpose of trying the issues of fact that are presented by the allegations in the information filed by the district attorney and the defendant's plea thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed therefore solely by the evidence introduced in this trial and the law as given by the court. The law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice, public opinion or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be. * * *

"The rule of law which clothes every person accused of crime with the presumption of innocence and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of a crime to escape, but it is a humane provision of the law intended, so far as human agency can, to guard against the danger of an innocent person being unjustly punished."

The court then instructed the jury that they could find the defendant guilty only if they found beyond a reasonable doubt and to a moral certainty that the offense upon which the prosecution had elected to stand was proved, and that they could not find the defendant guilty of any other offense or offenses committed at any other time; that such testimony was introduced only for the purposes of corroboration.

Over and over again the court instructed the jury that they could only find the defendant guilty upon testimony showing that the defendant was guilty, beyond a reasonable doubt, of the offense alleged to have been com-

mitted, as alleged by the district attorney, as occurring on or about the 8th day of July, 1930.

The court further instructed the jury: "You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under the instructions of the court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous. No juror should vote for either party, nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors."

[11] The court further instructed the jury that in this case the question of consent was not involved. This is alleged as error, the claim being that the question of consent is material in fixing the punishment. In support of this contention the case of *People v. Pantages* (Cal. Sup.) 297 P. 890, is relied upon. A consideration of the facts of the two cases, however, discloses that the *Pantages* Case does not support the rule that, where there is no evidence or force or violence, and the female is under the age of eighteen years, the question of consent becomes material. In the *Pantages* Case the whole of the testimony on the part of the prosecution was to the effect that the alleged offense was accomplished by force and violence. In meeting this charge it was held that testimony relating to the character of the prosecutrix was admissible for the purpose of rebutting the testimony as to force and violence, in that, if the prosecutrix was a woman of loose character, she would be more likely to consent, and therefore her testimony as to force and violence might be discredited, and, also, her testimony as to the commission of the offense might be weakened or discredited, and, under such circumstances, the question of consent would become material, as, in the *Pantages* Case, the prosecutrix testified that she suffered great pain, fainted, etc. In the present case there is no such testimony. The testimony of the prosecutrix is to the effect that the defendant began by making love to her, which culminated in the several acts of sexual intercourse testified to, and also in the act for the commission of which the defendant was found guilty.

The female in this case was of the age of 15 years, and under the Code provisions was

unable to give consent, and, there being no testimony as to the issue of force or violence, or threats, or intimidation, whether the prosecutrix did give her mental and physical consent becomes wholly immaterial, and the instruction given by the court that the prosecutrix was unable to consent in this case was and is a correct statement of the law. There being no testimony as to force or violence, testimony as to the actual consent of the female was not admissible either to mitigate or accentuate the punishment.

The judgment and the order are affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

117 Cal.App. 481

JONES v. TOLAND, County Sheriff.

Civ. 4376.

District Court of Appeal, Third District, California.

Oct. 15, 1931.

1. Execution ⇨125.

Service of execution against debtor of judgment debtor more than a year from date of issuance of execution held ineffective (Code Civ. Proc. § 688).

2. Execution ⇨125.

Code declaring attachment or garnishment shall have no effect after three years after issuance relates solely to proceedings prior to judgment, and is not applicable to proceedings on execution (Code Civ. Proc. § 542b).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Paul Jones against C. W. Toland, Sheriff of Butte County. Judgment for plaintiff, and defendant appeals.

Judgment affirmed.

J. Oscar Goldstein, of Chico, for appellant.

William H. Johnson, of San Jose, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to recover the sum of \$939.84, which it is alleged was converted by defendant in his capacity as sheriff of Butte county. After trial by the court, judgment was entered against defendant in the amount named. The appeal is prosecuted from the judgment.

From the undisputed facts it appears that in an action brought in Santa Clara county

entitled "Roberts v. Blanchard," a judgment was entered on June 18, 1924, against defendant therein, in the sum of \$5,117.76. On October 5, 1927, an execution was issued upon said judgment, and sent to defendant herein for service upon M. Ocovich, who was indebted to said Blanchard in an unknown amount. Defendant served the writ of execution upon Ocovich on October 7, 1927. No money was collected, and the writ was returned unsatisfied. On December 6, 1927, Blanchard obtained judgment against Ocovich in the superior court of Butte county for \$939.84. On December 7, 1928, a second execution was issued on the Roberts judgment, and on December 9, this was served by defendant upon Ocovich, and all money due Blanchard upon said judgment was garnisheed. On December 7, Blanchard assigned all his interest in said judgment to plaintiff. On January 23, 1929, plaintiff served upon defendant a third-party claim to the proceeds of said judgment, which had already been paid into court by Ocovich, and the money delivered to defendant. Defendant refused to pay over to plaintiff the money so collected, and this action was instituted to recover the same.

Section 688 of the Code of Civil Procedure provides, in part, as follows: "Until a levy, property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution; provided, however, an alias execution may be issued on said judgment and levied on any property not exempt from execution."

[1] It is admitted that the first execution against Blanchard was served after the expiration of one year from the date of the issuance thereof. It is plain the Legislature intended that, after the expiration of one year from the date of issuance, a writ of execution would have no further force or effect.

It is argued by the appellant that "the first execution followed by the second, created a lien in favor of the judgment-creditor, Roberts, so as to make his right to recover the debt from the garnishee superior to any claim or demand subsequently accruing."

We are unable to follow counsel in his construction of the Code section cited above. Upon the expiration of the first execution, the judgment creditor therein was in no better position than any other creditor. It cannot be contended seriously that the levy under an alias execution would relate back to the date of expiration of the first execution. If such a condition had been intended, the Legislature would have so declared. Furthermore, no lien was created by the levy of the first execution, as it was a nullity at the time of service—October 7, 1927.

[2] Appellant contends that section 542b of the Code of Civil Procedure, which provides that an attachment or garnishment shall be of no effect at the expiration of three years after the issuance of the writ of attachment, applies to garnishments under executions. In our opinion, this section relates solely to proceedings taken prior to judgment, and is not applicable to proceedings upon execution. This is apparent from a mere reading of the statute, which refers to a release of the levy thereunder by dismissal of the action or by entry and docketing of the judgment in the case; such contingencies would not have been mentioned if the Legislature had in mind proceedings subsequent to judgment. If the argument of appellant prevailed, the limit of one year upon executions would be absolutely nullified, and three years would be allowed for all executions. The three-year period for attachments and garnishments was considered by the Legislature as a reasonable time within which a litigant could subject attached property to any judgment which might be obtained, while the one-year limitation was considered a reasonable time for realizing upon the fruits of the judgment, with the right to an alias execution thereafter.

We are satisfied with the disposition of the case as made by the learned trial judge, and accordingly the judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.



117 Cal.App. 663

MAUSS et al. v. KATO et al.
Civ. 518.

District Court of Appeal, Fourth District, California.

Oct. 23, 1931.

1. Sales ☞390.

Action for money had and received will lie when property received is so worthless that law will imply promise to repay purchase price; but, to bring plaintiff within such rule, total failure of consideration must appear.

2. Sales ☞397.

Buyers' receipt of merchandise worth \$560, fixtures, and use of lease for 2½ years, held not to disclose such failure of consideration that action for money had and received will lie for purchase price.

Buyers paid \$2,900 for a business including fixtures, stock in trade, and a lease of space in market. The sellers had paid \$600 advance rent on the lease which was a sublease from one who leased from

owner. Buyers were required to vacate by referee in bankruptcy of original lessor, and they tore out the fixtures, sold them, and then recovered the original purchase price from sellers. No findings were made as to value of fixtures, stock in trade, use of lease for 2½ months, and \$600 advance rent paid which buyers received under purchase.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by A. Mauss and E. Mauss against H. Kato and others, copartners, doing business under the fictitious name of X Y Z Produce Company, and H. Kato and others, as individuals. From a judgment for plaintiffs, defendants appeal.

Reversed and remanded for a new trial.

J. Marion Wright, of Los Angeles, for appellants.

Charles H. Clark and Everett R. James, both of Los Angeles, for respondents.

BARNARD, P. J.

In December, 1924, the defendants sold to the plaintiffs a going business in Hollywood, including certain fixtures, stock in trade, and a lease of a space in a public market. This lease was a sublease from a party who in turn had leased the property from the owner. This lease was assigned to the plaintiffs, who obtained the consent of the sublessor to the assignment. The defendants had previously paid \$600 to their lessor as advance payment of the rent for the last two months of the sublease. Plaintiffs paid to the defendants \$2,900 for the business, including the stock in trade, the fixtures, the lease, and the advance payment of rent. The defendants gave to the plaintiffs a "bill of sale" covering the lease, stock, and fixtures in which they agreed to "warrant and defend the title to the said property, goods and chattels hereby conveyed, against the just and lawful claims and demands of all persons whomsoever." The plaintiffs took possession, paid the rent to the sublessor, secured additional space, remodeled the fixtures, and continued in business for about two years and six months. They then received a letter from a referee in bankruptcy purporting to represent the original lessor of the premises, requiring them to vacate. They then went to the defendants offering to surrender the business as it then was, and demanding a return of the \$2,900 paid. The offer not being accepted, they tore out the fixtures, sold what they had left, and brought this action to recover the \$2,900. The complaint as filed was in two counts, the first of which was for money had and received. The second count, while artificially drawn, attempted to set up a rescission. It

failed, however, to allege that the plaintiffs had returned or offered to return what they had received. A demurrer to the second count was sustained and the action went to trial upon the first count, as answered, resulting in a judgment for the plaintiffs for \$2,900. From this judgment the defendants have appealed.

[1, 2] It is apparent that the claim of respondents, if any they have, is for damages for a breach of the written warranty contained in the bill of sale. On the other hand, the complaint is not based upon a claim for damages, and counsel for respondents stated in open court that they were not seeking damages. An action for money had and received will lie when the property received is so entirely worthless that the law will imply a promise to repay the purchase price, but in order to bring a plaintiff within that rule, a total failure of consideration must appear. *Powers v. Freeland* (Cal. App.) 299 P. 736. It is hardly necessary to say that no total failure of consideration here appears. Assuming that an action for money had and received will also lie in case of a partial failure of consideration, this would be true only where the partial failure is as to a precise and definite part which is capable of being ascertained by computation, and in such a case, only the corresponding part of the money paid could be recovered. No such a situation here appears. The evidence shows that the respondents received merchandise of the value of \$560; that they received certain fixtures and furniture, the value of which does not appear; that they received the use of such furniture and fixtures for approximately two years and six months, there being nothing to show the value of this use; and that they had the possession of the premises and the benefits of the lease for the same length of time, with nothing to show the value of the same. The evidence also fails to show whether the \$600 advance rent paid was returned to respondents, or why it was not, if that was the case. The court made no finding as to the value of any of these things received by the respondents. While the court made a finding that the respondents lost all that they received, there is no evidence to support such a finding. Neither the findings nor the evidence support the judgment. While respondents apparently rely in part upon the claim of rescission, their own testimony was to the effect that they offered back what they had left when they were notified to vacate the premises.

An action for money had and received is in the nature of an equitable action. 17 Cal. Jur. 603, and cases cited. It has been frequently pointed out that the basis of the action is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff. In the case before us,

although the respondents received all of the property purchased, had the full and complete use of it all for two and one-half years, and at most only failed to keep the benefit of a part of one item, all that was received by them is ignored in the findings and judgment and they have recovered a judgment for the return of the full purchase price. So far as this record shows, there is nothing equitable in such a situation. While respondents argue that the court must have had in mind that they lost enough in damages through the loss of the unexpired term of the lease to offset all that they had received, such a theory is supported neither by the evidence, the findings, nor the pleadings.

The judgment must be reversed, and if the action is to be again tried it should be under revised pleadings which will permit the claim of appellants' liability under the terms of the warranty set forth in the bill of sale to be properly presented and passed upon.

The judgment is reversed, and the action remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

CASSERLY v. CITY OF OAKLAND et al.
No. 8120.

District Court of Appeal, First District, Division 1, California.
Sept. 21, 1931.

Rehearing Denied Oct. 21, 1931.

Courts ⇐209(2).

Petition for rehearing would be denied, where petition for writ of mandate was not filed in lower court in first instance.

Petition by Nora Casserly against the City of Oakland and others for a writ of mandate.
Petition denied.

PER CURIAM.

The petition for a writ of mandate in above-entitled matter is hereby denied.

On Petition for Rehearing.

PER CURIAM.

The petition for a rehearing filed in the above-entitled cause is hereby denied, for the reason that the petition for the writ of mandate was not filed in the court below in the first instance.

117 Cal.App. 504

SICHTERMAN v. R. M. HOLLINGSHEAD CO.

Civ. 7628.

District Court of Appeal, First District, Division 1, California.

Oct. 16, 1931.

1. Witnesses ⇨396(1).

Where party to action has changed his testimony on second trial, circumstances are admissible to explain his action to enable jury to determine whether change was inadvertence or perjury.

2. Appeal and error ⇨1180(1), 1195(4).

Unqualified reversal places parties in trial court in same position as before trial, giving plaintiff right to introduce new evidence rendering inapplicable, and therefore inadmissible, law of case as declared on former appeal.

3. Courts ⇨89.

Law of one case is not binding in deciding another, where facts are essentially different.

4. Evidence ⇨207(2).

Counsel's statement in brief before Supreme Court was not binding as an admission, but was only counsel's conclusion, and therefore properly excluded as evidence on second trial.

5. Trial ⇨140(1).

Jury is judge of witnesses' credibility.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Richard Sichterman against the R. M. Hollingshead Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Edwin H. Williams, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

TYLER, P. J.

Action for damages for personal injuries.

The appeal is from a judgment rendered in a second trial of the action. When the case was first tried, the jury rendered a verdict in favor of plaintiff for the sum of \$20,000. Upon appeal from the judgment rendered on this verdict, a reversal was had. Thereafter, upon a second trial, a verdict and judgment in plaintiff's favor for the sum of \$15,000 was rendered. This is an appeal from such judgment. The original judgment was reversed

upon the ground that the evidence failed to show negligence on the part of defendant.

[1-4] Upon the second trial, plaintiff offered, and there was received in evidence, new and additional testimony bearing upon this issue. It was claimed by defendant at the trial that plaintiff changed his testimony, and sought to prove that defendant's negligence was due to its driving at an excessive rate of speed; that such testimony was false and fabricated, and designed to meet the exigency of the case which arose after the appellate court held there was a failure of proof as to negligence on the part of defendant, as plaintiff had positively disclaimed, upon the first trial, any knowledge of the speed at which defendant was driving. In support of this claim, defendant offered in evidence the opinion and other judicial records on the first appeal, including the petition for transfer filed with the Supreme Court by plaintiff, wherein it was recited that if the decision of the appellate court was permitted to stand as the law of the case, plaintiff would be forever foreclosed from having any recovery. These records were offered for the purpose of showing plaintiff's express admission, after the time of the first trial, that he had no further evidence of negligence to present. It was claimed, in support of the offer, that plaintiff's declaration constituted an admission by conduct that a fabrication of evidence was necessary in order to save a case that was lost, except by the use of perjured testimony. The trial judge rejected all of this offered evidence on an objection made by plaintiff. This ruling is complained of as constituting prejudicial error. There can be no question that where a party to an action has changed his testimony, the circumstances under which that change was made are admissible in evidence to explain and characterize his action in so doing, so as to enable the jury to judge whether the change was due to mere inadvertence, or was part of a deliberate scheme of perjury. Here, however, defendant was permitted on the cross-examination of plaintiff to introduce his evidence given at the former trial and comment thereon, and he was afforded every opportunity to point out the departure in his testimony. It was for the jury to say how such departure affected his testimony. The trial judge was of the opinion, as indicated by his ruling on the motion for a nonsuit, that the testimony given at the second trial did not conflict with plaintiff's former testimony, but amounted to nothing more than additional thereto. The judgment on the former appeal was an unqualified reversal. This left the case at large, and the parties were placed in the same position as if it had never been tried, and plaintiff was afforded the right to introduce any additional or new evidence upon the issues raised. Having offered new evidence, the law of the case,

as declared on the former appeal, had no application, and therefore the decision on the former appeal had no force, and was properly excluded. 2 Cal. Jur., p. 1044; Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521. It was for the jury to determine the truth or falsity of the new evidence, it being the exclusive judge of the credibility of the witness. The doctrine of the law of the case has no application or binding force where facts, as here, are essentially different. 2 Cal. Jur., p. 950, § 557. Nor is there any merit in the claim that the exclusion in evidence of the statement of counsel, in his brief before the Supreme Court when seeking a transfer, that the decision of the appellate court precluded plaintiff from making any recovery in the action, constitutes error. It was but the conclusion of counsel, and not an admission during the trial of a cause as would preclude plaintiff from offering new and additional testimony upon the occasion of a second trial. *Adelstein v. Greenberg*, 77 Cal. App. 548, 552, 247 P. 520.

[5] Appellant further claims that the testimony of two new witnesses, who testified concerning the accident, was untrustworthy. We see nothing in their evidence which justifies this conclusion. However, the jury was the judge of their credibility.

The plaintiff suffered serious injury, and no claim is here made that the verdict is excessive. No other reasons than those we have considered are advanced for a reversal of the judgment.

From what we have said, it follows that the judgment should be, and it is hereby, affirmed.

We concur: KNIGHT, J.; CASHIN, J.

117 Cal.App. 399

TURNER v. COOK.
Civ. 7585.

District Court of Appeal, First District,
Division 2, California.
Oct. 7, 1931.

Rehearing Denied Nov. 6, 1931. Hearing
Denied by Supreme Court Dec. 2, 1931.

1. Contracts ⇨143.

Contract must be construed as whole.

2. Brokers ⇨75.

Contract held to show defendant should pay investment broker certain sum when she transferred stock, if prior to date broker was to receive contract to purchase.

Provision that sum was to be paid, "as a guaranty" that broker should receive such contract, and provision that broker was to "refund" amount upon sale of 75 per cent. of shares before certain date, both became meaningless if contract was construed otherwise. In the sense in which the term was used in the contract, "guaranty" was synonymous with "security," and to "refund" was to pay back. It was erroneous, therefore, to hold that defendant was bound to pay broker the amount at any time, after execution of contract, that she might transfer her interest in stock described.

[Ed. Note.—For other definitions of "Guaranty" and "Refund," see Words and Phrases.]

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action on contract by John Turner against Lillian Cook. Judgment for plaintiff, and defendant appeals.

Reversed.

Breed, Burpee & Robinson, of Oakland, for appellant.

Frederick W. Mahl, Jr., of Oakland, for respondent.

DOOLING, Justice pro tem.

Defendant appeals from a judgment for \$1,500, with interest from April 25, 1927. Respondent's assignor, L. F. Cowan, is an investment broker and financial counselor. Appellant in December, 1925, owned a substantial part of the capital stock of the Central Mendocino Power Company. Her holding consisted of an interest in a pool of 79,776 shares of common stock which was then held in escrow to secure the repayment of a loan. The due date of the loan was approaching, and appellant was faced with the necessity of saving her stock. At the same time the financial condition of the power company was not satisfactory; and on December 15, 1925, appellant first consulted Cowan to advise and assist her both in saving her own stock and in reorganizing or refinancing the company. After a number of consultations and on April 6, 1926, appellant executed and delivered to Cowan the following memorandum of agreement:

"San Francisco, Calif, April 6, 1926.
"Mr. L. F. Cowan, 155 Montgomery St.,
San Francisco, Calif.

"Dear Sir: In consideration of services rendered and to be rendered by you in connection with the sale of one hundred and five thousand (105,000) shares, (par value \$1.00) of the Central Mendocino County Power Company, it is hereby agreed that in event of my release of my rights, claims and interests, or

upon acceptance by and delivery to me of fifteen thousand dollars (\$15,000.00) as settlement for my rights, claims, and interests in connection with the holdings of seventy-nine thousand seven hundred and seventy-six (79,776) shares of the Common Stock of the Central Mendocino County Power Company, that I am to pay you the sum of fifteen hundred dollars (\$1,500.00) as a guarantee that you shall receive contract to purchase one hundred and five thousand (105,000) shares of the Common Stock of the Central Mendocino County Power Company at eighty cents per share, together with a guarantee of fourteen cents per share as payment of dividends on said stock at the rate of 7% per annum for a period of two years.

"It is understood that you are to refund me the said sum of fifteen hundred dollars (\$1,500.00) on the delivery to you of said contract and upon the provision and condition that you shall have, on or before September, 1926, sold seventy-five (75) per cent of one hundred and five thousand (105,000) shares of the Common Stock of the Central Mendocino County Power Company.

"In event of my failure to deliver said contract I am to be released from all obligations in connection therewith, upon the forfeiture of the sum of said fifteen hundred dollars (\$1,500.00).

"Time is the essence of this agreement.

"[Signed] Mrs. Lillian Cook.

"Witnessed, L. A. Kottinger."

Cowan never received a contract to purchase 105,000 shares of the common stock of the company, and appellant never received \$15,000 for her interest in the 79,776 shares of its common stock; but on April 25, 1927, through no effort of Cowan's, appellant transferred her interest in such stock for a sum less than \$15,000. Thereafter this action was commenced by respondent, as Cowan's assignee, to recover the sum of \$1,500 with interest from April 25, 1927, and the judgment appealed from followed.

It was the theory of the trial court that the contract bound appellant to pay Cowan \$1,500 at any time after its execution that she might transfer her interest in the stock described. Appellant urges that the obligation to pay the \$1,500 expired when her interest in such stock remained untransferred in September, 1926.

[1] One of the cardinal rules for the construction of contracts is that they must be considered as a whole; each part thereof being construed in the light of every other part. This rule has been recently well stated in *Ogburn v. Travelers' Ins. Co.*, 207 Cal. 50, 51, 52, 276 P. 1004, 1005, in the following language: "A contract should be construed, however, as an entirety, the intention being gathered from the whole instrument taking it by its four corners. Every part thereof should

be given some effect. Section 1641, Civil Code. In other words, 'the sense and meaning of the parties to any particular instrument should be collected ex antecedentibus et consequentibus; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done.' *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 227, 41 P. 876, 878."

[2] Applying this rule to the contract before us, we find that appellant, upon the transfer of her interest in the stock described, was to pay Cowan \$1,500, not absolutely, but "as a guarantee" that he should receive a contract to purchase 105,000 shares of common stock on certain designated terms. In the sense in which the term is here used "guarantee" is synonymous with "security." The \$1,500 was to be paid to secure or insure Cowan that he would receive the contract to purchase 105,000 shares. A further examination of the contract shows that it contemplated that Cowan should receive the contract to purchase 105,000 shares prior to September, 1926, because Cowan is to "refund" the \$1,500 if prior to that date he has sold 75 per cent. of the 105,000 shares. That the payment of the \$1,500 was intended to be made prior to September, 1926, is clearly shown by the use of the word "refund" in this clause. To refund is to pay back, and the \$1,500 could not be paid back prior to September, 1926, unless it had first been paid to Cowan prior to that time.

Reading the contract as a whole, we think that it clearly appears that the parties contemplated, not that appellant should pay Cowan \$1,500 absolutely and at any time that she might transfer her interest in her stock, but only if such transfer was made by her prior to the date when Cowan was to receive the contract to purchase 105,000 shares; i. e., not later than September, 1926. The provision that the \$1,500 is to be paid "as a guarantee" that Cowan will receive such contract, and the provision that Cowan is "to refund" the \$1,500 upon the sale of 75 per cent. of the 105,000 shares before September, 1926, both become meaningless if the contract is construed otherwise. It is patent that the \$1,500 could not be paid "as a guarantee" for the performance of an act at a time already past, and equally patent that the provision for its being refunded on the performance of an act at a time already past would by such a construction be shorn of any meaning or effect.

The language of the agreement "that in event of my release of my rights, claims and interests * * * that I am to pay you the sum of fifteen hundred dollars" if standing alone would support the construction sought to be placed upon it by respondent. But it does not stand alone and "the rules of construction forbid seizing upon some isolated

provision of a contract in order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument." *Skookum Oil Co. v. Thomas*, 162 Cal. 539, 547, 123 P. 363, 366.

The construction which we have placed upon this agreement is fortified, if need be, by the situation of the parties at the time it was drawn. At that time Cowan believed that he had a purchaser for appellant's interest in the pooled stock for \$15,000. So believing, the contract was drawn in the expectation that the transfer and sale of appellant's stock would be shortly made and long prior to September, 1926; Cowan did not guard against the contingency that the sale of appellant's stock might not be made until after that date. In fact, however, the purchaser whom Cowan believed he had secured refused to pay \$15,000 for the stock and the sale fell through. This was Cowan's misfortune, but cannot justify us in construing a contract for the payment of a sum of money "as a guarantee" for the performance of another act into a contract to pay absolutely and at any time.

The judgment accordingly must be and is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

117 Cal.App. 430
HERBOLD v. ATCHISON, T. & S. F. RY. CO.
 Civ. 7334.

District Court of Appeal, Second District,
 Division 1, California.
 Oct. 13, 1931.

Rehearing Denied Nov. 10, 1931. Hearing
 Denied by Supreme Court Dec. 10, 1931.

Appeal and error ⇌64.

Superior Court judgment affirming judgment of municipal court in same county was not appealable to District Court of Appeal, notwithstanding Superior Court of another county had concurrent original jurisdiction with municipal court (Const. art. 6, § 4b, adopted, and § 5, amended, in 1928; St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2).

Appeal from Superior Court, Los Angeles County, Appellate Department; Victor R. McLucas, Hartley Shaw, Edward T. Bishop, Judges.

Action by Calvin E. Herbold against the Atchison, Topeka & Santa Fé Railway Com-

pany. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

Robert Brennan, M. W. Reed, and E. T. Lucey, all of Los Angeles, for appellant.

Carter & Webster and George S. Carter, all of Pasadena, for respondent.

HOUSER, J.

In the municipal court of the city of Los Angeles plaintiff brought a personal action against the defendant for the sum of \$515, for which amount he recovered judgment, and which judgment, on appeal to the Superior Court, was affirmed. Thereupon the defendant took an appeal to this court from such latter judgment, and plaintiff has presented his motion to dismiss the same.

It appears to be conceded by respective counsel that, because of the fact that the defendant is a foreign corporation, doing business within this state, in the absence of any special statute to the contrary, an action against such corporation for such an amount of damages as is claimed in the complaint herein may be maintained in the Superior Court located within any county in the state *Waechter v. Atchison, Topeka & Santa Fé Ry. Co.*, 10 Cal. App. 70, 101 P. 41.

It is also likewise conceded that, had the cause of action upon which the complaint herein was founded arisen within the county of Los Angeles, the municipal court of the city of Los Angeles would have had exclusive jurisdiction of the action. But it is urged by appellant that, because the cause of action arose in Fresno county, within which no municipal court is established, it follows that either the Superior Court located within Fresno county or the Superior Court within any other county of the state would have jurisdiction of the action, with the ultimate result that both the Superior Court of Los Angeles county and the municipal court of the city of Los Angeles had jurisdiction of the action. It is therefore contended by appellant that a concurrent jurisdiction of the cause of action existed as between the Superior Court within the county of Los Angeles and the municipal court of the city of Los Angeles, and that (as further contended by appellant), because of the fact that the action was one which might have been maintained in the Superior Court of Los Angeles county, an appeal from the judgment rendered therein would lie to the District Court of Appeal, citing *Johnston v. Wolf*, 208 Cal. 286, 280 P. 980.

However, in the case of *Moye v. National Surety Co.*, 208 Cal. 279, 280 P. 982, it appeared that an action which had been commenced in the Superior Court of the county of Ventura was transferred to the municipal

court of the county of Los Angeles, from which latter court, after judgment rendered therein, an appeal was taken to the Superior Court of the county of Los Angeles, which appeal resulted in a judgment of reversal of the judgment of the municipal court. From the judgment in the Superior Court plaintiff appealed to the District Court of Appeal; whereupon a motion was made to dismiss the said appeal on the ground that the District Court of Appeal was without jurisdiction. In deciding the question thus presented, the Supreme Court adopted the opinion therefore rendered by the District Court of Appeal, which in part was as follows:

"It is contended by the defendant that, under the provisions of sections 4b and 5 of article 6 of the Constitution as amended in 1928, this court has no jurisdiction of the appeal. In resisting the motion to dismiss the appeal, plaintiff urges that, inasmuch as the cause of action was 'transitory,' the superior court of Ventura county had jurisdiction thereof. The argument seems to be that, as he would have had a right to appeal to this court from a judgment of the superior court of Ventura county, if a judgment had been rendered against him in that court, he has a right of appeal to this court from the judgment when rendered against him by any other court to which the cause was transferred. We fail to see that any such conclusion follows. The action having been transferred to the municipal court, the right of appeal from its judgment was in no respect different from the right to appeal from any other judgment of that court."

In the instant case, assuming that the superior court in the county of Fresno may have had original concurrent jurisdiction of the action, in view of the fact that the plaintiff chose to file his complaint in the municipal court of the city of Los Angeles, which concededly also had jurisdiction—it would seem that the final situation is analogous to that in the case to which attention has just been directed, and consequently that the motion to dismiss the appeal herein should be granted.

Moreover, section 5 of article 6 of the Constitution (as amended November 6, 1928), provides that the Superior Court shall have original jurisdiction in all civil cases and proceedings "except * * * cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts."

Among other situations in which jurisdiction is conferred upon the municipal court, section 29 of the Municipal Court Act (St. 1929, pp. 837, 838) provides that it shall have original jurisdiction in all cases "arising outside the county in which a municipal court is established, in which any proper defend-

ant named therein resides or has his place of business within the county wherein such municipal court is established."

As to the cause of action in the instant case, it appearing that by the terms of the statute "jurisdiction [thereof] is * * * given by law to municipal * * * courts," it would follow that the exception to the general constitutional jurisdiction of the Superior Court became and was effective, with the result that the Superior Court of Los Angeles county lost whatever original jurisdiction it may have had of said cause of action. In such a situation, the decision in each of the cases of *Berg v. Traeger*, 210 Cal. 323, 292 P. 495, 496, and *D. Q. Service Corp. v. Securities L. & D. Co.*, 210 Cal. 327, 292 P. 497, that the cited statute "had the effect of depriving the District Courts of Appeal of jurisdiction over appeals from the superior courts in any action within the jurisdiction of the municipal courts," is necessarily conclusive of the right of the defendant in the instant case to appeal from the judgment rendered by the Superior Court.

The motion to dismiss the appeal is granted, and the said appeal is dismissed.

We concur: CONREY, P. J.; YORK, J.

SHINTAFFER v. BANK OF ITALY NAT.
TRUST & SAVINGS ASS'N et al.*
Civ. 4402.

District Court of Appeal, Third District,
California.
Oct. 13, 1931.

Rehearing Denied Nov. 12, 1931. Hearing
Granted by Supreme Court Dec. 10, 1931.

Chattel mortgages ⇨ 138(2).

Lessor's crop mortgagee *held* entitled to lessor's share of crop harvested during redemption period, against purchaser at foreclosure of antecedent realty mortgage (Civ. Code, § 2955; Code Civ. Proc. § 707).

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by George C. Shintaffer against the Bank of Italy National Trust & Savings Association and others, in which named defendant and defendant Minnie E. Backus filed cross complaints. From the judgment, the last-named defendant appeals.

Affirmed.

Rich & Weis, of Marysville, for appellant Backus.

Desmond A. Winship, of Yuba City, for respondent Shintaffer.

Lawrence Schillig, of Yuba City, for respondent Bank of Italy Nat. Trust & Savings Ass'n.

Erling S. Norby, of Marysville, for respondents Hook.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the defendant and cross-complainant Minnie E. Backus from a judgment entered in the above-entitled action in favor of the Bank of Italy National Trust & Savings Association on its cross-complaint filed in this action. The facts upon which the cause was tried were all stipulated and are correctly summarized in the appellant's brief, as follows:

On May 21, 1928, Henry D. Hook and his brother Ellis Hook were the owners of a parcel of real property in the county of Sutter, state of California. Henry D. Hook owned a two-thirds interest and Ellis Hook owned a one-third interest in the property. On that date Henry D. Hook and his wife mortgaged all of the property to defendant Minnie E. Backus. It is conceded by the parties that the mortgage created a first lien upon the two-thirds interest of Henry D. Hook only and did not create any lien against the one-third interest of Ellis Hook. On November 8, 1928, Henry D. Hook and wife executed a deed of trust to Bank of Italy National Trust & Savings Association on the same property. On March 1, 1929, Henry D. Hook leased said real property to plaintiff George C. Shintaffer for the years 1929 and 1930. Under said lease, Shintaffer, the lessee, agreed as follows: To plow, harrow, and plant the said 140 acres to grain, barley, or wheat, in a good farmer-like manner, and harvest same and deliver in bulk same as harvested, free of charge to lessor. To deliver one-fourth of said crop at his own expense at warehouse designated by lessor not further distant than Yuba City, Cal., in a good merchantable condition. Shintaffer immediately went into possession of said real property as the tenant of Henry D. Hook. On June 5, 1929, Minnie E. Backus commenced an action against Henry D. Hook and his wife to foreclose her mortgage. Notice of the pendency of said action was filed on the same date. The Bank of Italy National Trust & Savings Association was made a party to said action, was served with summons, and appeared and filed an answer and cross-complaint setting up its second lien on said property. Thereafter, and while Shintaffer was in possession of said property as a tenant of Henry D. Hook, a crop mortgage was executed to the Bank of Italy National Trust & Savings Association by said Henry D. Hook on the 1929 and 1930 crops growing and to be grown on said premises. Defend-

ant Minnie E. Backus obtained a judgment of foreclosure and sale in her said action on July 27, 1929, and the interest of Henry D. Hook in and to said property was sold to Mrs. Backus at commissioner's sale on August 24, 1929. During the year 1930 and prior to the expiration of the period within which said real property might have been redeemed, Shintaffer, who was still the tenant in possession of Henry D. Hook, cropped the land to wheat. The crop for that year amounted to 208,240 pounds, of which it is admitted that Shintaffer is entitled to three-fourths or 156,180 pounds. Shintaffer also holds the warehouse receipts for the remaining one-fourth, or 52,060 pounds, in which he claims no interest. Of this amount, it is admitted, Ellis Hook is entitled to his one-third interest. The ownership of the remaining amount of wheat, amounting to 34,706 pounds, is disputed. Bank of Italy National Trust & Savings Association claims this wheat by reason of its crop mortgage, and Minnie E. Backus claims the wheat as rents, issues, and profits from Shintaffer, the tenant in possession of said property during the period for redemption. Upon this statement of facts the trial court decided that the Bank of Italy National Trust & Savings Association, as holder of the crop mortgage from Henry D. Hook, is entitled to the possession of the 34,706 pounds of wheat, and that defendant Minnie E. Backus, the purchaser at the foreclosure sale, is not entitled to any of said wheat grown in said lands by Shintaffer as tenant in possession during the period for redemption.

The appellant rests her appeal upon the case of *Clarke v. Cobb*, 121 Cal. 595, 54 P. 74, and section 707 of the Code of Civil Procedure, which provides, in part, that the purchaser, from the time of sale, is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

In the case at bar the record shows that the Bank of Italy National Trust & Savings Association had a chattel mortgage upon the crops grown upon the premises during the year 1930, executed in all particulars in accordance with the requirements of section 2955 of the Civil Code and the subsequent sections of the Code relating thereto. An examination of the case of *Clarke v. Cobb* reveals that the court actually held in that case (quoting from the syllabus): "That a certificate of sale of land, issued by a sheriff, does not pass any interest in the crops grown upon the land and ripened and harvested during the period of redemption." The facts in this case show that the crop involved was sown, ripened, and harvested before the period of redemption had expired and before the appellant had received a deed to the mortgaged premises.

This court, in a well-considered opinion written by Mr. Justice Pro Tempore Bartlett,

in the case of First National Bank of Lindsay v. Garner, 91 Cal. App. 176, 266 P. 849, where the facts were exactly similar as to a mortgage upon real property and a chattel mortgage given subsequently upon citrus fruits, held as follows: "A subsequent mortgage given on all citrus fruit grown on mortgaged lands, as authorized by section 2955 of the Civil Code * * * is prior to the mortgage on the lands, and in an action to foreclose the latter mortgage the decree of foreclosure should have provided that a sale thereunder should be subject to the crop mortgagee's right to take and hold all such crops at any time before the redemption period."

In Cowdery v. London, etc., Bank, 139 Cal. 298, 73 P. 196, 199, 96 Am. St. Rep. 115, a like question was considered as that involved here, and the court said: "A distinction is made in this state between the rents and profits, as such, and the corpus of the growing crops, it being held that the statutory mode of mortgaging crops as chattels is exclusive, and that a clause mortgaging the rents, issues, and profits, in a mortgage not executed in the form prescribed for chattel mortgages, is ineffectual to give the mortgagee any lien on or right to the growing crops, even after the appointment of a receiver, as against third persons who are in the position of purchasers for value, with or without notice." It was there held that the crop mortgage was prior in point of legal right, though subsequent in time of execution. To the same effect is the case of Locke v. Klunker, 123 Cal. 231, 55 P. 993.

In view of these decisions, which seem to us to settle the law in this state, the judgment of the trial court must be affirmed, and it is so ordered.

I concur: R. L. THOMPSON, J.

Presiding Justice PRESTON, deeming himself disqualified, did not participate in the foregoing opinion.

117 Cal.App. 489

DEMERS v. SUTHERLAND et al.
Civ. 483.

District Court of Appeal, Fourth District,
California.
Oct. 15, 1931.

Rehearing Denied Nov. 10, 1931. Hearing
Denied by Supreme Court Dec. 14, 1931.

1. Appeal and error ⇨931(1).

In examining sufficiency of evidence to support finding, appellate court accepts as true evidence sustaining it and inferences

which might reasonably be believed by trial court.

2. Appeal and error ⇨931(1).

Appellate court will resolve every substantial conflict in testimony to sustain finding.

3. Automobiles ⇨244(11, 35).

In intersectional collision, evidence sustained finding that defendant's bus was proceeding at dangerous speed, and had not entered intersection before automobile carrying plaintiff reached there.

4. Automobiles ⇨244(43).

In intersectional collision, evidence sustained finding that driver of automobile carrying plaintiff took proper precautions before entering intersection.

5. Negligence ⇨122(1).

Contributory negligence is an affirmative defense, burden of proving which is on defendant.

6. Automobiles ⇨245(14).

In intersectional collision, evidence held sufficient to present question of fact as to which vehicle entered intersection first.

7. Automobiles ⇨245(59).

Whether alleged excessive speed of car entering street intersection was proximate or contributing cause of collision held fact question.

Appeal from Superior Court, San Diego County; Percy S. King, Judge.

Action by Mildred C. Demers against Fred A. Sutherland and others. From a judgment against them, defendants appeal.

Affirmed.

E. P. Sample, W. H. Wylie, A. Haines, and Gray, Cary, Ames & Driscoll, all of San Diego, for appellants.

Wirt Francis, of San Diego, for respondent.

ALLISON, Justice pro tem.

In this case the plaintiff recovered judgment against the defendant in the sum of \$12,000. Defendant appeals.

The case was tried before the court without a jury. It appears that on the 22d day of March, 1929, respondent was riding in an automobile driven by Leo J. Demers, her husband, proceeding in a westerly direction along San Miguel avenue, and while crossing the intersection of said avenue with Massachusetts avenue a collision occurred between the automobile in which respondent was riding and an autobus owned by the appellant Fred

A. Sutherland and at the time being operated by appellant M. L. Curtis, an employee of Sutherland. The respondent received certain injuries as a result of the collision. Both of said avenues are public highways situated in San Diego county. The intersection at which the collision occurred is not within the corporate limits of any city, town, or village. Massachusetts avenue was at the time, and now is, an arterial highway, provided on both sides with boulevard stop signs. San Miguel avenue intersects Massachusetts avenue at right angles. At the time the collision occurred the autobus was proceeding in a southerly direction along Massachusetts avenue. The respondent's automobile was proceeding in a westerly direction along San Miguel avenue. These directions of movement indicate that the autobus approached the intersection on the right of the driver of the automobile, and conversely the automobile approached on the left of the driver of the autobus. The collision occurred in the early forenoon between the hours of 8 and 8:30 o'clock. There was at the time, or had been during the morning, a light rain, and the pavement was wet and slippery.

Leo J. Demers, husband of the respondent, who was driving the automobile in which respondent was riding, testified that he was quite familiar with the crossing, and that an earth embankment overgrown with weeds or growing grain was situated on the north of San Miguel avenue extending from the easterly line of Massachusetts avenue easterly for some distance; that the embankment entirely obstructed his view of Massachusetts avenue to his right, from which direction the autobus was approaching; that he stopped his car at the boulevard stop, shifted the gear of his automobile into second, and immediately went forward into the intersection, and just as they passed beyond the embankment into Massachusetts avenue he saw the stage over his shoulder for an instant before the collision occurred, but he was unable to say how fast the autobus was traveling; that the pavement on Massachusetts avenue is about 20 feet wide; that he traveled about 18 feet from the place at which he made the boulevard stop before his car was struck by the autobus; and that the embankment on his right approaching Massachusetts avenue blocked his vision all the way except for about 5 feet.

The respondent testified that she was familiar with the crossing; that her husband drove the car approaching the intersection, and, when about 50 feet from the intersection, he slowed down and eventually stopped at the boulevard stop; that it was impossible to see to the right at that point because of an earth embankment which she stated to be about 6 feet high; that from where her husband stopped the automobile it was impossible to see any distance at all to the right

down Massachusetts avenue because of the earth embankment; that her husband put the car into second gear and drove past the embankment. She did not see the autobus until just before it struck their automobile, and did not know how fast the autobus was traveling.

The only direct testimony introduced as to the speed of the autobus was that of the witness Curtis, the driver of the bus, a witness called on behalf of the appellants. Curtis testified that he approached the intersection at a speed of about 25 miles per hour, and that he slowed down to about 15 miles per hour as he approached the intersection of Massachusetts avenue and San Miguel avenue, and was driving about 15 miles per hour when he entered the intersection, and that, when he neared the intersection, he slowed down to about 15 miles per hour and looked to his left and then to his right, and, seeing nothing, he "stepped on the accelerator and started to cross"; "commenced speeding up a little." The left front fender of the bus received the greater damage. The left front headlight was smashed. No damage was done to the right front headlight. When he first saw the respondent's car it was about 15 feet east of the boulevard stop. He immediately applied his emergency and foot brake, disconnected the clutch of the bus, and locked the wheels; the pavement was slippery, and the bus slid about 50 feet from the place where he first slid the bus wheels until they came to a stop. After colliding with respondent's car, he pushed it down Massachusetts avenue about 51 feet. On cross-examination the witness testified that he was 10 or 15 feet back of the property line or pavement when he started to accelerate the speed of the bus.

Mrs. Rose Eckles, a passenger on the autobus, testified that the autobus did not travel at a high rate of speed, and that when approaching the intersection it slowed down definitely; that she thought it was stopping for passengers.

It also appears that the bus struck the respondent's automobile on the side and pushed it sideways southerly along Massachusetts avenue a distance of 75 feet, and that the force of the impact caused severe injuries to the respondent. The automobile in some manner became locked to the front of the stage. It did not turn over or leave the road, but remained upright. The automobile was completely wrecked, and some damage was done to the front of the autobus.

Appellant insists that the judgment should be reversed for the following reasons: First, that the evidence does not establish negligence on the part of the appellants; second, that the driver of the automobile in which respondent was riding was guilty, as a matter of law, of contributory negligence; third,

that the negligence of the driver of the automobile was imputable to respondent, and barred recovery by her.

On the question of negligence, the court found "that said stage or bus was being driven at a high and dangerous rate of speed and without due regard for the safety of other vehicles at said intersection and was so negligently, carelessly and recklessly driven and operated by the defendant M. L. Curtis as to cause the same to run into and against and collide with the automobile in which plaintiff was riding, crushing the side thereof and forcing said automobile sideways and southerly a distance of approximately 75 feet * * * said collision was caused solely by the negligence, carelessness and recklessness of defendant M. L. Curtis in operating the stage of defendant Fred A. Sutherland as alleged in plaintiff's complaint herein and as hereinbefore specifically found."

The court also found that it was not true that the bus entered the intersection prior to the time when respondent's automobile had reached said intersection, and that it was not true that Leo J. Demers drove said automobile either carelessly, negligently, or improperly; nor that he failed to take proper precaution prior to entering said intersection, but, on the contrary, the said Leo J. Demers did take all proper precaution prior to entering said intersection, and did observe the boulevard stop; that it was not true that said Leo J. Demers drove said automobile, in entering said intersection, at a high or unlawful or excessive rate of speed, and that it is not true that said collision was caused by reason of the negligence and carelessness of Leo J. Demers. "The finding upon this, as upon other issues of fact, is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that that conclusion is without substantial support in the record." *Hassell v. Bunge*, 167 Cal. 365, 139 P. 800, 801. "Every case of the kind here involved has its own peculiar features, and must be determined on the particular facts which surround the given transaction or transfer." *Byrnes v. Moore*, 93 Cal. 393, 29 P. 70.

[1, 2] In examining the sufficiency of the evidence to support the questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the findings made, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this state, to be resolved in favor of the finding.

[3, 4] We are of the opinion that the evidence is sufficient to sustain the finding that the defendant's autobus was, at the time of

the collision, being driven at a high and dangerous rate of speed; also that the testimony is sufficient to sustain the finding that appellants' stage had not entered the intersection prior to the time the automobile in which respondent was riding reached said intersection; also that the said Leo J. Demers did take all proper precautions prior to entering said intersection. In the case of *Couchman v. Snelling* (Cal. App.) 295 P. 845, 847, it was said that, "where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. * * * Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection"—cited with approval in *Page v. Mazzel* (Cal. Sup.) 3 P.(2d) 11.

[5, 6] It is next insisted that the driver of the automobile in which respondent was riding was guilty, as a matter of law, of contributory negligence. Contributory negligence is an affirmative defense. The burden of proving it is on the appellants. Under the testimony, we believe that there was sufficient evidence to present a question of fact as to which of the vehicles entered the intersection first. If respondent's car actually entered the intersection before the appellants' stage approached it, respondent had the right to assume that she would be given the right of way and be permitted to pass through the intersection without danger of collision. *Couchman v. Snelling*, supra. The question is usually one of fact, and becomes a question of law only when the evidence is of such a character that it will support no other legitimate inference. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513.

[7] If the evidence in this case was such that it might reasonably be inferred therefrom that the respondent's car entered the intersection at a speed in excess of the speed which the law permitted under the circumstances, the question of whether such excess speed constituted or was the proximate or contributing cause of the collision was a question of fact which, under the circumstances, was to be determined by the court.

Appellant insists that the rule announced in the case of *Lindenbaum v. Barbour* (Cal. Sup.) 2 P.(2d) 161, is determinative of the question of contributory negligence here. In that case the court had under consideration the power of the board of supervisors of San Bernardino county to pass an ordinance regulating the right of way of automobiles at intersections on those streets which have been

designated as "Stop Boulevards," and have been clearly marked with signposts giving notice of such facts. The court held that the board of supervisors of San Bernardino county had the power to pass such an ordinance, and that the same did not conflict with the provisions of the California Vehicle Act (St. 1923, p. 517, as amended), and that the right of way over the intersection under consideration in that case was controlled by the provisions of the county ordinance. The record here does not disclose the existence of a county ordinance regulating traffic on the intersection in question.

Appellant has submitted to this court a motion for an order authorizing and directing that additional testimony be taken in this case. This motion is denied on authority of *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 369

**METROPOLITAN CASUALTY INS. CO. v.
STATE INDUSTRIAL ACCIDENT
COMMISSION et al.
Civ. 4502.**

District Court of Appeal, Third District,
California.

Oct. 5, 1931.

1. Master and servant ⇨403.

Under statute, burden rests on employer to prove that person performing work is independent contractor; otherwise he is presumed to be employee (St. 1917, p. 849, § 19 (d) (1)).

2. Master and servant ⇨414.

Whether person performing services under oral contract is employee or independent contractor is question of law and fact (St. 1917, p. 849, § 19 (d) (1)).

3. Master and servant ⇨417(7).

Finding of Industrial Commission on question whether person performing services under oral contract is employee or independent contractor is conclusive on appeal, unless there is absolute absence of evidence so as to render finding unreasonable (St. 1917, p. 849, § 19 (d) (1)).

4. Master and servant ⇨405(2).

Finding of Industrial Commission that claimant performing services in "topping

trees" was "employee," and not "independent contractor," *held* supported.

Facts disclosed that claimant was regularly employed by another company; that he and another party were employed by foreman of orchard company for a single day at a stated wage to top certain trees of the orchard company; that, in topping the trees, foreman and employee of orchard company remained on ground handling ropes which were furnished by the orchard company; that during progress of the work foreman directed additional topping; and that, while work was being done, limb swung against claimant causing injury.

[Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

Proceeding under Workmen's Compensation Act by Dewey Littlejohn, claimant, opposed by the H. B. Orchard Company, employer, and the Metropolitan Casualty Insurance Company, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation, insurance carrier brings certiorari.

Award affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

PLUMMER, J.

This cause is before us upon the petition of the above-named company to review an award made by the Industrial Accident Commission in favor of the respondent Dewey Littlejohn.

The question involved in this proceeding is whether the respondent Dewey Littlejohn was an employee or an independent contractor at the time he sustained the injuries resulting in the award just mentioned.

The record shows that the respondent Dewey Littlejohn and William Joseph Lanum were employees of the Pacific Gas & Electric Company, and were at work as such employees at and near an orchard owned and operated by the H. B. Orchard Company, of which company a Japanese by the name of Hatamiya was acting as foreman; that during the time Littlejohn and Lanum were employed in the neighborhood of said ranch Mr. Hatamiya interviewed them with regard to whether they knew of any one who understood "topping" trees. It appears that the Orchard Company owned three trees which they desired to have "topped." In the top of these trees there was a growth of mistletoe. At first it was understood that Littlejohn and Lanum

were to "top" the trees only to the extent necessary to remove the mistletoe, but, after the work had been carried on in part, Hatamiya requested that the trees be "topped" somewhat lower, or down about 14 feet from the ground, in order that they might be "budded." At the time of the interview with Hatamiya just mentioned, Mr. Littlejohn informed Mr. Hatamiya that he understood "topping" trees, whereupon Mr. Hatamiya asked what would be the charge for "topping" the three trees. Mr. Littlejohn looked over the work, stated that they wanted as their compensation \$6 a day apiece, and that the work would require about one day's time for the two men, and the charge therefor would amount to \$12. Mr. Hatamiya and another employee of the Orchard Company were to assist in the work. It was agreed that the work should be done on a Sunday so as not to interfere with the employment of Littlejohn and Lanum in their services with the Pacific Gas & Electric Company. Finally, a time was agreed upon for the work, and Mr. Littlejohn and Mr. Lanum went to the premises of the Orchard Company, asked Mr. Hatamiya how he wanted the trees "topped," and the two men went up and began cutting the trees. Hatamiya stayed on the ground, and, assisted by a Filipino, managed the ropes in letting down the limbs so as not to do any damage to a fence standing along the line of the trees. After the mistletoe was all cut out, Mr. Hatamiya, at the suggestion of a man who understood "budding," requested that the trees be "topped" still lower, as heretofore stated, and, as there was ample time to complete the work in one day, Littlejohn and Lanum agreed thereto. The saw for sawing the trees and the ropes used in letting down the limbs were furnished by Hatamiya. While the work was in progress, it appears that one of the limbs that was being sawed off, in some way or other not explained, swung around and came in contact with the person of Littlejohn, inflicting somewhat serious injury, to wit, a fracture of the pelvis. The foregoing covers in substance all of the occurrences relating to the employment. The commission found that the respondent Littlejohn was an employee and not an independent contractor.

[1-4] Under the provisions of subdivision 1 of subdivision D of section 19 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 849), the burden in this case rests upon the petitioner to prove that Littlejohn and Lanum were independent contractors; otherwise Littlejohn would be presumed to be an employee. The fact is admitted that Littlejohn, at the time of the injury, was actually performing services for and on behalf of the H. B. Orchard Company. Under the decision of the Supreme Court in the case of *Hillen v. Industrial Accident Com-*

mission, 199 Cal. 577, 250 P. 570, it appears that whether a person performing services is an employee or an independent contractor under an oral contract is a question of law and fact, and that the finding of the commission is conclusive, unless there is an absolute absence of evidence in the record so as to render such finding unreasonable. Following this case and the recent decision of the Supreme Court in the case of *La Franchi et al. v. Industrial Accident Commission of California et al.*, 3 P.(2d) 305, where the facts upon which the claim of the injured person being an independent contractor appears to us to be much stronger than they are in this case, it must be held that the circumstances disclosed in the record support the findings of the commission.

The award is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

117 Cal.App. 423

SILVA v. GOLDMAN.

Civ. 7903.

District Court of Appeal, First District,
Division 1, California.

Oct. 10, 1931.

1. Brokers ⇨86(3).

Evidence held to show that material terms of contract to be procured by real estate broker were never agreed upon.

Such terms were left for future determination, and there was no meeting of the minds of owner and proposed tenant.

2. Brokers ⇨52.

It was essence of real estate broker's obligation in securing tenant to bring parties to agreement as to material terms of contract.

3. Evidence ⇨594.

Jury or trial court may, if not acting arbitrarily, reject uncontradicted testimony of witness (Code Civ. Proc. § 1847).

While a witness is presumed to speak the truth (Code Civ. Proc. § 1847), nevertheless the jury or the trial court sitting as such is the exclusive judge of his credibility.

4. Appeal and error ⇨1011(1).

Under inconsistent testimony, findings will not be disturbed, though appellate court may think different conclusion should have been reached.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by M. R. Silva against William Goldman to recover real estate broker's commission. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert B. Gaylord, William M. Maxfield, and Harold M. Child, all of San Francisco, for appellant.

G. C. Ringole, of San Francisco, for respondent.

PER CURIAM.

An action by a real estate broker to recover a commission for services alleged to have been rendered in procuring a tenant for a building to be constructed by the defendant.

Plaintiff alleged that he was employed to procure a tenant for an apartment house which defendant agreed to erect, the term to be ten years and the rental \$11.50 per room each month for the first five years, and \$12 per room per month for the remainder of the term; that payment of the same was to be secured by a chattel mortgage upon the furniture to be installed therein by the tenant; that he procured such tenant in one Starr, who offered and was ready, willing, and able to lease the apartments upon the above terms, and who delivered to defendant his certified check for \$2,500 as evidence of good faith; further, that defendant accepted the offer and the check, and later erected the apartment house, but refused to enter into a lease with Starr or to pay plaintiff a commission for his services.

The court found that on or about July 1, 1926, it was orally agreed that, if plaintiff procured a responsible tenant for the proposed building for the term of ten years at a rental of \$12 per room per month, the rent to be secured by a chattel mortgage upon the furniture to be installed therein by the tenant, the terms of the lease to be as determined by defendant's attorney, and the plans and specifications to be agreeable to both defendant and the tenant, then defendant would pay plaintiff the usual commission for his services; further, that no person who was willing or who offered to enter into the lease upon the above terms was procured, and that the check mentioned was returned to Starr.

Judgment was entered for defendant, and plaintiff, who has appealed therefrom, contends that the findings are not supported by the evidence.

According to plaintiff's testimony, the proposed building was to contain twenty-eight apartments, a total of fifty-six rooms, and

no plans or specifications were prepared. He stated: "I drew a sketch of that building; that was only on a piece of paper in lead pencil, a rough sketch to give Mr. Goldman some idea of it. I would not say that was plans and specifications." On September 29, 1926, Starr proposed in writing to lease the apartments on the rental basis alleged in the complaint, and his offer contained numerous specifications as to how the rooms, hallways, and basement should be equipped, and the kind and quality of equipment to be placed therein by defendant, none of which, so far as shown, had been discussed or agreed upon by plaintiff and defendant. The offer also stipulated that the furniture should cost not less than \$5,000, and that the check delivered therewith be retained by defendant unless the offerer should enter into the lease, install the furniture, and execute the chattel mortgage.

While there is no direct evidence on the subject, it appears to have been the understanding between plaintiff and defendant that any proposed tenant should give security for his promise to enter into the lease and execute the mortgage; but there is no evidence that the amount thereof, or the value of the furniture to be placed in the apartments, was agreed upon. Defendant, after considering the offer and consulting his attorney, determined that the amount of the check was not sufficient security for Starr's promise to enter into the lease and execute the mortgage to justify the investment necessary to erect the apartments; and the check was subsequently returned. After some discussion with plaintiff, defendant fixed the sum of \$6,000 as the deposit required by him in this connection, the same to be returned to the lessee upon the execution of the lease and mortgage; also that the amount and value of the furniture to be installed and the specifications should be first agreed upon by himself and Starr. The latter declined to furnish security in addition to the \$2,500, but testified that on April 4, 1927, he made a new offer in writing, which was introduced in evidence. It provided for the deposit of security in the sum of \$6,000 as required by defendant, the rental to be \$12 monthly per room; that the furniture to be placed therein and mortgaged to secure the rent should not be of less value than \$7,500, and also that the plans and specifications should be prepared by a person named therein, who presumably was an architect.

[1, 2] Defendant denied that the last offer claimed was made to him, and on this question the testimony was conflicting. In the meantime the apartment was erected; its management being retained by defendant.

The evidence shows sufficiently that material terms of the contract to be procured

by plaintiff were never agreed upon by him and the defendant, but were left for future determination, and on these terms there was no meeting of the minds of defendant and the proposed tenant. Under the circumstances, it was of the essence of plaintiff's obligation to bring the parties to an agreement in the above respects (*Ayers v. Thomas*, 116 Cal. 140, 47 P. 1013), and this, according to the evidence adduced by defendant, plaintiff failed to do.

Plaintiff urges that certain testimony given by himself and his witnesses was not denied, and that the court should therefore have found accordingly. In the same connection there was testimony of statements by plaintiff tending to show his belief that the failure to consummate the lease was not due to defendant's fault.

[3, 4] While a witness is presumed to speak the truth (Code Civ. Proc. § 1847), nevertheless the jury or the trial court sitting as such is the exclusive judge of his credibility, and may, provided it does not act arbitrarily, reject the testimony of a witness even though uncontradicted (27 Cal. Jur. § 156, p. 184). The same rule applies to inconsistencies in the testimony, and the findings will not be disturbed even though the appellate court may think that a different conclusion should have been reached (*Clopton v. Clopton*, 162 Cal. 27, 121 P. 720).

We are satisfied that the findings are sufficiently supported, and nothing has been shown which would justify a reversal of the judgment.

The judgment is affirmed.

MOSKOVITZ v. LE FRANCOIS. *
Civ. 7756.

District Court of Appeal, First District,
Division 1, California.

Oct. 14, 1931.

Rehearing Granted Nov. 13, 1931.

1. Replevin ⇨63.

Where plaintiff is entitled to possession at commencement of action, but right ceased and vested in defendant before judgment, latter must affirmatively allege such facts in answer.

2. Replevin ⇨65.

In replevin action, addition of evidentiary matters respecting right of possession did not make cross-complaint vulnerable to general demurrer.

3. Landlord and tenant ⇨194(1).

Tenant's surrender of premises pursuant to three-day notice terminated lease and landlord's right to rent accruing subsequently.

4. Chattel mortgages ⇨237.

Mortgagor's tender of amount of debt, refused by mortgagee, extinguished lien of chattel mortgage, and entitled mortgagor to possession of furniture.

5. Replevin ⇨46.

Mortgagee obtaining furniture through writ of replevin had no right to sell it before.

6. Chattel mortgages ⇨237.

That mortgagee, obtaining furniture through writ of replevin, had sold it, could not deprive mortgagor of defense that tender of amount of debt extinguished mortgage lien and entitled her to possession.

7. Replevin ⇨107.

Where mortgagee sold furniture obtained through replevin writ, judgment for mortgagor, who tendered amount of debt and extinguished lien, would properly be for its value only.

8. Replevin ⇨65.

Cross-complaint, alleging defendant mortgagor tendered amount of debt and demanded possession of furniture mortgagee had obtained through replevin writ, mortgagee's refusal, and praying damages for conversion held not demurrable.

9. Appeal and error ⇨1011(1).

Trial court's findings on conflicting evidence could not be reviewed.

10. Chattel mortgages ⇨237.

Mortgagee's failure at rejection of tender to specify objections and amount claimed to be due precluded him from so objecting at trial (Code Civ. Proc. § 2076).

Appeal from Superior Court, City and County of San Francisco; W. A. Anderson, Judge.

Action by Samuel Moskovitz against Marie Le Francois, also known as Mrs. A. Francis. From the judgment, plaintiff appeals.

Affirmed.

Albert Picard, of San Francisco, for appellant.

Barrett & Barrett, of San Francisco, for respondent.

GRAY, Justice pro tem.

Appellant sued to recover the possession of certain furniture or its value, together with

damages for its detention. After trial by the court, respondent recovered judgment for the value of the furniture, less rent due appellant. Claiming that respondent's cross-complaint stated a cause of action for the conversion of the furniture occurring after the commencement of this action and arguing that such an entirely separate and distinct cause of action is not a proper matter of cross-complaint, appellant assigns as error the overruling of his general demurrer to the cross-complaint. A proper consideration of these matters requires a summary of the pleadings.

The complaint alleged that appellant was entitled to possession of certain furniture of the value of \$4,000 which respondent, as owner, had mortgaged to secure her lease of an apartment house owned by appellant; that the mortgage authorized appellant to take possession of the furniture and foreclose upon default in payment of rent; that respondent failed to pay rent of \$1,120 for April and May, and on May 21st wrongfully removed the furniture from the apartment house, and still retains possession, although appellant has demanded its surrender. The prayer sought possession of the furniture or its value, with damages for its detention. Briefly, the cross-complaint alleged the execution of the lease and mortgage, appellant's ownership of the apartment house, his service upon her on May 17th of a three-day notice to pay rent or quit possession, her surrender of possession of the apartment house, the then accrual of rent of \$940, her tender to appellant of the sum of \$1,120 and demand for return of the furniture, which the sheriff had replevied and delivered to appellant, the latter's refusal to comply with the demand and to satisfy the mortgage, appellant's sale, as a pledge, of the furniture to his son for \$1,140, and the furniture's value of \$6,720. The prayer of the cross-complaint asked damages for conversion in a sum equal to the difference between said value of \$6,720 and said accrued rent of \$940.

[1, 2] Appellant's argument is largely based upon the fact that respondent's affirmative defense is called, and is in the form of, a cross-complaint. If a plaintiff is not entitled to possession at the commencement of the action, a defendant need not affirmatively allege his right of possession, but, under a general denial of plaintiff's right, may recover such possession, which plaintiff has obtained by a writ issued in such action. *Pico v. Pico*, 56 Cal. 453. However, if the plaintiff is entitled to possession at the commencement of the action, but his right ceased and vested in defendant prior to judgment, the latter must affirmatively allege such facts. *Bolander v. Gentry*, 36 Cal. 105, 95 Am. Dec. 162; *Rhoades v. Lyons*, 34 Cal. App. 615, 168 P. 385. Since such facts do not give rise to a new cause of action in the defendant, but merely defeat plaintiff's recovery, they properly should be

pleaded as an affirmative answer instead of as a cross-complaint. *Glide v. Kayser*, 142 Cal. 419, 76 P. 50. However, this form of pleading has been recognized. *Ackerman v. Schultz*, 178 Cal. 190, 172 P. 609. It would have been a better form of pleading if the complaint and cross-complaint had each merely alleged generally a right of possession without setting forth evidentiary matters showing such right (*Summerville v. Stockton Milling Co.*, 142 Cal. 529, 547, 76 P. 243), but the addition of evidentiary matters did not make the cross-complaint vulnerable to a general demurrer (*Laughlin v. Thompson*, 76 Cal. 287, 18 P. 330).

[3-8] Passing from a consideration of its form to its substance, does the cross-complaint allege facts which, if true, would prove that right of possession had passed from appellant to respondent? Respondent's surrender of the premises, pursuant to the three-day notice, terminated the lease and appellant's right to rent accruing subsequently. *Costello v. Martin Brothers*, 74 Cal. App. 782, 241 P. 588; *A. H. Busch Co. v. Strauss*, 103 Cal. App. 647, 284 P. 966. The only debt then secured by the chattel mortgage was the rent accrued at the time of the termination. *Bell v. Central Bank*, 89 Cal. App. 551, 265 P. 551; *Miller v. Salomon*, 100 Cal. App. 756, 281 P. 89. Respondent's tender of the amount of that debt, although refused by appellant, extinguished the lien of the chattel mortgage, but not the debt, and respondent was then entitled to possession of the furniture. *Wildman v. Radenaker*, 20 Cal. 615; 11 C. J. 679. So far it would appear that the facts pleaded constituted a good defense. Do the further facts pleaded change this conclusion? The cross-complaint further alleged that appellant, through a writ of replevin, had obtained the furniture and sold it to his son. Appellant had no right to sell, as it was his duty to retain the same so that it might be returned to respondent in the event that possession was so awarded by the judgment. *Steele v. Marlborough Hall Corp.*, 100 Cal. App. 491, 280 P. 380. It would therefore be illogical to hold that appellant's wrong could deprive respondent of her defense. Since the sale made any provision for the return of the furniture unavailing, the judgment would properly be for its value only. *Peterson v. First Nat. Bank*, 101 Cal. App. 532, 281 P. 1104. Furthermore, the allegation as to the sale did not change the issues as to right of possession, but merely affected the remedy. *Henderson v. Hart*, 122 Cal. 332, 54 P. 1110. The demurrer to the cross-complaint was properly overruled.

[9, 10] The court found the facts as alleged in the cross-complaint. Appellant claims that certain findings are not supported by the evidence. Since the evidence as to the value of the furniture, as to appellant's retraction of the three-day notice and respondent's surrender of the premises, is conflicting, findings as

to such matters cannot be here reviewed. *Peterson v. First Nat. Bank*, supra. Appellant further argues that the tender of two months' rent was insufficient, because there was then also due other sums secured by the mortgage, to wit, the cost of repair of the premises, and cost of storage of the furniture. But the failure at the rejection of the tender to specify these objections and the amount claimed to be due precluded respondent from so objecting at the trial. Code Civ. Proc. § 2076; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 P. 82.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

116 Cal.App. 699

RAPP et al. v. SOUTHERN SERVICE CO.
Civ. 348.

District Court of Appeal, Fourth District, California.

Sept. 19, 1931.

Rehearing Denied Oct. 15, 1931. Hearing Denied by Supreme Court Nov. 16, 1931.

Automobiles 245(6).

In action for death of pedestrian injured by automobile operated by general manager of defendant corporation, directing verdict for defendant *held* error.

MARKS, J., dissenting.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Action by Anna M. Rapp and another against the Southern Service Company. From a judgment on a directed verdict for defendant, plaintiffs appeal.

Reversed.

Superseding opinion in 298 P. 67.

James B. Ogg, of Alhambra, J. B. Joujon-Roche, of Los Angeles, and V. A. Morgan, of Alhambra, for appellants.

Joe Crider, Jr., Elber H. Tilson and Lee Solomon, all of Los Angeles, and Nichols, Cooper & Hickson, of Pomona, for respondent.

JENNINGS, J.

A rehearing was granted herein for the purpose of giving further consideration to the point that the action of the trial court in granting respondent's motion for a directed verdict at the conclusion of the trial was justified, by reason of the fact that there was no evidence of sufficient substantiality to

show that, at the time of the accident which resulted in the death of decedent, the general manager of respondent, Fred E. Whyte, was acting within the scope of his employment.

The action was one instituted by the widow and minor child of Leo A. Rapp, deceased, to recover damages resulting from his death. The trial court on motion of defendant directed the jury to return a verdict in favor of defendant, for the reason that the court was of the opinion that the evidence showed that the decedent was guilty of contributory negligence which proximately contributed to the injuries described in the complaint. The jury thereupon returned its verdict in favor of defendant, and judgment was entered thereon. Plaintiffs have appealed. The question presented on this appeal, therefore, is whether the trial court erred in directing a verdict in defendant's favor.

The decedent suffered injuries resulting in his death in a collision between himself and an automobile operated by Fred E. Whyte, general manager of the defendant corporation. The accident occurred on the evening of December 9, 1927, at the intersection of Almansor street and Valley boulevard in the city of Alhambra. At about 10 p. m. of that day, the deceased alighted from a bus which had stopped at the southeast corner of the intersection of Almansor street and Valley boulevard, and started to cross Valley boulevard. A drizzling rain was falling at the time. As the deceased pursued his course across the boulevard, he passed directly in front of an automobile approaching him from the west, at which time he turned his head in the direction of this automobile. He then turned his head in the direction in which he was walking, and, without again looking up, continued on his way across the boulevard. The deceased had arrived at a point a few feet south and east of the center point of the intersection of the two streets when the collision between himself and the automobile operated by Fred E. Whyte occurred. This latter automobile was then proceeding in an easterly direction on Valley boulevard at a speed of approximately 20 miles per hour. When the deceased was approximately 50 feet ahead of this automobile, he was observed by one of its occupants. At that time the deceased was crossing Valley boulevard at an ordinary pace with his head down.

In view of the foregoing facts, which were established by the testimony of the two living witnesses who were present at the scene of the accident and observed the conduct of deceased immediately prior to the collision, it is urged that the action of the trial court in directing the jury to return a verdict in favor of respondent on the ground that deceased was guilty of contributory negligence as a matter of law constituted error.

It is settled in California that the right of a court to direct a verdict is, with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit; and also that a court may grant a nonsuit when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given. *Perera v. Panama-Pacific International Exposition Company*, 179 Cal. 63, 175 P. 454; *Estate of Caspar*, 172 Cal. 147, 155 P. 631.

It is equally well established that "contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.'" *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513; *Wing v. Western Pac. Co.*, 41 Cal. App. 251, 182 P. 969. And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 701, 703, 89 P. 1093." *Moss v. H. R. Boynton Co.*, 44 Cal. App. 474, 476, 186 P. 631, 632. See, also, *White v. Davis et al.*, 103 Cal. App. 531, 284 P. 1086, 1091.

Since we are here dealing with the reciprocal rights and duties of a pedestrian and the operator of an automobile on a public street, decisions of our courts in cases of this character are illuminating. In *White v. Davis*, supra, the contention that the plaintiff, a pedestrian who had been struck and injured by an automobile truck, was guilty of contributory negligence, as a matter of law, was one of the subjects under consideration by the court. In its decision, the court uses the following pertinent language: "The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. There

seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury."

While it is obvious that the question as to whether the deceased, under the state of facts herein appearing, was guilty of contributory negligence as a matter of law is a close one, it would appear that, under the more recent decisions of our courts, the question must be deemed to have been one of fact, and that it should have been submitted to the jury for their determination. The evidence presented at the trial shows that the deceased, as he walked out in the street in front of the automobile operated by Dr. Riddell, turned his head towards the Riddell automobile, and looked in the direction from which the automobile operated by Fred E. Whyte was approaching. Whether deceased did not see the approaching vehicle, or, having seen it misjudged its speed or the distance that intervened between it and him cannot, of course, be discovered. The fact remains that deceased did take some precaution. He did at least look up and in the direction from which danger was to be expected. This action on his part would appear to be sufficient to relieve him of the disability of contributory negligence as a matter of law, and appellants were entitled to have the question submitted to the jury as a matter of fact.

It is urged that the trial court, in directing a verdict for respondent, did not necessarily limit its action in so doing to the single ground that deceased was guilty of contributory negligence as a matter of law. The language employed by the court in directing a verdict for respondent is as follows: "Ladies and gentlemen, the court finds that in this case, from the evidence, that the decedent, Leo A. Rapp, was guilty of contributory negligence at the time and place of the accident which approximately contributed to the injuries complained of. Therefore, it instructs the jury to return a verdict for the defendant."

It is clear that the court in its direction of a verdict did confine itself to the single ground of contributory negligence. The language is plain and unequivocal. That such was the court's intention is made doubly clear by the following dialogue between the court

and counsel for appellant during the argument of respondent's motion for a directed verdict:

"The Court: It seems to me that the evidence in this case shows that the decedent did not exercise any care at all. I cannot see it any other way. I was very doubtful on the other motion.

"Mr. Ogg: I think that under the authorities, your Honor, he exercised all the care that the law required and that, in any regard, is a question for the jury—to say whether or not he was guilty of contributory negligence. That is a question for the jury under the instructions of this court. There is not sufficient evidence to find a man guilty of contributory negligence as a matter of law because the evidence is that he looked to the west, the source from which danger would be expected.

"The Court: The only testimony about his looking is that he looked toward this car and then looked down.

"Mr. Ogg: Well, if the court please, Dr. Riddell testified he looked towards his car and he was going to draw a conclusion to the effect that he figured he had plenty of time to pass it.

"The Court: I am going to grant the defendant's motion. Call the jury."

Nevertheless, it is the action of the court in directing the verdict rather than the court's reason for taking the action that is the subject of review on appeal. It is the judgment in favor of respondent based on the verdict directed by the court which is the subject of this appeal, and, if the judgment is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. 2 Cal. Jur., p. 809. In *Davey v. Southern Pacific Co.*, 116 Cal. 325, 329, 48 P. 117, the court says: "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." See, also, *In re Kingsley*, 93 Cal. 576, 29 P. 244; *Unger v. San Francisco-Oakland Rys.*, 61 Cal. App. 125, 137, 214 P. 510; *People v. Bailey*, 30 Cal. App. 581, 590, 158 P. 1036.

If, therefore, the action of the trial court in directing a verdict for respondent is capable of being sustained on another ground than that relied upon by the court, the judgment should be affirmed. It is urged that such other ground exists in the alleged failure of proof by appellants that Fred E. Whyte, who oper-

ated the automobile which collided with the deceased, was, at the time of the accident, acting within the scope of his employment. It is elementary that in order to fasten upon the master liability for damages occasioned by a tortious act of the servant, there must be proof that at the time the tort was committed the servant was engaged on the master's business.

The evidence introduced, which tended to show that respondent's agent was acting within the scope of his employment at the time of the accident, consists first of the admission in respondent's answer that Fred E. Whyte was the general manager of respondent; second, that on the evening when the accident occurred Whyte was operating his own automobile and was returning to his home in Pomona after having attended a meeting at a cafe in Los Angeles, at which there were present 30 or 40 persons engaged in the business of dry cleaning, in which business respondent is engaged, and that the meeting had been arranged for the purpose of presenting for discussion by fire chiefs and representatives of dry-cleaning establishments a certain law relating to the operation of dry-cleaning establishments, which had been enacted by the preceding Legislature; and third, a declaration by Fred E. Whyte, in the hospital to which the decedent was taken following the accident, that he was on company business at the time the accident occurred.

Since the declaration of the general agent of respondent that he was on company business has an important bearing on the question now under consideration, it is proper to relate in what manner the record shows that it appears in the evidence produced at the trial. Dr. O. J. Riddell was called as a witness on behalf of plaintiffs and was asked the following question: "What happened after he cleared your car?" The witness stated what he saw at the time of the accident; that he assisted in removing the injured man, in his own automobile, to the Alhambra hospital; that he was followed to the hospital by Fred E. Whyte and his guest Presnell in the former's automobile. The witness then said: "Mr. Whyte at this time asked that I * * * " When the witness had reached this point in his testimony, an objection was interposed by counsel for respondent that the statement the witness was on the point of relating was a volunteer statement and hearsay. Later, counsel added the objection that no proper foundation for the admission of the statement had been laid. The trial court overruled the objections thus made, and the witness then continued his testimony, during which he testified that Mr. Whyte made the statement that he was on company business, and that he was insured. At the conclusion of the testimony, wherein the witness testified to the statement made by Whyte at the hospital, counsel for respondent moved that

the portion of the testimony containing the statement be stricken from the record, on the grounds that no foundation had been laid for relating the conversation, that the statement was not binding on respondent, that it was incompetent, irrelevant, immaterial, and was not an admission against interest, and was not a part of the *res gestæ*. The motion was by the court denied.

It is obvious that the statement of the general manager of respondent, who operated the automobile which collided with the decedent, that he was on company business at the time of the accident, is important to appellant's case, for unless it appears that there was evidence of sufficient substantiality tending to establish that Whyte, at the time of the accident, was acting in the scope of his employment, a necessary element to appellant's case was lacking, and the motion for a directed verdict was properly granted. If the statement attributed to Whyte by the witness Riddell is eliminated, it is at least open to doubt that the evidence relating to the character of the meeting which Whyte had attended, standing alone, would suffice to sustain appellant's contention that it was *prima facie* established that the accident occurred at a time when Whyte, the agent, was acting in the scope of his employment.

Conceding, without deciding, that the objections of respondent to the admission of the statement of Whyte that he was on company business were well taken and should have been sustained, the problem of the possibility of successful attack by the respondent is presented. Respondent has taken no appeal from the judgment. Respondent is interested solely in maintaining the judgment in its favor, based upon the verdict of a jury returned in conformity with the direction of the court. The statement of respondent's general manager that he was on company business at the time of the accident had been received in evidence and was before the court, who had twice ruled in favor of its admissibility. It is the general rule that a respondent in whose favor a judgment is rendered is interested only in maintaining the judgment, and that he cannot, on an appeal of the opposite party, ask a court of review to consider any errors against him. 2 Cal. Jur., p. 839. This is true even though errors of which respondent complains were excepted to by him in the trial court and included in a bill of exceptions and are argued or discussed in respondent's brief. 2 Cal. Jur., p. 839; 3 Cor. Jur., p. 1404. "The party who prevailed at the trial has no errors, committed at the trial, to complain of, and if he had he would not be heard to complain, for he was not injured thereby." *Byxbee v. Dewey*, 128 Cal. 322, 324, 60 P. 847. The following California decisions are authority for the above stated rule: *Seaward v. Malotte*, 15 Cal. 305; *Klauber v. San Diego Street Car Co.*, 98 Cal. 105, 32 P. 876; *Estate*

of *Olmsted*, 122 Cal. 224, 54 P. 745; *Coyle v. Lamb*, 123 Cal. 264, 55 P. 901; *Globe Grain & Milling Co. v. Drenth*, 41 Cal. App. 604, 183 P. 285, 286; *Meeker v. Cross*, 59 Cal. App. 512, 211 P. 229, opinion on application for rehearing.

The decision in *Globe Grain & Milling Co. v. Drenth*, *supra*, is illuminating on the problem now under discussion. In this case defendant appealed from an order granting plaintiff a new trial in an action for the conversion of barley. In a former trial (36 Cal. App. 156, 171 P. 821), plaintiff was nonsuited on the ground that plaintiff's evidence failed to show a sale of the barley or sufficient change of possession to satisfy the requirements of section 3440, Civil Code. From the judgment entered upon the nonsuit, plaintiff had appealed, and it was held that growing crops were not subject to the provisions of section 3440 of the Civil Code, and the judgment was therefore reversed. Upon the second trial, the jury returned a verdict in defendant's favor, and judgment was entered thereon. Plaintiff moved for a new trial, which was granted. On appeal from the order, it was observed that the court's action could be sustained only on the single ground that the evidence was insufficient to justify the verdict. During the second trial, the court made a ruling and gave an instruction to the effect that a certain statement in one of defendant's special defenses that plaintiff had served upon defendant a verified claim of ownership of the barley was to be considered by the jury as an admission in plaintiff's favor. It was observed that plaintiff had in no other manner attempted to prove a demand upon defendant, and it was contended that, since there was no competent evidence of plaintiff's claim of ownership, therefore the plaintiff had failed to establish its case, and that it could not be said the evidence was insufficient to sustain the judgment rendered in defendant's favor. The appellate court agreed that the plaintiff was not relieved of the necessity of proving a demand because of the allegations contained in defendant's answer that a claim of ownership had been served upon him, pointing out that such an allegation was new matter constituting a defense and deemed controverted, and could not be regarded as evidence in plaintiff's favor. The court then went on to say that having been regarded as evidence during the trial the defendant, upon plaintiff's motion for a new trial, was not entitled to have it disregarded, and upon appeal from the court's order could not be heard to complain that evidence had been improperly admitted in plaintiff's favor. "The case upon appeal, therefore, must be considered in the light of all the evidence embraced within the record, including that improperly admitted over the defendant's objection. *McCloud v. O'Neill*, 16 Cal. 392; *In re Olmsted's Estate*,

122 Cal. 224, 54 P. 745; Pierce v. Jackson, 21 Cal. 636; 1 Hayne on N. T. & App. § 98."

To apply the language above quoted, this case upon appeal must be considered in the light of all the evidence embraced in the record before us, including evidence that may have been improperly admitted over respondent's objections.

It is contended by respondent that in declining to consider the propriety of its objections to the evidence, respecting the statement by respondent's general manager that at the time of the accident he was on company business, the anomalous result is achieved that the judgment based on the verdict directed by the court is reversed in the face of a necessary element of plaintiff's case being supported by evidence which, for the sake of this argument, we may concede was incompetent, whereas it is pointed out that had the case been permitted to go to the jury, and assuming a verdict in plaintiffs' favor and judgment thereon, the error in admitting the testimony complained of would have been fatal and necessitated a reversal of the judgment. The first answer to this argument is that in the supposititious case where the jury might have rendered a verdict for plaintiffs, on appeal from the judgment entered thereon, the present respondent would be the appellant, the party aggrieved, interested not in maintaining, but in reversing the judgment, specifying the errors claimed to be prejudicial as ground for reversal, whereas the sole interest of respondent in the present appeal is to maintain the judgment. A second answer to the argument is to be found in the language of the court in Seaward v. Malotte, 15 Cal. 304, 306: "The verdict was so palpably against this evidence, that it should have been set aside without hesitation. Several objections, it is true, were taken to the evidence thus offered, but as they were overruled, we do not notice them. The defendants are not the appellants, and had the ruling been otherwise, *it is possible that other evidence might have been offered.*" (Italics ours.)

So it may be said in the instant case that had the trial court sustained respondent's objections to the testimony attacked as incompetent and hearsay, it is possible that other competent testimony might have been introduced which would have established that respondent's general manager was, at the time of the accident, acting within the scope of his employment. The effect of the reversal of the judgment herein will be to cause a retrial of the action wherein appellant may be able to produce additional evidence tending to sustain the necessary element that respondent's general manager was acting within the scope of his employment at the time the automobile which he was operating collided with de-

dent. If the judgment based on the directed verdict is affirmed, the opportunity of producing such evidence is entirely removed, and the judgment becomes final.

It must be assumed that the trial court, at the time it granted the motion for a directed verdict, had in mind the evidence bearing on the question of respondent's general manager acting within the scope of his employment at the time of the accident, which the court had theretofore admitted. We are of the opinion that this evidence was sufficient to entitle appellants to have the question submitted to the jury, and that the action of the trial court in directing a verdict for respondent may not be sustained on the ground that no evidence of sufficient substantiality, tending to show that when the accident occurred respondent's general manager was acting within the scope of his employment, had been introduced.

The judgment is reversed.

I concur in the order: BARNARD, P. J.

I dissent: MARKS, J.

GILLIS v. BLOOME et al. *
Civ. 7945.

District Court of Appeal, Second District,
Division 1, California.
Oct. 8, 1931.

Rehearing Granted Nov. 6, 1931.

Appeal and error § 113(1).

Order denying defendants' motion to set aside order granting motion for new trial, made after entry of nonsuit in defendant's favor, *held* appealable.

Action by Robert C. Gillis, as receiver for the Western Oil & Refining Company, against Mark C. Bloome and others. From an order denying defendants' motion to set aside an order granting a motion for new trial, after entry of judgment of nonsuit for defendants, defendants appeal. On motion to dismiss appeal.

Motion denied.

Cooper & Collings, of Los Angeles, for appellants.

C. P. Von Herzen and Frank M. Willcox, both of Los Angeles, for respondent.

PER CURIAM.

Motion to dismiss an appeal by defendants from an order denying their motion to vacate

and set aside an order granting a motion for a new trial, which was made after entry of a judgment of nonsuit in favor of the defendants, is made upon the ground that "the appeal attempted to be taken is from an order which is not appealable."

The identical question now before this court was decided against respondent's contention in the case of *Moffitt v. Ford Motor Company* by the Supreme Court on March 26, 1931, 297 P. 553.

The motion to dismiss the appeal is therefore denied.

Separate actions by Charles T. Howland against Sallie O. Scott. Judgments for plaintiff, and defendant appeals.

Judgments affirmed.

See, also, 2 P.(2d) 416, 418.

Crail, Shutte, Penprase & Miller, of Los Angeles, for appellant.

Salisbury & McNeil, of Los Angeles, M. W. Conkling, of San Diego, and Charles W. Lyon, of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

This appeal involves three suits brought on three promissory notes, and also three suits brought to cancel the same three notes for alleged fraud, not in the procuring of the three notes sued upon, but in procuring other notes eventually taken up by the execution of the three notes sued upon.

The defense to the suit to cancel and rescind the notes is: First, that the holders took the same in due and ordinary course of business, without notice of the alleged fraudulent representations or other defenses; second, ratification by the makers of these notes after discovery of the alleged fraud; three, acceptance by the makers of these notes of benefits and considerations both before and at the time of the execution of the new notes, which have not been returned.

The record shows that John Scott, Jr., and James Ferguson were engaged in promoting a corporation known as the Great Western Lime & Cement Company. By order of the corporation commissioner certain shares in this corporation were impounded for their benefit as promotion stock, to be issued to them when they had sold a certain amount of the stock for cash. John Scott, Jr., and James Ferguson, being in need of money, induced Sallie O. Scott, the aunt of John Scott, Jr., to execute notes in favor of John Scott, Jr., and James Ferguson, aggregating \$10,000, such notes to be used by them as collateral security in obtaining money from the bank. To secure Sallie O. Scott, John Scott, Jr., and James Ferguson gave her their promissory notes, aggregating \$10,000, and also agreed to give her a part of their promotion stock in said corporation as a bonus for her credit. These notes executed by Sallie O. Scott were by John Scott, Jr., and Ferguson indorsed and sold to Charles T. Howland and R. S. Howland, the plaintiffs and respondents herein. The proceeds of the sale of these notes were used by John Scott, Jr., and James Ferguson for the purposes of the corporation. When these notes became due, the Howlands demanded payment of Sallie O. Scott. She then claimed and protested to both Howlands that she had been defrauded by her nephew, John Scott, Jr., and James Ferguson. Nevertheless, Sal-

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HOWLAND v. SCOTT.

Civ. 4304.

District Court of Appeal, Third District, California.

Sept. 30, 1931.

Rehearing Denied Oct. 30, 1931. Hearing Denied by Supreme Court Nov. 27, 1931.

1. Bills and notes ☞516.

Finding that maker, subsequent to discovery of facts concerning alleged fraud, executed renewal notes to obtain extension of time and agreed to pay interest causing holders to surrender original notes indorsed by original payees, held supported.

2. Appeal and error ☞1011(1).

Findings of trial court on conflicting evidence are conclusive.

3. Appeal and error ☞931(1).

All reasonable inferences are to be indulged in favor of court's findings.

4. Appeal and error ☞901.

Burden is on appellants who claim error to show its existence.

5. Appeal and error ☞996.

Where different inferences may reasonably be deduced from facts or circumstances, reviewing court cannot substitute its deductions for those of trial court.

6. Bills and notes ☞140.

Maker by executing renewal notes after discovering facts concerning alleged fraud and permitting holders to surrender original notes, indorsed by original payees, waived alleged fraud.

Appeal from Superior Court, Los Angeles County: Louis P. Russell, Judge.

lie O. Scott, on being threatened with a suit for the collection of said notes and in order to get an extension of time for the payment thereof, paid to the Howlands the interest to December 7, 1923, and at the same time gave new notes, one for \$6,000, payable to Charles T. Howland and one for \$4,000, payable to R. S. Howland. Mrs. Scott, at the time of executing these last notes, petitioned the corporation commissioner and had transferred into her hands 15,000 shares of the promotion stock originally promised to her by John Scott, Jr., and Ferguson. She also kept in her possession the \$10,000 note theretofore given her by John Scott, Jr., and James Ferguson. The Howlands also surrendered to her the old notes with the indorsements of John Scott, Jr., and James Ferguson thereon. At the time Mrs. Scott executed the original notes to John Scott, Jr., and Ferguson, she also signed and put into their hands a writing, stating that she had signed said notes for a good consideration and had no defense thereto. She also supplied a financial statement to accompany her notes.

We have set forth only a brief statement of the facts relative to the Sallie O. Scott notes. The facts, however, relating to the Otis Scott and Roy O. Scott note of \$2,500 are substantially the same, the findings are the same, and a decision in one case will be determinative of all of them.

The court found, among other things, that, "at the time said notes originally passed into the hands of Charles T. Howland and R. S. Howland the notes were purchased in due course of business prior to maturity and endorsed over to Howlands, for value received from the Howlands, and that neither Charles T. Howland nor R. S. Howland had any knowledge or notice of any defect therein or defense thereto, or of any representations or promises of any kind or character made or claimed to have been made by John Scott, Jr., or by others to the said Sallie O. Scott, and that Charles T. Howland and R. S. Howland were further induced to purchase said notes by the written statement made and put forth by said Sallie O. Scott to the effect that the notes were executed for a good consideration and that she had no defense thereto."

The court also found that prior to the execution of these last notes, which was on December 6, 1923, Sallie O. Scott had discovered all of the facts concerning the alleged fraud practiced upon her by John Scott, Jr., and James Ferguson; also that, "upon the presentation of said notes for payment, on or about December 6, 1923, the said plaintiff (Sallie O. Scott) requested additional time in which to pay said notes and agreed that if time were extended for payment she would pay the interest thereon—whereupon the plaintiff (Sallie O. Scott) and said Chas. T. Howland agreed that in lieu of said notes then held by

them, aggregating \$10,000 and a part of which notes were endorsed by John Scott, Jr., and a part of which were endorsed by Roy Scott, that they would accept two new notes executed by Sallie O. Scott alone, one in the sum of \$6,000, payable to Chas. T. Howland, and one in the sum of \$4,000, payable to * * * R. S. Howland, payable 30 days after said date; that thereupon (Sallie O. Scott) executed and delivered to the said R. S. Howland the aforesaid note in the sum of \$4,000 and to the said Chas. T. Howland the aforesaid note in the sum of \$6,000 and thereupon the said notes, with the endorsements of the said Roy Scott and John Scott, Jr., were surrendered to the said John Scott, Jr., and cancelled. That neither the said * * * R. S. Howland nor the said Chas. T. Howland would have surrendered the said notes previously given and bearing the endorsements of Roy Scott and John Scott, Jr., if said * * * (Sallie O. Scott) had not at that time executed such new notes and that said Sallie O. Scott received a further valuable consideration for the execution of the notes herein sued on in the form of certain stock in the Great Western Lime and Cement Co., then given to her."

The appellants strenuously contend that the evidence is insufficient to support the findings of the trial court.

[1-5] It is true that the evidence is sharply conflicting upon every material issue involved in these cases. The trial court undoubtedly accepted the testimony of Charles T. Howland and R. S. Howland and their witnesses as being a true and correct version of the entire transaction. The testimony of these witnesses is amply sufficient to support the material findings of the trial court. The findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in favor of the findings. The burden is upon appellants who claim error to show its existence. Furthermore, where two or more inferences may reasonably be deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court. It follows from what has been said that we are powerless to interfere with the conclusion of the trial court.

[6] The findings of the court bring this case within the rule announced in *Schmidt v. Mesmer*, 116 Cal. 267, 48 P. 54, where it is said: After discovering the deceit, the party defrauded "must stand toward the other party at arm's length, must comply with the terms of the contract on his part, must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud."

To the same effect are *Tucker v. Beneke*, 180 Cal. 588, 594, 595, 182 P. 299; *Monahan v.*

Watson, 61 Cal. App. 417, 214 P. 1001; Randisi v. Simone, 26 Cal. App. 661, 147 P. 1176; Hutchins v. Security Trust, etc., Bank, 208 Cal. 463, at page 475, 281 P. 1026, 65 A. L. R. 1059; Jackson v. Meinhardt, 99 Cal. App. 283, at page 289, 278 P. 462.

These findings of the trial court, based, as we have shown, upon conflicting evidence, are insurmountable obstacles in the path of appellants obtaining any relief in this court.

Other contentions made by appellants are without merit, and require no special discussion.

The judgments must be affirmed and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

117 Cal.App. 323

In re PENCE'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BERKELEY BAPTIST DIVINITY SCHOOL et al.

Civ. 7899.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1931.

Rehearing Denied Oct. 30, 1931.

1. Wills ⇨199.

Codicil refers to and operates as republication of will, and both are regarded as forming but one instrument speaking from date of codicil (Civ. Code, §§ 1287, 1320).

2. Wills ⇨439.

Testator's intention must be preserved, if possible.

3. Wills ⇨16.

Execution of codicil less than 30 days before testatrix' death held not to invalidate charitable bequests not referred to therein (Civ. Code, §§ 1287, 1313, 1320).

Testatrix made will on May 15, 1926, first codicil May 21, 1927, and second codicil October 12, 1927, and died November 10, 1927. By original will she gave specified sums to three charitable and educational institutions, followed by proviso that, if total bequests should exceed one-half of distributive net value of her estate, each of bequests should be proportionately reduced, and gave residue to husband. The second codicil merely provided for certain personal bequest without in any manner referring to the charitable bequests made in original will and modified

in first codicil; hence fact that second codicil was executed less than 30 days before testatrix' death did not invalidate such charitable gifts.

4. Wills ⇨16.

Codicil changing amounts bequeathed to charitable institutions held republication of entire will as of date of codicil, as respects statutory restrictions on charitable bequests.

First codicil involved provided that, if husband predeceased testatrix, she gave property given to husband in original will to the charitable and educational institutions share and share alike, and closed with recital that, "Except as herein modified, I hereby republish and redeclare my said last will and testament."

5. Wills ⇨627(1).

Bequest of residue to charitable and educational institutions, "share and share alike," created gift in common.

6. Wills ⇨13(1).

Educational institution, as legatee of residue in common with charitable institutions, was not entitled to take as ultimate residuary beneficiary, to exclusion of next of kin, portions of residue which charitable institutions could not take because of statutory one-third restriction on gifts within six months of death (Civ. Code, §§ 683, 686, 1313, 1350).

7. Adoption ⇨21.

Adopted son of testatrix' predeceased brother held not testatrix' next of kin, as respects intestate property (Civ. Code, §§ 228, 229, 1386, subd. 5).

8. Adoption ⇨21.

Statutes prescribing rules for computation of degrees of kindred contemplate relationship by consanguinity, and are inapplicable to adopted persons (Civ. Code, §§ 1389, 1390, 1393).

Appeals from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Proceedings in the estate of Mary Elizabeth Pence, deceased. From a decree of final distribution, the Berkeley Baptist Divinity School, Woman's American Baptist Home Mission Society, the Chicago Home for Incurables, James Wellington Duke, and Willard L. Pollard and another, trustees of the estate of Martha A. Pollard, deceased, and others appeal, opposed by the Security-First National Bank of Los Angeles, executor.

Affirmed.

John H. Miller, of San Francisco, for executor and respondent Security-First Nat. Bank of Los Angeles.

Robert B. Gaylord, of San Francisco, for appellants Berkeley Baptist Divinity School and Woman's American Baptist Home Mission Soc.

Gibson, Dunn & Crutcher and E. H. Conley, all of Los Angeles, for appellants Chicago Home for Incurables, Central Trust Co. of Illinois, and Security-First Nat. Bank of Los Angeles.

Louis Greenbaum and Sidney A. Wilson, both of Los Angeles, for appellants Willard L. Pollard and Edwin C. Pollard.

Newlin & Ashburn and Tom C. McNamee, all of Los Angeles, for appellant Duke.

CONREY, P. J.

The questions of primary interest in this case relate to a statutory restriction on testamentary gifts for charitable uses. Section 1313 of the Civil Code (Deering's) as in force at the point of time to which this case relates, was as follows: "*Restriction on Devise for Charitable Uses. Exceptions.* No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee and devisee, next of kin, or heirs, according to law; and provided, further, that bequests and devises to the state, or to any municipality, county or political subdivision within the state, or to any state institution, or for the use or benefit of the state or any state institution, or to any educational institution which is exempt from taxation under section 1-a of article thirteen of the Constitution of the state of California, or for the use or benefit of any such educational institution, are excepted from the restrictions of this section; provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild, or when all of such heirs shall have by writing, executed at least six months prior to his death, waived the restriction contained herein."

In this case it appears that the testator died on the 10th day of November, 1927. She had made a will on May 15, 1926; she made

a codicil to that will on May 21, 1927; she made a second codicil on October 12, 1927. The second codicil is of minor importance. The controversies which have arisen in the case are the result of the execution of the first codicil. By the terms of the original will the testator gave to a trustee for the charitable institution known as the Chicago Home for Incurables the sum of \$10,000; and to the charitable institution known as the Woman's American Baptist Home Mission Society the sum of \$10,000; and to the educational institution known as the Berkeley Baptist Divinity School the sum of \$10,000. There was also a personal specific bequest of \$2,000 to a friend. These bequests were followed by the following proviso: "Provided, however, that in the event the total amount of all of the bequests hereinbefore contained shall exceed one-half of the distributive net value of all of the estate of which I may die possessed, then each of said foregoing bequests shall be proportionately reduced in amount so that the aggregate amount of all of said bequests shall be equal to one-half of the distributive value of all the estate of which I may so die possessed." She then gave the residue of her estate to her husband, Kingsley A. Pence. Hereinafter, for the sake of brevity, we shall refer to the first codicil as the codicil; and to the Chicago Home for Incurables as the Home for Incurables; and to the Woman's Baptist Home Mission Society as the Mission Society; and to the Berkeley Baptist Divinity School as the Divinity School.

The codicil was executed to cover the contingency of the death of decedent's husband before her own death. The codicil provides that in that event the testator gives, share and share alike, to the named trustee of the Home for Incurables, and to the Mission Society, and to the Divinity School, the property given to her husband in the will as originally executed: "All of the above bequests to be in addition to, and upon the same terms and conditions as the bequests already given to them in my last will and testament." The codicil closed thus: "Except as herein modified, I hereby republish and redeclare my said last will and testament."

At this point we should hold in mind the following proviso of said section 1313, Civil Code: "Provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild. * * *" The record shows that at the time of her death, Mrs. Pence had no living parent, husband, wife, child, or grandchild. If both will and codicil had been executed more than six months' before the death of the testator, the entire residue of the estate would have been distributed to

the institutions named in the will. As will later appear, however, the restrictions contained in said section 1313 have in this case caused intestacy as to a part of the estate, and therefore it became necessary for the court to ascertain who were the next of kin and entitled to inherit. It is an unquestioned fact that Martha A. Pollard was properly determined to be the sole heir at law, unless her claims are inferior to those of James Wellington Duke, who also claims to be the sole heir at law.

After settlement of the final account of the executor, there remained for distribution the sum of \$84,802.34. Certain bequests of personal property and cash amounting to \$6,400 were allowed and paid, and about these there is no dispute. A hearing was had upon the petition for distribution and the opposition of the several parties thereto, and the court made full findings of fact preliminary to the decree. Among other things the court found that the codicil executed on the 21st day of May, 1927, and within a period of six months prior to the death of said testatrix, was a republication of the last will and testament of said testatrix as of the date of the codicil; that the bequests and devises to the Home for Incurables and the Mission Society were to charitable or benevolent societies or corporations, or in trust for charitable uses, as defined by section 1313, Civil Code; that the bequests and devises to the Divinity School were to an educational institution which is exempt from taxation under section 1a of article thirteen of the Constitution of the state of California, and as such are excepted from the restrictions of section 1313 of the Civil Code; that the bequests and devises contained in the will and in the codicil, to the Home for Incurables, and to the Mission Society, in excess of one-third of the estate of the decedent, are contrary to the provisions of said section 1313; that the bequests in the codicil devising the remainder of the estate of decedent to the three institutions named was not a bequest or devise to a class; that, therefore, the Divinity School was not entitled to succeed to that portion of the legacies given to the Home for Incurables and the Mission Society in excess of one-third of the estate, which lapses. From the decree which was entered pursuant to the findings of fact and conclusions of law made by the court these appeals, five in number, have been taken by the several parties. The appellant Martha A. Pollard has died since the appeals were taken, and the trustees of her estate have been substituted for her in this proceeding.

The appeal of Mrs. Pollard is from that part of the decree of distribution which awarded to the trustees of the Home for Incurables the sum of \$14,133.72 (with the statutory interest allowed thereon); and which awarded to the Mission Society the like sum

of \$14,133.72, with the interest thereon; and which allowed to the Divinity School the full sum of \$26,134.11, with the interest thereon. As stated by counsel for Mrs. Pollard in her briefs: "This appeal presents the sole question of whether or not the Berkeley Baptist Divinity School is an educational institution which is excepted from the restrictions and limitations of section 1313 of the Civil Code." The test is whether or not the institution at the time of the death of the deceased herein was an educational institution which was then exempt from taxation under section 1a of article thirteen of the Constitution of the state of California. According to that section of the Constitution, the exemption from taxation as therein described and limited is allowed to "any educational institution of collegiate grade, within the State of California, not conducted for profit." After hearing the evidence, the court found that the Divinity School was an educational institution of collegiate grade. That it is within the state and is not conducted for profit are facts not contested. Appellants Pollard and Duke contend that this finding is not sustained by the evidence, and that their contention is sustained by the decision of the Supreme Court in Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868. The principle announced in that case is that the words of the Constitution in the section referred to mean that exemption from taxation is granted to an institution of collegiate grade as a whole, and not otherwise. It was held that, upon the facts proved by the evidence in that case, the institution did not comply with the standard thus set. In the case at bar we have read the evidence, and we think that the evidence is sufficient to sustain the finding of the court on this question. This being so, it follows that the Divinity School was qualified to take whatever was given to it by the terms of the will.

[1, 2] The appeals of the Mission Society and of the Home for Incurables are from that portion of the decree which decrees that Martha A. Pollard is entitled to the residue of the estate, and distributes said residue to her. As more definitely stated in the brief of counsel for the Home for Incurables and its trustees, their appeal is from that part of the decree which restricts the share distributable to the trustee to the sum of \$4,133.72 in addition to its bequest of \$10,000. This court, in making its computation of the amount of residue of the estate left after paying the specific bequests, excluded each of the three \$10,000 gifts from the list of specific bequests, and treated them as part of the residue. The action of the court in this respect resulted from its finding that the codicil of May 21, 1927, was a republication of the will as of the date of the codicil; from which the court seems to have concluded that the legacies given for charitable purposes in the original will, as

well as in codicil, should be treated as subject to the provisions of section 1313 of the Civil Code. "The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil." Section 1287, Civ. Code. "Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument." Section 1320, Civ. Code. In *Estate of Cutting*, 172 Cal. 191, 196, 155 P. 1002, 1004, Ann. Cas. 1917D, 1171, where the court had occasion to deal with this question, the court said: "The codicil refers to the will, and operates as its republication, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil." Thus the general rule is clear. It is also true, however, as a rule of construction, that the intention of the testator must be preserved, if possible. The courts have in many instances refrained from applying the rule regarding republication by codicil with all the severity which would attend the interpretation of a new will by which all previous wills had been set aside. In *Estate of Matthews*, 176 Cal. 576, 169 P. 233, the court referred to this exception and said: "*Estate of McCauley*, 138 Cal. 432, 71 P. 512, is an excellent example of the application of the exception. In that case it was held that, where valid bequests to charity had been made by the terms of the will, they were not nullified by a republication due to a codicil having no special reference to the said bequests, such republication occurring within 30 days of the death of the testatrix, notwithstanding the fact that under section 1313 of the Civil Code an original bequest in trust for charitable uses fails if the donor dies within 30 days of the execution of the testament."

[3] So in the case at bar, although the decedent executed the second codicil less than thirty days before her death, this fact does not operate to invalidate the charitable gifts that were made. This is so because the second codicil merely provided for certain personal bequests without in any manner referring to the charitable bequests. Under the doctrine of the *McCauley Case*, supra, the bequests contained in the original will and the first codicil remain in force.

[4] But a different situation is presented by the first codicil when considered in relation to the original will. This codicil did make special reference to the previously made bequests to the three institutions mentioned, and changed the amounts thereof and the method of computing the amounts thereof. We are of the opinion that the execution of the first codicil, considered in the light of the terms and purposes expressed therein, was a republication of the entire will as of the date of the first codicil, and brought the charitable bequests of the original will, as well as of the codicil, down to a date whereby they became subject to the restrictions contained in said

section 1313 of the Civil Code. From this we draw the further conclusion that the court did not err in its decision concerning the amount which should be distributed to the trustee for the Home for Incurables, nor as to the amount to be distributed to the Mission Society.

[5, 6] On behalf of the Divinity School, it is further contended that the school, under the residuary clause, is entitled to any portion of the residuum which otherwise would go to the Chicago Home and the Mission Society, but which they are prevented from receiving by reason of the "one-third restriction" upon gifts made within six months of death. In other words, it is contended that under the residuary clause of the will, if there is any portion of the estate which the prohibited charities cannot receive, then the Divinity School is entitled to that portion, to the exclusion of the next of kin. The residuary clause, as stated in the codicil, is a gift to three named legatees, "share and share alike." It is admitted that the quoted expression on its face indicates a gift in common, rather than one which goes to the "survivor." Manifestly this must be so. Section 683 of the Civil Code provides that a "joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy * * * or when granted or devised to executors or trustees as joint tenants." Section 686, Civil Code, declares that "every interest created in favor of several persons in their own right is an interest in common, * * * unless declared in its creation to be a joint interest, as provided in section 683. * * *" Section 1350, Civil Code, provides: "A devise or legacy given to more than one person vests in them as owners in common." Seeking to avoid the effect of these rules, the Divinity School contends that the residuary gift runs to a class, and that, two of the residuary beneficiaries being disqualified, they are in legal effect dead, and the qualified beneficiary is therefore entitled to any excess in the residuum. With this contention we are not able to agree. "The rule or presumption is that the gift is not one to a class where the will designates the takers by name, or identifies them by their number; and this inference will be given effect in the absence of anything to show a contrary intention. Thus, where property is expressed to be given to A, B, and C, the survivors do not take the share of one who predeceased the testator. Nor does the rule in avoidance of intestacy overcome the presumption that the devisees or legatees were intended to take as individuals and not as a class." 26 Cal. Jur. 946. See, also, 40 Cyc. 1473, and 28 R. C. L., p. 262; *Estate of Hall*, 183 Cal. 61, 190 P. 364. It is our conclusion that the Divinity School is not entitled to take as ultimate residuary beneficiary to the exclusion of the next of kin.

[7] It remains only to consider the appeal of James Wellington Duke. This appellant contends that the court erred in deciding that the decedent left surviving her as next of kin only the said Martha A. Pollard; also that the court erred in not finding that said Duke was the next of kin of the decedent, related in the same degree of kindred to the decedent as is the said Pollard, but that, for the reason that Pollard claims through an ancestor more remote than does Duke, Duke is therefore entitled to all the residue of the estate of said decedent occasioned by the lapsing of a part of the legacies. On this branch of the case we are of the opinion that, since appellant Duke claims only as the adopted son of a predeceased brother of the decedent, Mary Elizabeth Pence, he is not entitled to rank as one of next of kin to the decedent.

Pursuant to evidence about which there is no dispute, the court found that Mrs. Pollard was a sister of the half blood of the mother of decedent, that James Wellington Duke is the adopted son of Wellington Duke, deceased brother of said testatrix, "and that the said Wellington Duke predeceased the testatrix, leaving no widow, father, no mother, sister, nor brother nor any children other than the said James Wellington Duke." In relation to the right of inheritance of an adopted son under the circumstances set forth in this case, reference is made to sections 228 and 229 and subdivision 5 of section 1386 of the Civil Code. They are as follows: "§ 228. *Effect of Adoption.* A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." "§ 229. *Effect on Former Relations of Child.* The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it." Section 1386, subd. 5, reads thus: "If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be

preferred to those claiming through an ancestor more remote."

There can be no doubt that upon the death of Wellington Duke the said James Wellington Duke as his adopted son became his heir and entitled to succeed to his estate precisely the same as a child of the blood. In this case, however, appellant is not claiming as the heir of his adopted father. He is claiming as next of kin, on the theory that he and the decedent have a common ancestor in the person of Millicent Duke, who was the mother of the decedent, Mary Elizabeth Pence, and also mother of said Wellington Duke. Mrs. Pollard, on the other hand, was a half-sister of said Millicent. The father of Millicent was the common ancestor of Mrs. Pollard and of the decedent herein.

[8] The rules of computation of the degrees of kindred as found in sections 1389, 1390, and 1393, of the Civil Code, evidently contemplate relationship by consanguinity. It would be only an artificiality of statutory interpretation that could lead to an application of these sections to an adopted person. At page 8 et seq., of 38 A. L. R., there is an extensive note on the subject of the right of an adopted child to inherit from kindred of adopting parents. The decisions vary, not only in the principles approved, but also by reason of differences in the statutes of the several states. Generally speaking, the great weight of authority is against the contentions of appellant Duke in this case. We think that the majority rule is the rule which most nearly conforms to the law of this state. While the precise question presented in this case, concerning inheritance rights of an adopted person, has not been directly decided in California, there are two cases in which the applicable rules or principles have been discussed. These are the *Estate of Darling*, 173 Cal. 221, 159 P. 606, and *In re Mercer's Estate*, 205 Cal. 506, 271 P. 1067. It seems to us that the effect of those decisions runs in favor of the proposition that the rights of inheritance of an adopted child, although complete with respect to the adopting parents, do not extend to the collateral relatives of that parent.

The decree of final distribution as entered in the court below is affirmed.

We concur: HOUSER, J.; YORK, J.

117 Cal.App. 486

MESSNER v. MASON'S DAIRY.
Civ. 450.District Court of Appeal, Fourth District,
California.

Oct. 15, 1931.

Rehearing Denied Nov. 14, 1931. Hearing
Denied by Supreme Court Dec. 14, 1931.**1. Partnership** $\S$ 236.

Note given by partner for partnership debt did not, unless paid, relieve retiring partner of liability, absent express agreement to that effect.

Facts disclosed that one partner went to the credit manager of plaintiff corporation to which his partnership was indebted and told him that he had purchased the interest of the other member of the partnership and that thereafter he alone would conduct the old partnership business, that he paid a part of the partnership indebtedness in cash and gave his personal note for the balance, and that the note was never paid.

2. Partnership $\S$ 242(5).

Evidence justified trial court's inference that personal note of successor to partnership was not given in full discharge of partnership indebtedness.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

Action by A. W. Messner, trustee in bankruptcy for the Spreckels Commercial Company, against Mason's Dairy, a co-partnership composed of M. W. Mason and another. From the judgment, defendant M. W. Mason appeals.

Affirmed.

Hearing denied by Supreme Court: SHENK, J., dissenting.

Dean Sherry, of San Diego, and B. A. Mason, of Hollywood, for appellant.

J. C. Hizar and Hamilton, Lindley & Higin, all of San Diego, for respondent.

JENNINGS, J.

Defendant M. W. Mason appeals from a judgment rendered against him.

Prior to December 1, 1928, appellant was a member of a partnership known as Mason's Dairy, the other member of which was appellant's brother, C. H. Mason. On the aforesaid date the partnership was indebted to the Spreckels Commercial Company, a corporation, of which respondent is the trustee in bankruptcy, in the sum of \$3,146.27, for supplies theretofore furnished to said partnership. On or about December 5, 1928, C. H. Mason went to the credit manager of the corporation and stated to him that he had pur-

chased the interest of appellant in the said partnership, and that he would thereafter conduct the business of the said partnership alone, and that he desired to make a settlement of the prior indebtedness of the partnership to the corporation. He then proposed that on the following day he would draw a check in the sum of \$1,500 in favor of the corporation and would execute a promissory note to the corporation for the balance of the account. On December 6, 1928, C. H. Mason drew his check in favor of the corporation for the sum of \$1,500, and on the same day executed a promissory note to the corporation for the sum of \$1,646.27. The evidence shows that the check for \$1,500 was not paid, but was returned to the payee with a notation that the drawer of the check did not have sufficient funds on deposit with the bank on which the check was drawn to pay the check. It also appears that shortly thereafter a new check for \$1,200 was given to the corporation by C. H. Mason in lieu of the check for \$1,500 which had been returned unpaid, and that the smaller check was paid on presentation. The promissory note executed by C. H. Mason as aforesaid was never paid. At the conclusion of the trial herein, the court found that appellant and his former copartner were liable for the entire amount of the indebtedness due from the partnership to the corporation on December 5, 1928, and rendered judgment accordingly.

[1, 2] Appellant complains of the court's finding that the prior indebtedness of the partnership was not fully discharged by the execution and delivery to the corporation of the promissory note of the remaining partner as hereinbefore described. It is contended that the finding to this effect is entirely lacking in evidentiary support, and that, on the contrary, the evidence conclusively indicates that the check and promissory note were given to and accepted by the corporation in full settlement of the pre-existing debt of the partnership to the corporation. It may be conceded that such is the effect of the evidence produced by appellant. But the credit manager of the corporation testified that at the time the check and note were given nothing was said about releasing appellant from liability for the pre-existing indebtedness of the partnership and that it was a matter of mutual accommodation both to C. H. Mason in allowing him further time to pay off the indebtedness of the partnership to the corporation, and to the corporation in that the giving of the note reduced the balance appearing on the books of the corporation as due from the partnership and enabled the corporation to balance its ledger accounts at a time near the end of the year. It is true that this witness also testified that the check and note were given to "clean up" the pre-existing indebtedness of the partnership, but it is also true that the witness did not testify that the check and note were received by the corporation

with the understanding and under the agreement that they should operate as full payment of the partnership indebtedness and discharge the retiring partner from any further liability. The decisions are clear that the note of a debtor given in payment of a pre-existing indebtedness, if not itself paid, does not constitute payment unless received by the creditor under an express agreement to accept it as an absolute payment and that the presumption is not in favor of its being received as payment. *Dellapiazza v. Foley*, 112 Cal. 380, 44 P. 727; *Savings Bank v. Central Market Co.*, 122 Cal. 28, 54 P. 273; *Bonestell v. Bowie*, 128 Cal. 511, 61 P. 78; *Menzel v. Primm*, 6 Cal. App. 204, 91 P. 754; *Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 P. 550. Even if it be conceded that there is no conflict in the evidence, it is obvious that the state of the evidence is such that the trial court may have drawn the inference therefrom that the check and note were not received by the corporation in full discharge of the partnership indebtedness. Such an inference was reasonable, and the court's finding thereon is conclusive on appeal. *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 416

JOHNSON v. MORTGAGE GUARANTEE CO.
et al.
Civ. 8090.

District Court of Appeal, First District,
Division 2, California.

Oct. 9, 1931.

1. Principal and surety ⇨185.

Surety paying debt for which he is liable extinguishes debt, and his remedy is against principal on implied obligation to reimburse him.

2. Pleading ⇨36(2).

In view of admissions in pleading and evidence, plaintiff, suing surety to establish trust, could not contend that only remedy of surety after paying plaintiff's debt was action against plaintiff for reimbursement.

In amended complaint, plaintiff alleged defendant was entitled to take over and hold trust deed and that it became necessary to take over such deed to protect it in payment of liens filed against property, and that it became necessary to foreclose such deed of trust. At the trial, plaintiff introduced arbitration agreement in which

it was set forth that defendant became purchaser of note executed by plaintiff.

3. Subrogation ⇨7(1).

Surety paying debt which principal owed would have right to be subrogated to whatever interest creditor had in deed of trust held as collateral security.

4. Pledges ⇨56(1).

Statute providing pledgee cannot sell evidence of debt is for benefit of pledgor, who may waive it (Civ. Code, § 3006).

5. Pledges ⇨38.

Pledgee may assign his interest in collateral to assignee, who thereupon holds pledged property in same capacity as original pledgee.

6. Pledges ⇨56(6).

Holder of pledged property may become purchaser, in absence of fraud.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit by H. T. Johnson against the Mortgage Guarantee Company and others, to establish a trust in certain real estate of which the National Surety Company claimed to be the owner. From an adverse judgment, plaintiff appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Bailie, Turner & Lake and Allen T. Lynch, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff brought this action to establish a trust in his favor in certain real estate of which the National Surety Company claims to be the owner, for an accounting by the National Surety Company, and the appointment of a receiver.

The National Surety Company by its answer denied that it held said property in trust for plaintiff, and filed a cross-complaint alleging therein that it was the owner of the property and that plaintiff had no right, title, or interest therein. Judgment was rendered in favor of National Surety Company, and from this judgment plaintiff appeals.

Substantially the facts of this case are as follows: In February, 1926, appellant, who was a contractor, entered into a contract with Carrie E. Craig and Jeannette Lohrum, who were the owners of the property described in the complaint, for the erection thereon of a French villa of nineteen houses for the contract price of \$91,763, and for the faithful performance of said contract respondent execut-

ed on behalf of appellant a builder's bond in the sum of \$22,941 and a laborers' and materialmen's bond in the sum of \$45,882 conditioned for the payment of claims of laborers and materialmen performing labor or furnishing material to be used in the performance of the work under said contract. As part payment of the contract price for the construction of said buildings, the said Carrie E. Craig and Jeannette Lohrum on February 19, 1926, executed their promissory note to appellant for the sum of \$42,500, payable in installments of \$500 per month until February 15, 1928, when the remainder was to be paid in full, and as security for said promissory note they executed a deed of trust on said property to the Title Guarantee & Trust Company, as trustee, in favor of appellant, said deed of trust being subject to a trust deed executed by the said Carrie E. Craig and Jeannette Lohrum to the Title Guarantee & Trust Company for the benefit of the Mortgage Guarantee Company dated February 19, 1926, for the sum of \$65,000. On or about March 1, 1926, appellant executed to the Hammond Lumber Company his promissory note for \$32,500 payable on or before six months after date and as collateral security for the payment of same transferred to the Hammond Lumber Company the said note for \$42,500 secured by the deed of trust as aforesaid. On December 29, 1926, the Hammond Lumber Company executed and delivered to respondent an assignment of the note for \$32,500 and the deed of trust securing same; the consideration for said assignment being the sum of \$20,486.65, which was the amount owing to said Hammond Lumber Company by appellant for material furnished under said contract. Thereafter on or about September 27, 1927, respondent made a private sale of the deed of trust, which was executed as collateral security securing the said \$42,500 promissory note and at that sale respondent became the purchaser thereof. Thereafter, default having been made by Carrie E. Craig and Jeannette Lohrum in the payment of certain installments of the said \$42,500 note, respondent caused a sale to be made of the property covered by said deed of trust by the trustee named therein, and at said sale respondent became the purchaser of said property, and thereupon the said trustee executed and delivered to respondent a trustee's deed for said property.

At the trial of this case, it appearing that the Mortgage Guarantee Company has assigned its beneficial interest in the first deed of trust for \$65,000 to the Metropolitan Life Insurance Company, the action was dismissed as to it; it being conceded by appellant and respondent that said \$65,000 deed of trust is a first lien on said property. At the trial it was stipulated by counsel for the respective parties that the evidence would be restricted to the issue whether or not respondent acquired and held the property involved in the action

in trust for appellant, and that no evidence should be introduced regarding the accounting until the court should first determine that respondent did acquire and hold the said property in trust for appellant.

[1] The first and main contention of appellant is that, when respondent made the alleged purchase of the \$32,500 note from the Hammond Lumber Company, paying therefor the amount that appellant was owing the Hammond Lumber Company for material used in the construction of said buildings, namely, \$20,486.65, such payment extinguished the said note, and thereupon appellant became entitled to the said deed of trust. It is the well-settled law of this state that, when a surety pays a debt for which he is liable as such surety, he thereby extinguishes the debt, and his remedy is against the principal upon the implied obligation of the principal to reimburse him. *Yule v. Bishop*, 133 Cal. 574, 62 P. 68, 65 P. 1094; *Bray v. Cohn*, 7 Cal. App. 124, 93 P. 893; *Crystal S. Hutton*, 1 Cal. App. 251, 81 P. 1115; *W. H. Marston Co. v. Fisheries Co.*, 201 Cal. 715, 258 P. 933.

[2, 3] Respondent, while conceding this to be the law, claims that its transaction with the Hammond Lumber Company was not a payment by it as surety of a debt owing by appellant to the Hammond Lumber Company, but, on the contrary, was the purchase of said note which appellant had executed to said company, and the trial court so found.

In his amended complaint appellant alleges the respondent, having issued its bonds to protect the owners and to guarantee the payment of the claims for material supplied and labor performed, under the provisions of the application for said bonds, was entitled to take over and hold the said trust deed, that it became necessary for respondent to take over the said deed of trust to protect it in the payment of liens filed against the property, and that respondent did take over said trust deed as security therefor, and that it became necessary, through the failure of the makers of said trust deed, to pay the sums secured thereby, to foreclose the said deed of trust which respondent did, and at the foreclosure sale purchased the said property and is now the owner thereof. And, in his answer to the cross-complaint, he alleges that, under and by virtue of the terms of the application for said bonds, he assigned to respondent as security to protect it for any money paid out by it, the said trust deed in the sum of \$42,500 covering the real property whereon the said buildings are situated. Furthermore, at the trial of the case appellant introduced in evidence an arbitration agreement signed by himself as one of the parties thereto, in which, referring to the \$32,500 note, it was set forth therein that respondent did become the purchaser of same and is now the owner thereof.

In the face of these admissions, it certainly

does not lie in the mouth of appellant to say that, by the payment to the Hammond Lumber Company, as a consideration for the \$32,500 note, of the sum owing to said company by appellant for material furnished, thereby respondent's only remedy was to proceed against appellant for reimbursement. But assuming that, instead of purchasing the \$32,500 note respondent as surety paid the debt which appellant owed the Hammond Lumber Company. In that event, as such surety, he would have the right to be subrogated to whatever interest the Hammond Lumber Company had in the said deed of trust. In the case of *Title Guaranty, etc., Co. v. Duarte*, 54 Cal. App. 260, 201 P. 790, 792, Justice Hart said: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, * * * at the time of entering into the contract of suretyship, or acquired by him afterwards." Civ. Code, § 2849. 'A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal.' Civ. Code, § 2848. As is said by Mr. Justice Shaw in *Martin v. De Ornelas*, 139 Cal. 41, 49, 72 P. 440, 444, referring to the above Code sections: "These sections are but a re-enactment of the well-settled rules of equity on the subject of subrogation or substitution. Story's Equity Jurisprudence, §§ 495-502; Brandt on Suretyship, § 260 et seq."

[4] The second contention of appellant is as follows: "That by purchasing said note at the sale made by it on September 27, 1927, the respondent purchased what it had no right to sell. If it had any right to sell said note it had no right to sell it at prior sale."

We infer from this contention that appellant claims that, the note for \$42,500 and the deed of trust being a pledge, respondent had no right to sell them. Section 3006 of the Civil Code provides that the pledgee cannot sell the evidence of debt, but may proceed to collect it. But as the provisions of this section are for the benefit of the pledgor, he may waive it. *Traders' Bank v. Wilcox*, 42 Cal. App. 24, 183 P. 256; *Gault v. Wiens*, 32 Cal. App. 1, 161 P. 996; *McArthur v. Magee*, 114 Cal. 126, 45 P. 1068. In the case under consideration, appellant expressly waived the provisions of said section 3006 by his agreement contained in the assignment of the said securities to the Hammond Lumber Company. Therein he stipulated that, should any part of the said note remain due or unpaid, the Hammond Lumber Company or its assigns had full power and authority to sell or collect said collateral securities, and, in case of sale, said Hammond Lumber Company or assigns was authorized to sell said securities at public or private sale and said company or its assigns might become the purchaser at said sale.

[5, 6] The third contention of appellant is that respondent is not the legal owner of the note secured by said trust deed and had no right to bid in the property as owner of said note or beneficiary of said deed of trust. A pledgee may assign his interest in the collateral to an assignee who thereupon holds the pledged property in the same capacity as the original pledgee held it. *Revert v. Hesse*, 184 Cal. 295, 193 P. 943; *Pease v. Fitzgerald*, 31 Cal. App. 727, 161 P. 506. The holder of pledged property may himself become the purchaser of it and by virtue of the sale take absolute title to the property, unless it be shown that he obtained the title by fraud. *Kelly v. Matlock*, 85 Cal. 122, 24 P. 642; *Wright v. Ross*, 36 Cal. 415; *Hoult v. Ramsbottom*, 127 Cal. 171, 59 P. 587.

Appellant attacks those findings of the court which denied his ownership of said property and which found such ownership to be in respondent. We are of the opinion that the findings are supported by the evidence.

Appellant claims the respondent, being a foreign corporation, failed to comply with the requirements of section 405 of the Civil Code, and that, having so failed under the provisions of section 409 of said Code its contracts relating to property within this state are void. A careful search of the record fails to disclose any evidence that respondent had not complied with the requirements of said section 405.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

117 Cal.App. 136
ROBINSON v. FARNSWORTH et al.
 Civ. 7758.

District Court of Appeal, First District,
 Division 1, California.
 Sept. 26, 1931.

1. Corporations ⇨346.

Liability against corporate directors created under statute preserving rights to creditors accruing prior to repeal of statute imposing liability, repeal of statute did not impair plaintiff's action (Civ. Code § 309, as amended by St. 1929, p. 1266, § 12).

2. Appeal and error ⇨174.

Plaintiff's capacity to sue, not questioned in court below, cannot be taken advantage of on appeal.

Appeal from Superior Court, City and County of San Francisco; Benjamin C. Jones, Judge.

Suit by Jane R. Robinson against George W. Farnsworth and others. From a judgment for defendants, plaintiff appeals.

Reversed.

L. L. James and Edgar H. Rowe, both of San Francisco, for appellant.

Thos. M. Foley, of San Francisco, for respondent Thompson.

TYLER, P. J.

Suit to enforce liability against corporation directors.

The complaint alleges that in the month of April, 1927, defendants were directors of the Pickwick Spark Plug Company, a corporation, and at that time they incurred an indebtedness on behalf of the corporation in excess of its subscribed capital stock. This action was brought to enforce such liability.

It was defendants' contention in the court below that the statute (Civ. Code, § 309) upon which the action was based had been repealed, and that the liability of directors for such an act therefore no longer existed. At the close of plaintiff's case, a motion for a nonsuit was made on the ground stated. The trial court granted the motion, and judgment went for defendants. From such judgment this appeal is prosecuted.

[1] It is now conceded by respondents, as indeed it must be, that section 404 of the Civil Code contains, as claimed by appellant, a general saving clause preserving the rights to creditors, accruing under the repealed section prior to its repeal. It is not disputed that the liability here sought to be enforced was thus created. Hence, under its provision, the repeal of section 309 of the Civil Code in 1929 (St. 1929, p. 1266, § 12) did not abate or impair plaintiff's alleged cause of action. See *Western Mortgage & Guaranty Co. v. Gray* (Cal. App.) 291 P. 670¹; *Peterson v. Ball* (Cal. Sup.) 296 P. 291. Respondents, however, now contend for the first time on appeal, that an action of this character should be in the form of a creditor's bill in equity rather than in the form of an individual or private action, for which reason the nonsuit was properly granted. The repealed statute imposed a liability against directors of corporations for incurring debts beyond their subscribed capital stock. The statute provided in express terms that such directors were in their individual and private capacity jointly and severally liable to the corporation and to the creditors thereof to the full amount of the debt contracted.

[2] In construing statutes of a like character, some of the courts have held that the remedy is in equity on the trust fund theory, and that all the creditors should be made parties. Other courts adopt the view that the remedy is at law, and the liability imposed

may be enforced by any one creditor without requiring other creditors to be made parties; the directors being jointly and severally liable. A full discussion of this question and a review of the authorities is to be found in *Thompson on Corporations* (3d Ed.) vol. 2, § 1481 et seq. See, also, *United States Farm Land Co. v. Bennett*, 55 Cal. App. 306, 307, 203 P. 794, where many cases are cited. We are not called upon to discuss or pass upon this question, as respondent is in no position to raise the same. No question of the capacity of the plaintiff to sue was raised in the court below, either by demurrer or answer. It cannot be taken advantage of for the first time in the appellate courts. *Bulkley v. Big Mud-dy Iron Co.*, 77 Mo. 105; *Woodbury v. Nevada Southern Railway Company*, 120 Cal. 463, 52 P. 730. Moreover the record does not disclose that there are any other creditors. None are here, if there be any, raising any such question.

Respondent urges the further point, also for the first time on appeal, that plaintiff is estopped from prosecuting the action for the reason that she knew only five shares of the corporation had been subscribed to at the time the liability was incurred. No element of estoppel is here involved.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

117 Cal.App. 381
PEOPLE v. McCLURE.

Cr. 129.

District Court of Appeal, Fourth District,
California.
Oct. 6, 1931.

1. Rape ☞51(1).

In prosecution for rape, evidence *held* sufficient to sustain conviction.

2. Criminal law ☞1168(2).

Defendant cannot complain of his inability to determine for which of two acts of intercourse he was convicted of rape, where evidence was sufficient to sustain conviction for both.

3. Rape ☞53(2).

In prosecution for assault with intent to commit rape, evidence *held* sufficient to support conviction.

4. Criminal law ☞404(4).

In prosecution for rape, torn garments of prosecutrix *held* admissible to prove guilt of accused, although evidence that accused tore them was weak.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Superseded by (Cal. Sup.) 300 P. 961.

5. Criminal law ☞665(2).

In prosecution for rape, accused cannot complain of court's using its discretionary power in excluding certain witnesses from court room and permitting prosecutrix to remain.

6. Criminal law ☞1035(1).

Accused cannot for first time on appeal repudiate former stipulation of his counsel that crimes of which he stands convicted were committed, if at all, within jurisdiction of court.

7. Criminal law ☞1171(3).

Erroneous statement by prosecuting attorney to jury that there was no evidence showing that rape, with which accused was charged, was not committed, *held* harmless.

8. Criminal law ☞823(4).

Defective charge omitting element of intent to commit rape without consent of prosecutrix *held* cured by correct instruction immediately following.

9. Criminal law ☞822(1).

Instructions must be taken as whole and read together.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Bruce McClure was convicted of rape, and of assault with intent to commit rape, and he appeals.

Judgment affirmed.

Laurence B. Myers, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

MARKS, J.

The appellant prosecutes this appeal from a judgment, by the terms of which he was sentenced to state's prison, after a verdict by a jury finding him guilty of the crimes of rape and of assault with intent to commit rape, committed in Fresno county, state of California, upon June Bell, a woman of the age of about 21 years and not his wife.

Appellant urges three grounds upon which he seeks a reversal of the judgment: First, that the evidence was insufficient to sustain the verdict and judgment finding the defendant guilty of the crime of rape; second, that it was insufficient to sustain the verdict and judgment finding the defendant guilty of the crime of assault with intent to commit rape; third, errors of law occurring during the trial prejudicial to the rights of appellant. We will consider these grounds in the order in which they are stated.

The offenses for which the appellant was convicted occurred during an automobile ride taken by himself, June Bell, and two others on the night of April 5, 1931. On the morning of the following day appellant admitted having had sexual intercourse with June Bell upon this occasion, maintaining that it was with her consent, and that he used no force or violence in accomplishing the act.

[1] The prosecutrix testified in great detail concerning the events preceding and during her ravishment by appellant. She testified to a struggle with him lasting almost a half hour before he accomplished his purpose; that he choked her, struck her, and knocked her unconscious, and accomplished his purpose by means of his superior strength, with force and violence and against her will and without her consent. Her evidence is amply corroborated by the testimony of other witnesses. Without going into the details of the sordid and brutal attack upon her, suffice it to say that a physician, who examined her shortly after the acts were accomplished by appellant, testified to the physical conditions which he found. There were bruises upon her face, neck, and body; both her rectum and vagina were torn and blood stained, indicating penetration by the sexual organ of appellant. The clothing worn by the prosecutrix was introduced in evidence. Her dress and stockings were badly torn, and her step-ins were torn and blood stained. The shirt and trousers worn by appellant at the time of the attack were also introduced in evidence, and both were blood stained. The evidence is ample to sustain the verdict and judgment.

[2] Appellant complains, in this connection, that there were two separate acts of intercourse proved, and that he suffered prejudice by not being able to determine of which act he stood convicted. The evidence discloses that both of them constituted rape and appellant is fortunate that he was not charged with both offenses instead of one, as a verdict of guilty of both would have been amply supported by the evidence.

[3] The evidence is also ample to support a conviction of assault with intent to commit rape, which occurred a short time before the rape was accomplished, and at another place in Fresno county. The prosecutrix testified that she was running away from the advances of the other man in the party when appellant jumped out of some bushes, knocking her to the ground and falling upon her body. He pinioned her arms and legs to the ground, and with his superior strength overcame her struggles to release herself. He was caused to desist from the attack by the other woman in the party coming to the assistance of the prosecutrix, seizing him by the hair, and dragging him off his prone position on the body of Miss Bell. Appel-

lant maintains that this evidence fails to disclose any intent on his part to commit the crime of rape on the prosecutrix. The question of intent may be determined by the jury from the circumstances of the attack. In this case the jury was justified in concluding from the position of the bodies of appellant and the prosecutrix that appellant intended to commit the crime of rape upon her, and was prevented from accomplishing his purpose by the struggles of his victim and the interference of the other woman of the party.

[4] Appellant advances several arguments in support of his third assignment of error. He first urges that the trial court erred in refusing to strike from the record exhibits consisting of the various articles of clothing worn by the prosecutrix at the time of the rape, upon the ground that it is not certain whether they were torn by the appellant or by the other man in the party. The facts of the violent attack by appellant, the blood stains upon his clothes and the underclothes of the prosecutrix, the torn and bleeding parts of the prosecutrix, and her positive testimony upon direct examination that the garments were torn by the appellant during the attack, amply uphold the ruling of the trial court, even though upon cross-examination she weakened in her statement that the clothes were torn by him. This objection goes to the weight of the evidence and not its admissibility.

[5] Appellant next complains of a ruling by the trial court granting his motion excluding other witnesses from the courtroom, and permitting the prosecutrix to remain therein. It has been consistently held in California that the granting of a motion to exclude witnesses rests within the discretion of the trial court. *People v. Garbutt*, 197 Cal. 200, 239 P. 1080; *People v. Ghio*, 82 Cal. App. 28, 255 P. 205; *People v. Kasparoff*, 94 Cal. App. 7, 270 P. 398. It is within the discretion of the trial court to permit a witness to remain in the courtroom after other witnesses have been excluded. *People v. Hong Ah Duck*, 61 Cal. 387; *People v. McCarty*, 117 Cal. 65, 48 P. 984; *People v. Oliver*, 7 Cal. App. 601, 95 P. 172.

[6] Appellant next maintains that the evidence was insufficient to show that the crimes were committed in Fresno county. At the commencement of the trial it was stipulated by counsel for appellant that they were committed, if at all, in Fresno county, counsel using the following language: "Mr. Curran: I will stipulate wherever they went and wherever they stopped, and if any offense was committed it was within the jurisdiction of this court." Appellant cannot now be heard for the first time to repudiate this stipulation, and maintain that the evidence

for the people did not establish the places of the commission of the crimes within the county of Fresno. *People v. Nolan*, 34 Cal. App. 545, 167 P. 642.

[7] Appellant next complains that the district attorney was guilty of misconduct in his argument to the jury in which the following occurred:

"Mr. Carter: Every man is presumed to do and to intend to do that which he does in fact do. The law presumes guilty intent from the doing of the act. Did he commit the rape by force or violence? Did he commit the act of sodomy? Not one scintilla of evidence in this record, not one contradictory statement showing that these acts were not committed. Oh, gentlemen—

"Mr. Curran (interrupting): Well now just a minute, your Honor, I would like to interrupt. When counsel says there is not one bit of evidence here showing that he didn't commit the act of rape he has forgotten absolutely what appeared in the statement he introduced in evidence. I ask that counsel withdraw his remarks or else the court admonish the jury."

Similar statements have been held to be without prejudice, even though erroneous. *People v. McNamara*, 65 Cal. App. 521, 224 P. 476; *People v. Calvert*, 80 Cal. App. 50, 251 P. 244.

[8] Lastly appellant complains of an instruction given to the jury as follows: "You are instructed therefore, that if you believe to a moral certainty and beyond all reasonable doubt, from all of the evidence bearing upon the charge laid in the second count of the information, that this defendant, Bruce McClure, did at the time and place alleged, make an assault upon June Bell with the intention then and there of accomplishing with the said June Bell by means of force or violence, an act of sexual intercourse, then the charge alleged in the second count of this information has been proved to the degree required by law and you should find the defendant guilty."

[9] He maintains that this instruction left out the element of intent to commit rape against the will and without the consent of the prosecutrix. If we assume the correctness of this position, the instruction immediately following the one quoted correctly instructed the jury on this question. Instructions must be taken as a whole and read together. In this case they fully and fairly stated the law applicable to the facts in evidence, and contained no error prejudicial to the appellant.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

THOMAS J. HAVERTY CO. v. PACIFIC INDEMNITY CO. et al.*

Civ. No. 6912.

District Court of Appeal, Second District, Division 2, California.

Oct. 7, 1931.

Rehearing Denied Nov. 6, 1931. Hearing Granted by Supreme Court Dec. 3, 1931.**Appeal and error** ⇨766.

Appellant's brief, offending rules respecting index, statement of points, and references to transcript, justifies dismissal of appeal, in view of courts' repeated cautions (Rule 8 of Supreme Court and District Courts of Appeal).

Rule 8 of Supreme Court and District Courts of Appeal provides, in part, that brief over 30 pages long shall contain topical index of contents and shall preface each point separately, and that, on appellant's failure to observe rule, court may dismiss appeal. The rule further provides that, where parts of typewritten record are required to be printed in briefs, substance thereof may be printed with references to line and page of typewritten transcript. Appellant's brief was 70 pages long, contained no topical index, presented none of points separately, and "The Facts" was 11-page narrative without reference to line or page of transcript.

Appeal from Superior Court, Los Angeles County; Charles D. Wallace, Judge.

Action by the Thomas J. Haverty Company against the Pacific Indemnity Company and others, in which Joe Proper and Henry Schrubbe, copartners, filed a cross-complaint. From a judgment in favor of defendants Joe Proper and Henry Schrubbe, and awarding the Pacific Indemnity Company its costs, plaintiff appeals.

Appeal dismissed.

Richard J. O. Culver, of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

Robert E. Austin and John H. Helmick, both of Los Angeles, for cross-complainants and respondents.

CRAIG, J.

The plaintiff and appellant, as contractor, instituted an action against its subcontractors and their surety, upon an alleged failure to perform the conditions of the subcontract. Issue was joined by the defendants, and said subcontractors by a cross-complaint asserted a claim for damages upon the ground that the plaintiff had negligently prevented the per-

formance of the conditions upon which its action was based. Judgment was rendered in favor of the subcontractors, and their surety was awarded its costs. The plaintiff appealed from such judgment.

The opening brief of the appellant, consisting of some seventy pages, is little more than an abridged résumé of its version of the case, and in many respects fails even to present a correct statement of the facts upon which it would be necessary to base a decision upon the merits. Although punctuated by five ambiguous captions, "The Facts," "Argument," "The Surety," "The Subcontractor," and "Other Erroneous Findings," at random, there appears no attempt upon the part of the briefer to comply with the rules of the Supreme Court and District Courts of Appeal which govern in such cases. The "Argument," for instance, consists of the following fifteen mere assignments of purported grounds, none of which is specifically mentioned separately or afforded space or heading elsewhere in the brief:

"The cause must be reversed for many reasons, among which the following are probably the most apparent:

"1. Errors of the court in rulings upon objections.

"2. Erroneous findings of fact for the court among which are the following:

"(a) The finding that plaintiff agreed to keep said ditch free from water at all times so that the sub-contractor might carry on its work without interference whatsoever on account of water within the ditch.

"(b) The finding that the surety should be notified in writing of any act of the subcontractor which might involve a loss for which surety is responsible.

"(c) The finding that the subcontractor furnished sufficient labor and material to complete the contract within the time provided therein.

"(d) The finding that at the commencement of the performance of the contract plaintiff required certain alterations in the terms of the contract and required the ditch to be dug 5½" deeper than the contract called for.

"(e) The finding that the subcontractor had completed 53% of the whole contract on May 16th.

"(f) The finding that the subcontractor performed its work in a workmanlike and skillful manner.

"(g) The finding that large portions of the sum of \$22,707.34 spent by Thomas Haverty Company in completing the contract were carelessly, recklessly and negligently disbursed.

"(h) The finding that the subcontractor could have completed its work for \$4,061.50 if the water had been kept out of the ditch.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 11 P.2d 864.

"(l) The finding that Proper and Schrubbe were damaged in the sum of \$3,089.42.

"(j) The finding of the modification of the contract after the execution of the bond.

"(k) The finding that the additional depth added substantially to the cost and expense of the work.

"(l) The conclusion of law that Proper and Schrubbe recover of plaintiff \$3,089.42 and costs.

"(m) The conclusion of law that plaintiff should recover nothing by its action.

"(n) The conclusion of law that Pacific Indemnity Company should recover its costs from plaintiff.

"The judgment in favor of Proper and Schrubbe and against plaintiff must be reversed as there is no evidence whatsoever upon which to base it. We will deal with this phase of the case presently, as it will require a longer discussion than will the judgment in favor of the surety company."

Rule VIII of said rules provides, in part:

"When a printed brief contains thirty pages, or more, it must be prefaced with a topical index of its contents and a table of cases and authorities cited showing the pages on which each is cited.

"The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented.

"For any failure to observe this rule the court may, of its own motion, order the proper index to be supplied, or strike out the brief, or for the failure of the appellant, dismiss the appeal.

"Where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs (C. C. P. § 953a et seq.) it shall be sufficient to state therein the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification. * * *" 204 Cal. p. xlix.

The record is brought up by means of a printed transcript consisting of four hundred and fifty pages, embracing technical and intricate diagrams and accounts. The brief contains no topical index, presents none of the points separately, under appropriate headings or otherwise, and "The Facts" consists of an eleven-page narrative which in no instance refers to any line or page of the transcript, for verification. Were it an isolated inadvertence attributable to justifiable misapprehension, the dereliction might be entitled to less drastic measures than a dismissal of the appeal might seem to import. But, in view of repeated cautionary expressions of this and other courts, we are compelled to instill respect for the rules of court and previous rulings, and to require their observance by those who must be presumed to be familiar with them.

Barnes v. Cocke, 99 Cal. App. 700, 279 P. 190;
Hawkins v. Doolittle (Cal. App.) 298 P. 862;
Burns v. Renaker Co. (Cal. App.) 2 P.(2d) 408.

The appeal is dismissed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 236

FENN v. PICKWICK CORPORATION.

Civ. 6558.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1931.

Rehearings Denied Oct. 20, 1931. Hearing Denied by Supreme Court Nov. 27, 1931.

1. Patents ⇨218(1).

Under royalty contract, requiring licensee to manufacture certain number of articles per year for each of three years, output for each year determined whether there had been breach.

2. Patents ⇨218(1).

That royalty contract requiring licensee to manufacture certain number of articles used expression "or pay royalty on that number," in reference to certain articles, *held* not to limit licensor's remedy for licensee's nonperformance to revocation of license relating to articles with which such expression was not used.

3. Patents ⇨213.

Provision regarding licensee's right to patentable idea originated by licensor *held* not to render royalty contract nonassignable.

Royalty contract was not rendered nonassignable by provision that, in event the licensor originated any novel or patentable idea in the line of those covered by the license given, the licensee should have the option of procuring a like license for the manufacture, sale, and distribution of said article on a royalty to be agreed on by the parties, since the term "a like license" was too indefinite to result in the forming of a contract, and the further expression "on a royalty to be agreed on" robbed the provision of any effect as binding agreement.

4. Patents ⇨213.

Warranty that licensor had right to grant licenses did not render royalty contract nonassignable.

5. Assignments ⇨18.

Ordinarily, contract is assignable.

6. Assignments ⇨19.

Assignor, bound to render service of personal nature, cannot, by assigning contract, substitute some one in his place (Civ. Code, § 1457).

7. Assignments ⇨19.

If assignment of contractual right materially lessens assignor's interest in performance of his personal obligations, contract is nonassignable.

8. Assignments ⇨19.

If personal obligation has been practically discharged, contract otherwise nonassignable may be assigned.

9. Patents ⇨213.

Licensor could not by assignment of royalty contract escape burden of agreement to save licensee harmless.

10. Patents ⇨211(1).

Licensor's obligation, under agreement in royalty contract to save licensee harmless, was that of indemnifier, to be discharged by payment of money.

11. Patents ⇨213.

Licensor's agreement under royalty contract to save licensee harmless *held* not to prevent assignment of contract.

Royalty contract was assignable, since the obligation to save licensee harmless was not so related to the benefits to be derived from the contract that the benefits could not be assigned, though the obligation remained.

12. Patents ⇨219(2).

Licensor's obligation to save licensee harmless *held* not condition precedent, performance of which must be established to recover on royalty contract (Civ. Code, § 1439).

13. Patents ⇨213.

Licensor's assignee could not recover on royalty contract without alleging and proving licensor's obligation to protect licensee against outstanding rights or contracts had not been breached (Civ. Code, § 1439).

14. Patents ⇨219(2).

Licensor's agreement to prosecute patent applications to final determination *held* condition precedent required to be performed before licensor's assignee could recover on royalty contract (Civ. Code, § 1439).

15. Patents ⇨219(2).

Licensor's obligation to execute further documents necessary and expedient to carry

royalty contract into effect *held* condition precedent, required to be performed to obtain recovery on contract (Civ. Code, § 1439).

Appeal from Superior Court, Los Angeles County; H. V. Alvarado, Judge.

Action by Mrs. Libbie R. Fenn against the Pickwick Corporation. Judgment for plaintiff, and defendant appeals.

Reversed, with instructions.

Superseding opinion in 300 P. 47.

Libby & Sherwin and M. Tellefson, all of Los Angeles, for appellant.

Harry M. Irwin and Arthur J. Hughes, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Plaintiff recovered judgment upon a contract between her assignor, one Jack Cathrill, and the defendant corporation. By the contract the defendant was licensed and agreed to make certain patented articles, a royalty on each one made to be paid to plaintiff's assignor. The evidence is uncontradicted that for articles manufactured before the action was commenced there was due \$443.80. It was stipulated that the minimum required, according to plaintiff's understanding of the contract, had not been manufactured during the first two years, and that the further sum of \$7,361.20 would have been due as royalty if that minimum number had been produced. Judgment was given for the total of these two sums.

[1, 2] Appellant criticizes the inclusion of the sum of \$7,361.20 in the judgment on two grounds, both of which arise from its interpretation of the contract. The contract provides, as appellant reads its terms, for the manufacture of a minimum number of articles on an average during a three-year period, of which period one year is yet to run. Secondly, it insists, with the exception of miner's lamps and stop lock valves, failure to manufacture the minimum required is free from penalty because of the restricted employment of the words, "or payment of royalty." The provisions of the contract which are in debate are these:

"That said licensee hereby agrees to manufacture the following amounts of said articles under said letters patent and patent applications, to-wit:

"Six thousand (6000) pairs per year for each of the first three (3) years of the term of this contract and seventy-five hundred (7500) pairs per year thereafter of the J. C. lens;

"Three thousand (3000) per year of the spotlight and bracket;

"Six thousand (6000) pairs per year for each of the first three (3) years of the term of this

contract of the J. C. lens and shield indirect beam light and seventy-five hundred (7500) pairs per year thereafter;

"One thousand (1000) per year of the miner's lamp or payments of royalty upon that number;

"Fifteen hundred (1500) pairs per year of the J. C. headlamp complete;

"One thousand (1000) per year of stop lock valve, or payment of royalty upon that number;

"Provided, that the right to terminate this license herein granted as to any one or more of said letters patent and/or patent applications, for the reason that said licensee has not manufactured the number or numbers hereinbefore specified, shall not give said licensor the right to cancel the license herein granted as to any of the others of said articles patent or patent applications; and provided, further, that the license herein granted shall be and is hereby declared to be irrevocable for the period of three (3) years from and after the date of this agreement."

We cannot agree with defendant's interpretation that it still has a year before it can be said that it has not manufactured the minimum number required. No such meaning can be extracted from such expressions as: "6,000 pairs per year for each of the first three years of the term of this contract." If during the first year only 1000 pairs are manufactured a production of 50,000 pairs the next two years cannot secure compliance with the requirement "6,000 pairs per year for each of the first three years." At the end of each year the yardstick of the contract applied to the output determines at once whether or not there has been a breach.

Nor are we persuaded that, with respect to all articles except miner's lamps and stop lock valves, failure to manufacture is free from penalty. Appellant argues that, because with respect to these two articles only is use made of the expression "or payment of royalty upon that number," the only remedy the licensor has for a failure to comply with the contract as to all other articles is to revoke the license at the end of the three-year period. It may be, as suggested by appellant, that there can be no termination of the license to manufacture miner's lamps and stop lock valves if the royalty is paid, no matter how small the output, and that this is the purpose of the expression attached to these two articles. This we are not called upon to decide, but find in it a possible explanation of the parties' meaning. In any event, we fail to find any intent that the licensee could manufacture or not, as he chose, the number of articles specified, or that the ordinary consequence attendant upon a breach of contract, i. e., liability to respond in damages, was avoided and the only remedy was a forfeiture of the license. Such a contract could have been written. It was not.

Speaking exactly, appellant is not required to pay royalty on the articles it did not manufacture, but is required to pay damages for its failure to live up to its contract. The sum of \$7,361.20 was properly included in the judgment.

[3] This leaves us with the more difficult problem presented by appellant's objection that the contract upon which plaintiff relies is not assignable because by it the assignor undertakes responsibilities of a personal nature. Appellant points particularly to paragraphs 3a and 8 in substantiation of its position. By the first of these two paragraphs plaintiff's assignor agreed that, "in the event" he originated any novel or patentable idea in the line of those covered by the license given, the licensee should have "the option of procuring a like license for the manufacture, sale and distribution of said article and/or patent, within a period of twelve months after written notice from said licensor of the nature and character of said patent and/or idea, on a royalty to be agreed upon by the parties hereto. * * *" It is apparent that by this provision of the contract plaintiff's assignor did not undertake to have any novel or patentable idea, nor, if he had one, was he under any legal obligation to license defendant. "A like license" is too indefinite a term, as it is used here, to result in the forming of a contract of which it is a vital element; and the further expression "on a royalty to be agreed upon" robs the paragraph of any effect as a binding agreement. 6 Cal. Jur. 45 and 215 et seq. There is nothing in paragraph 3a, therefore, that makes this contract nonassignable.

[4-8] Paragraph 8, so far as now of concern to us, reads as follows: "That said licensor hereby warrants that he has the right to give and grant the licenses hereinbefore set forth and agrees to save and hold harmless said licensee and to protect said licensee against any and all rights or contracts in said articles, patents, patent rights and/or patent applications hereinbefore described now outstanding. * * *" By these provisions, it will be noted, plaintiff's assignor does not undertake to protect the licensee from all those who may infringe on the patent, so there is no continuing duty in that regard which, if present, might make it nonassignable. *Martin v. New Trinidad Lake Asphalt Co.* (1918) 182 App. Div. 719, 170 N. Y. S. 234. The agreement is one of warranty of present title, not unlike that implied in a transfer of real estate by a grant deed (Civ. Code, § 1113). and would be as appropriate if title to the patents instead of a license under them was the subject of the contract. Because of this burden resting on the licensor, was the contract nonassignable, so that plaintiff has no right to her judgment? We think not. "The rule of the early common law as to the assignability of choses in action has been much

changed in modern times," and ordinarily now a contract is assignable. *La Rue v. Groezinger* (1890) 84 Cal. 281, 24 P. 42, 18 Am. St. Rep. 179. Where the proposed assignor is bound by the contract to render service of a personal nature, he cannot, by assigning his contract, substitute some one else in his place. "The burden of an obligation may not be transferred without the consent of the party entitled to the benefit. Civ. Code, § 1457." *Montgomery v. De Picot* (1908) 153 Cal. 509, 96 P. 305, 307, 126 Am. St. Rep. 84. Furthermore, if divorcing himself from his rights under the contract tends to lessen materially his interest in the performance of his personal obligations, the contract as a whole is unassignable. Hence we find such cases as *Paper Products Mach. Co. v. Safepack Mills* (1921) 239 Mass. 114, 131 N. E. 288, where, without much discussion of the basic reasons, it was held that a contract was not assignable by the terms of which the attempting assignor had agreed to advise the licensee respecting carrying on work under the patents. No such agreement is contained in the contract under consideration by us. Furthermore, if the personal obligation has been practically discharged a contract otherwise nonassignable may be assigned. *Taylor v. Black Diamond, etc., Co.* (1890) 86 Cal. 589, 25 P. 51; *Rosenthal Paper Co. v. National Folding Box & Paper Co.* (1919) 226 N. Y. 313, 123 N. E. 766.

[9-11] It is only the duty to save and hold harmless the licensee and to protect it against all rights or contracts in the patents, etc., outstanding when the contract was executed that is a continuing obligation under paragraph 8. So far as appears, it may be a naked duty, one which the licensor will never be called upon to discharge. If the contrary were the fact, it should have been made to appear by appropriate pleadings in order to uphold the defense of nonassignability. Furthermore, while the licensee cannot be compelled without its consent to accept another in the place of the licensor, the latter's obligation is, with respect to his agreement to save and hold harmless, that of an indemnifier (see *Somers v. United States P. & G. Co.* [1923] 191 Cal. 542, 547, 217 P. 746), to be discharged by the payment of money, and it is not so related to the benefits to be derived from the contract that the latter may not be assigned away though the former remain. A lease may be assigned, leaving the original lessee liable (15 Cal. Jur. 753), and a contract of sale of real estate is assignable by the purchaser, although it "in nowise releases the personal liability of the assignor to the vendor." *Laack v. Dimmick* (1928) 95 Cal. App. 456, 273 P. 50, 55. So, we hold, although plaintiff's assignor cannot by an assignment escape the burden of his agreement to save and hold harmless, he may part with his right to the benefits. Whether in receiving the fruits and seeking to harvest them plaintiff has accept-

ed also the obligations of the contract is a question we need not decide.

[12-15] Appellant further stresses the lack of pleading and proof that those things had been done which the licensor, plaintiff's assignor, undertook to do. As one of the grounds of nonsuit was that "there has been (no) allegation * * * no proof of performance on the part of the plaintiff or her assignee (assignor)," it cannot be said that the point is raised for the first time on appeal.

The law which governs is not in doubt. Section 1439, Civil Code, reads: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided in the next section." In *Lewis Publishing Co. v. Henderson* (1930) 103 Cal. App. 425, 284 P. 713, 714, this statement appears: "In any event, as stated in *Rathbun v. Security Mfg. Co.*, 82 Cal. App. 793, 256 P. 296, it is elementary that one party to a contract cannot compel another to perform while he himself is in default." A group of cases in 6 California Jurisprudence 480 are gathered under the statement: "and the rule is fundamental that the plaintiff must allege and prove either performance or a valid excuse for non-performance, in so far as performance was incumbent upon him."

In three particulars plaintiff's assignor undertook to act. In paragraph 8 he agreed, first, to save and hold the appellant harmless from any outstanding rights or contracts. This we have already considered and held to be an obligation to be discharged by the payment of money, if damage results to the licensee, and we conclude that this is an independent condition, not a condition precedent or concurrent. In the same paragraph, however, there is the further obligation to protect the licensee against outstanding rights or contracts. Plaintiff must allege and prove compliance with this provision, or excuse for nonperformance; in other words, that she is not in default with respect to it. *Wilkey v. New Standard Concentrator Co.* (1903, C. C. A.) 164 F. 421. In paragraph 9 the licensor agrees to prosecute the patent applications to final determination. This plainly is a condition precedent. In paragraph 11 he agrees to execute and deliver any and all further documents necessary and expedient to carry the contract into effect. Surely a failure to comply with this requirement might excuse performance on the defendant's part.

Because of the absence of pleading and proof in the three particulars noted, the judgment is reversed, with instructions to the trial court (a) to make an order striking from the findings of fact now on file paragraphs

IV, V, VI, VII, and VIII; (b) to enter judgment for the defendant, unless within twenty days after the filing of the remittitur from this court amendments to the pleadings are filed alleging facts not now alleged, in which event appropriate proceedings shall be had leading to a new conclusion of law and new judgment based on the present findings as ordered amended, together with any new findings which may be made as the result of a new trial on the issues raised by the amendments to the pleadings.

We concur: HOUSER, Acting P. J.; YORK, J.

On Petitions for Rehearing.

PER CURIAM.

Because we foresaw the possibility that the defendant might desire to amend, we purposely worded our judgment so that the right to file amended pleadings was not limited to either party. We see no necessity of amending our judgment to make possible that already permitted.

The two petitions for a rehearing are denied. The application for leave to produce additional evidence is denied.

117 Cal.App. 355

MYRAN et al. v. SMITH et al.

Civ. 7686.

District Court of Appeal, First District, Division 1, California.

Oct. 5, 1931.

1. Appeal and error ⇨926(5).

Reviewing court must assume, where record disclosed no objection, that, if preliminary proof were necessary to entitle record of deed to admission, it was offered before record was admitted.

2. Trial ⇨105(5).

Absent objection or motion to strike, secondary evidence may become primary.

3. Evidence ⇨157(1).

Secondary evidence, where admissible, will serve as proof of fact in dispute.

4. Evidence ⇨336(1).

In action to quiet title, official record of deed was admissible under statute (Code Civ. Proc. § 1951).

5. Appeal and error ⇨714(5).

Evidence material in determining appeal should have been in transcript or brought in

by some appropriate proceedings; it not being sufficient that it appeared in brief and argument.

6. Husband and wife ⇨249.

After title to property vests in husband, property is community property.

7. Adverse possession ⇨16(1).

Community interest does not arise in property from inception of husband's adverse claim sufficient to make every act of husband that of wife as regards essentials of prescription.

8. Husband and wife ⇨265.

Wife's right in community property is not "vested," but she has mere expectancy as heir.

[Ed. Note.—For other definitions of "Vested Right," see Words and Phrases.]

9. Adverse possession ⇨114(1).

Claim of title by adverse possession could not be supported by evidence showing joint possession with neighbor, neighbor's possession being unexplained, purchase of tax title, occasional use, fencing of lot on two sides, and failure to pay taxes.

10. Adverse possession ⇨85(4).

Evidence held not to show that purchase of tax title was made with intent to claim property adversely.

11. Adverse possession ⇨1.

There are no equities in favor of party seeking by adverse holding to acquire another's property.

12. Adverse possession ⇨19.

As regards adverse possession, fence surrounding two sides of lot, with front of lot open, could not constitute "inclosure."

[Ed. Note.—For other definitions of "Inclosure," see Words and Phrases.]

13. Adverse possession ⇨89.

Payment of taxes is essential to acquiring title by adverse possession.

14. Adverse possession ⇨47.

Filing of action to quiet title broke continuity of adverse holding, so that rights of parties were determinable as of date of suit.

15. Taxation ⇨526.

There is no duty of payment as to taxes levied until taxes are due.

16. Adverse possession ⇨94.

Allowing taxes to become delinquent and property to be sold, and then redeeming prop-

erty, is not payment of taxes as regards adverse possession.

17. Adverse possession ⇨94.

Allowing taxes to become delinquent and redeeming property before sale was not payment of taxes as regards adverse possession during years taxes were delinquent.

18. Adverse possession ⇨13.

To acquire right by prescription in lands of another, possession must be adverse, continuous, uninterrupted, and by owner's acquiescence, and possession taken must be open, hostile, and continuous.

19. Taxation ⇨734(7).

Sale of property for delinquent taxes and tax deed held void, where delinquent list failed to state amount of penalties (Pol. Code, § 3764).

Pol. Code, § 3764, provides that the delinquent list to be published by the tax collector must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by Clarence Myran and others against K. G. Smith and others. Judgment for named defendant, and plaintiffs appeal.

Reversed.

John F. Poole and H. E. Gleason, both of Los Angeles, for appellants.

Don Marlin and Charles S. Feeney, both of Los Angeles, for respondents.

PARKER, Justice pro tem.

The action is one to quiet title. The defendants, other than K. G. Smith, are fictitious persons. Appearance was made by but one defendant, K. G. Smith, and the issues as joined were between this defendant and the plaintiffs. From a decree establishing title in defendant, plaintiffs appeal.

[1-5] Before taking up the questions presented by appellants, we have the contention of the respondent to the effect that appellants failed to show any semblance of title in themselves, and that therefore they cannot be heard to complain of the weakness of respondent's title. The argument of respondent is based upon the fact that the evidence supporting plaintiffs' title consisted of the official record of a deed conveying the property to them as executors, and a duly authenticated copy of decree of distribution vesting the estate in them as individuals. The burden of the argument is that the intro-

duction of the record was improper and in itself insufficient, in the absence of proof of loss of the original conveyance. As far as the record before us discloses, no objection was made to the offer or the admission in the court below. The only record we have is the certified transcript on appeal, which recites merely that plaintiffs introduced in evidence the duly acknowledged deed, in Deed Book 2824, records of Los Angeles county, conveying to them the property in controversy. From the bare record we must assume, if preliminary proof were necessary to entitle the record to admission, that such proof was offered prior to the admission of the record. And further, in the absence of any objection or motion to strike, secondary evidence may become primary. The rule has always been that secondary evidence is admissible under certain circumstances, and that, when admitted, will serve as proof of the fact in dispute. Passing both of these features of the argument, we can find a complete solution of the point in the Code section and the authorities construing same. Code of Civ. Proc. § 1951; *Pray v. Anthony*, 96 Cal. App. 772, 781, 274 P. 1024; *Adams v. Hopkins*, 144 Cal. 19, 77 P. 712; *Mercantile Trust Co. v. All Persons, etc.*, 183 Cal. 369, 191 P. 691. The brief and argument of respondent on the point contains what purports to be evidence taken at the trial, but the bill of exceptions contains no such evidence. If the evidence thus presented were of any importance in determining the appeal, it should have been in the transcript or brought in by some appropriate proceeding. Also, the authorities cited by respondent on the question of the admissibility of the record construe the Code section as it read prior to the amendment, and have no bearing in applying the section as it now reads. No question is raised as to the ownership by appellants' grantor in the deed.

We may now consider the points of appellants. The title to the property was found to be in the defendant upon two grounds: First, that title thereto had been acquired by prescription; and, second, that defendant had acquired the title through a tax sale. We will first consider the question of prescription.

[6-8] The testimony brought before us in the transcript is quite meager. However, not one word of testimony discloses that the defendant K. G. Smith ever saw the property involved or ever made any claim thereto. The entire activity shown is that of one L. J. Smith, husband of the said K. G. Smith. Respondent contends this to be immaterial by reason of the law providing that all property acquired by either spouse during coverture, other than by bequest, devise, or gift, is community property. It is difficult to follow this

reasoning. It may be true, and no doubt is, that, after title vests in the husband, the property would be community property, but it would seem to be stretching the idea of the community a trifle too far to contend that a community interest arose from the inception of the adverse claim, sufficient to make every act of the husband that of the wife in as far as the essentials of a prescription might be involved. The right of the wife in property conceded to be community property is not a vested right. In the case of *Stewart v. Stewart*, which case was practically twice decided (199 Cal. 318, 249 P. 197; 204 Cal. 546, 269 P. 439), and referring to the last decision we find at page 553 of 204 Cal., 269 P. 439, 441, after citing many authorities the court says: "These authorities hold uniformly and consistently that during the marriage the husband is the sole and exclusive owner of all the community property, and the wife has no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survive him. A careful perusal of our former opinion will convince the most critical that we did not, in anything that we said therein, depart in the least degree from this long-established doctrine, so clearly and emphatically enunciated and adhered to in the many prior decisions of this court, a large number of which were referred to and discussed in our former opinion." Incidentally, we here note that the prescription claimed is alleged to have been initiated in 1920, and this action was commenced in July of 1926. We mention this here to indicate that the laws applicable were of that period rather than attempt to discuss the effect of the more recent Code amendments of later years.

In the present action there is not even an attempt to have the property decreed as community property, but the claim of title, and the title as found, is exclusively in the wife. If the wife acquired this property through prescription, it must be because all of the essentials of a prescriptive title have been shown. As noted, the defendant wife offered no evidence at all concerning her activities in the matter. She made no claim of ownership, adverse or otherwise, during the period of alleged holding; she was never shown to have been in possession of the property. We cannot conceive how she acquired any title thereto prior to the time the husband acquired title, in the face of the law that she would acquire no title even after the husband had become vested with the title through the prescription. We may, however, pass this point entirely, and assume, for the purposes of discussion, that the holding of the husband and his actions could be accredited to the wife. The record fails to disclose the presence of all of the elements necessary to constitute a complete title through prescription.

[9-12] The testimony of L. J. Smith, the husband, shows as follows: In 1920 he owned the lot next to the lot in dispute. He wanted to buy the lot in question to keep some one from building on it, and so he went to the title company to ascertain the owner thereof, in order that he might purchase. Stopping here, it seems conclusive that at that time, which was in February or March, 1921, there was no assertion of any claim of ownership or right, but expressly an acknowledgment of no claim at all. Continuing with the testimony, he learned at that time that the property was going to be sold for taxes in July, and in July he went up and bought the tax title. This was on July 26, 1921. In the month of about April or May he had procured lumber to build a garage, but did not build until after he had bought the lot at the tax sale. After he had bid in the property, but before deed, he went to some man who told him it was all right to build, and he did. He used the place off and on when down there, and when he was not there he rented it two or three different times to people who wanted it. The man that lives next door used it, but paid nothing. In addition to the foregoing, there is evidence, undisputed, that he (Smith) fenced two sides of the lot, leaving unfenced the side next to his own property and also the side next to the sidewalk, presumably the street. From the foregoing it is apparent that there is a lack of proof showing exclusive possession on the part of Smith, inasmuch as such possession as is shown appears to have been joint with some neighbor, with no word of evidence disclosing the nature of the possession by the latter. Under the record this man next door could assert as strong a title as does Smith. Further, the purchase of the tax title, under the evidence, discloses not an intent to claim the property adversely and against the whole world, but rather an effort to secure the rights of the delinquent owner. The testimony that Smith used the lot whenever he was down there is far too indefinite to support a claim of hostile, exclusive, and continuous possession. There are no equities in favor of a party seeking by adverse holding to acquire the property of another. *Glowner v. De Alvarez*, 10 Cal. App. 194, 101 P. 432. Indeed, the very purpose of all organized government is to protect one in the enjoyment of his property, rather than by some sort of artifice to deprive him thereof. Under the conditions shown and the testimony referred to, the question of inclosure becomes more or less unimportant. In *Pollack v. McGrath*, 32 Cal. 15, at page 22, it is stated: "The fences which constituted the only inclosure of the lots in controversy, admitting that they were erected and maintained as * * * stated, fall far short of a substantial inclosure. We are therefore of the opinion that the defendant's motion for

a nonsuit should have been sustained." Likewise here it needs no argument to demonstrate that a fence surrounding two sides of a lot with the front of the lot open could, under no construction, legal or mechanical, constitute an inclosure.

[13-18] It is conceded that the payment of taxes is one of the essential elements of acquiring title by adverse possession. The title cannot ripen in the adverse claimant without the payment of taxes. At the time of the filing of the action herein, the last half of the Los Angeles city taxes had not been paid and were delinquent. Subsequent to the filing of the action, the property was redeemed by the defendant. It would follow that, when the suit was commenced, the defendant had not paid all taxes and assessments levied upon the property during the five-year period. Without question, the filing of the suit was a break in the continuity and peace of the adverse holding, and the rights of the parties were to be determined as of the date of suit. It may be true that a different situation would be present if the tax had been levied and not yet due, as it is manifest that there can be no duty of payment until the same is due. However, the taxes delinquent had been long due prior to the commencement of the suit and unpaid. Authority need not be cited as to the necessity of the payment of taxes as an element of adverse holding. However, reference may be had to the following cases: *Glowner v. De Alvarez*, supra; *Cavanaugh v. Jackson*, 99 Cal. 672, 34 P. 509; *O'Connor v. Fogle*, 63 Cal. 9. Allowing taxes to become delinquent and the property to be sold and then redeeming the property is not payment. In *McDonald v. McCoy*, 121 Cal. 55, at page 73, 53 P. 421, 427, we find authority to the effect that, if payment of taxes "is an element in the adverse possession tending to show good faith, certainly during" the time "in which the taxes have not been paid the possession lacks an essential element required in the statute," and that "during all the years in which the delinquency was allowed, the true owner might forbear suit because of his knowledge that the person in possession had not paid taxes, thereby indicating that he was not holding adversely." To the same effect is *Gallo v. Gallo*, 31 Cal. App. 189, 159 P. 1058. Though the property here was not sold for taxes, but was redeemed before sale, the same reasoning would apply.

All in all, we conclude that the necessary elements going to create a title by prescription or adverse possession have not been shown. No personal right in the defendant appears, nor does any act on her part at all connect her with the property. The possession, or claimed possession, of the husband, lacked continuity or hostility, and the taxes were not paid. Indeed, on almost every phase of the case we have but a suggestion.

As has been said in some of the earlier cases, among which may be cited *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 P. 808, 810, 25 P. 378, 10 L. R. A. 484, to acquire the right by prescription in the lands of another, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner. To effect that result the possession taken must be open, hostile, and continuous—"he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."

[19] We come then to the claim of defendant based upon the tax deed. It is the contention of appellants that the tax deed was void and conveyed no title. It is unnecessary to recite the contentions of either party on this phase of the case. It is indisputable that the notice of delinquency is exactly the same as that before the District Court of Appeal and the Supreme Court in the following cases: *Bussenius v. Warden*, 71 Cal. App. 717, 236 P. 371; *Snodgrass v. Errengy*, 86 Cal. App. 664, 261 P. 497; *Gottstein v. Kelly*, 206 Cal. 742, 276 P. 347. In each of the cited cases the sale was held void. Quoting from *Bussenius v. Warden*, supra, at page 722 of 71 Cal. App., 236 P. 371, 373, we find: "Section 3764 of the Political Code, * * * provided, among other things, that the delinquent list to be published by the tax collector 'must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description. * * *' The foregoing statement from the findings shows that said delinquent tax list failed to set forth the amount due for penalties; although the notice of sale stated * * * that, 'unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold.' It thus appears that, although the proposed sale was conditioned upon nonpayment of penalties, the delinquent list as published was defective, in that it failed to state the amount of those penalties. Respondents contend, and apparently there is no answer thereto, that by reason of this defect the subsequent sale to the state was void, and that consequently the deed relied upon by appellant was likewise void." The *Bussenius Case* was followed in each of the other cited cases. Without further detail, the record here discloses exactly the same error, and we therefore must hold that the tax deed here under discussion is void and confers no title in defendant.

For the reasons hereinbefore stated, the judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

117 Cal.App. 148

McCLORY v. DODGE et al.
Civ. 4243.

District Court of Appeal, Third District, California.

Sept. 26, 1931.

Rehearing Denied Oct. 26, 1931. Hearing Denied by Supreme Court Nov. 23, 1931.

1. Licenses ⇨39.

Transaction whereby corporation obtained owner's stock, promising to deliver its own stock in exchange, *held void* under statute (St. 1917, pp. 675, 679, §§ 3, 12).

It appeared that president of corporation in question arranged meeting between owner of stock and corporation's agent and salesman, who promised to give unspecified number of shares of corporation's stock in exchange for certain stock belonging to owner, stating that corporation's stock would be delivered as soon as permit for its issuance could be obtained from corporation commissioner. St. 1917, pp. 675, 679, §§ 3, 12, provide that no company shall offer or negotiate for sale of any security of its own issue until it has secured permit, and invalidate any securities issued in violation of statute.

2. Licenses ⇨39.

Owner, having parted with stock under illegal executory contract, not being in *pari delicto*, could recover in action for money had and received (St. 1917, pp. 675, 679, §§ 3, 12).

Under such circumstances, law implies promise to refund stock, in view of fact that St. 1917, p. 675, § 3, forbidding corporation to sell any security of its own issue without obtaining permit, imposes entire penalty for violation thereof on seller of stock rather than on buyer, and is for benefit of buyer, who is therefore not in *pari delicto*.

3. Fraud ⇨59(1).

Person fraudulently induced to part with property, receiving nothing, may recover its full value.

4. Corporations ⇨116.

Owner delivering stock to corporation's agent in exchange for corporation's stock had title thereto until exchange was made according to owner's instructions.

As long as corporation retained possession of such stock and did not apply it according to instructions of owner, corporation held stock purely as owner's agent.

5. Corporations ⇨306.

Corporation which, before completing exchange agreement, converted proceeds of stock

acquired thereunder at least misappropriated stock, constituting tort for which directors or others concerned were personally liable.

6. Corporations ⇨306.

Evidence warranted presumption that directors knew manner whereby corporation acquired stock under exchange agreement, making them personally liable for its value.

7. Corporations ⇨306.

Directors who, through reasonable diligence and care, could have known that they did not own stock acquired under exchange agreement, *held* personally liable for value.

8. Corporations ⇨306.

Evidence showed that directors had actual knowledge of manner whereby corporation had acquired stock under exchange agreement.

9. Corporations ⇨306.

Directors cannot take property, and, having converted proceeds to use of themselves or corporation, escape liability by relying on inability of owner to prove that directors knew property belonged to him.

10. Evidence ⇨601(4).

Evidence that owner paid \$13,000 for stock, and, under exchange agreement, received \$13,000 note therefor, and that parties treated stock as being worth \$13,000, made *prima facie* showing of value and sustained findings.

11. Appeal and error ⇨1071(5).

Immaterial findings, whether supported by evidence or not, may be disregarded.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by N. E. McClory against Jonathan S. Dodge and others. Judgment for plaintiff, and defendant named and others appeal.

Affirmed.

Superseding opinion in 296 P. 658.

Hearing denied by Supreme Court; SHENK, J., dissenting.

H. L. Carnahan, of Los Angeles, Harry Povey, of Boise, Idaho, and Person & Rodgers, Edmund H. Hinshaw, Howard R. Hinshaw, and Raymond Tremaine, all of Los Angeles, for appellants.

Joseph S. Campbell, of San Diego, for respondent.

PRESTON, P. J.

Plaintiff and respondent N. E. McClory brought this action to recover the value of certain shares of stock which he claims had been secured from him under an illegal contract and by fraudulent representations.

The case was tried before the court without a jury, and resulted in a judgment in favor of plaintiff and against all of the defendants. From this judgment, the defendants Dodge, Harrison, Welch, Hunter, and Griffis have appealed. Hool and Boyd did not appear at the trial and judgment was entered against them by default, and they have not appealed.

The facts necessary for a correct understanding of the questions involved may be thus briefly stated: The Federal Securities Corporation was a stock brokerage house in Los Angeles, buying and selling stocks generally, but particularly the stock of the Union Mortgage Company. Its principal agent and salesman was one R. G. Boyd. Commencing in June, 1923, and continuing from time to time until April 1924, respondent had purchased through Boyd 13,000 shares of the preferred stock of the Union Mortgage Company, for which he had paid the total sum of \$13,000. About the first of May, 1924, James A. Hool, the then president of the Federal Securities Corporation, wired respondent, who resided in San Diego, that Boyd was coming to San Diego, representing the Federal Securities Corporation, and would "have something very important," to discuss with him. Pursuant to this arrangement, Boyd and respondent met in San Diego. At this meeting, Boyd made a proposition to respondent to give him a certain number of shares of the preferred and common stock of the Federal Securities Corporation, the number not being stated, for the 13,000 shares of the Union Mortgage Company owned by respondent, informing him that the stock of the Federal Securities Corporation would be delivered to him as soon as a permit for its issuance could be secured from the corporation commissioner, for which an application had been made, and that this permit would be issued in a short time. Respondent accepted the proposition of Boyd, and delivered to him his 13,000 shares in the Union Mortgage Company. Boyd gave respondent a typewritten sheet of paper, termed by respondent as a "subscription"; the exact wording of this document is not revealed by the record. Boyd delivered respondent's 13,000 shares of the preferred stock of the Union Mortgage Company to Hool, the president of the Federal Securities Corporation, who turned said shares into the Federal Securities Corporation, and said corporation, Federal Securities Corporation, afterwards sold the stock of respondent to various persons and received and retained the money therefor. The corporation commissioner refused to grant the Federal Securities Corporation a permit. Thereafter, and on October 14, 1925, Boyd again called upon the respondent and gave him a note, dated May 10, 1924, signed by James A. Hool personally for \$13,000 and took from respondent the so-called receipt or "subscription," stating to respondent at the time that the note was to act as a substitute for the "sub-

scription" blank, as the corporation commissioner objected to the Federal Securities Corporation taking the "subscription." Respondent was told by Boyd that note could and would be exchanged for the shares of stock in the Federal Securities Corporation, when that corporation obtained the permit to issue stock.

The Federal Securities Corporation paid respondent interest on this note every month from May 1 to December 1, 1924. In the month of February, 1925, the Federal Securities Corporation was adjudged a bankrupt. Shortly thereafter Hool was also adjudged a bankrupt. The Hool note was never paid, and respondent never received anything for his stock in the Union Mortgage Company, save and except the interest above set forth, which amounted to \$624.

Hool, Hunter, and Griffis, three of the defendants, were directors of the Federal Securities Corporation from a time at least several months prior to May 1, 1924, and until after October 14, 1924. James M. Welch, another defendant, became a director on the first or second of May, 1924, but resigned and severed his connection with said corporation the latter part of August, 1924, or the first of September. Jonathan S. Dodge and Hyman Harrison, two other defendants, admit by their answer that they were directors on and after May 9, 1924. All the appealing defendants were directors and in control of the affairs of the Federal Securities Corporation when respondent's stock was sold, and they authorized and directed the sale thereof to various individuals. All the proceeds of these various sales were used by these defendants in the operation of the business of the Federal Securities Corporation.

[1] There can be no question but that the stock transaction between Boyd and respondent was in direct violation of the California Corporate Securities Act, and therefore, void. Stats. 1917, p. 673; Act 3814, Deering's General Laws of 1923. Section 3 of said act provides in part: "No company shall sell, * * * or offer for sale, negotiate for sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 12 of the act renders void any securities issued in violation of the statute. See, also, *Castle v. Acme Ice Cream Co.*, 101 Cal. App. 94, 281 P. 396; *Tatterson v. Kehrlein*, 88 Cal. App. 37, 263 P. 285, 291; *Imperial Livestock Co. v. Tracy*, 208 Cal. 205, 281 P. 50.

In *Tatterson v. Kehrlein*, supra, the court said: "The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in *pari delicto*, and the buyer may have judgment for the money paid out by him under the illegal contract."

[2] Therefore, respondent having parted with his property under an illegal contract, and not being in *pari delicto*, and the illegal contract remaining purely executory, has a right to recover his property in an action for money had and received. And, under such circumstances, the law implies a promise to refund it. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Smith v. Bach*, 54 Cal. App. 236, 201 P. 611; *Wassermann v. Sloss*, 117 Cal. 425, 49 P. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *National Stone Tile Corp. v. Voorheis*, 93 Cal. App. 739, 743, 270 P. 286; *Rose v. Foord*, 96 Cal. 152, 30 P. 1114; *Cal. Credit, etc., Corp. v. Goodin*, 76 Cal. App. 785, 792, 246 P. 121; *Almquist v. Garner*, 53 Cal. App. 305, 200 P. 76.

[3] The rule is also well settled in this state that one who has been induced by fraud to part with property, receiving nothing in return, will be entitled to recover the full value of what he has thus given. *George Cople Co. v. Hindes*, 34 Cal. App. 580, 170 P. 155.

Appellants admit that Federal Securities Corporation, which is now bankrupt, owes respondent for his stock, but strenuously contend that even though they were directors and in control of the affairs of the Federal Securities Corporation when respondent's stock was sold, directed the sale thereof, and received the money therefor, and used the same for the benefit of the Federal Securities Corporation, still they are not personally liable for the reason that they had no knowledge of the acts and conduct of Boyd in securing possession of respondent's stock in the first instance, and were not directors when the Federal Securities Corporation secured the stock from respondent through Boyd and Hool.

[4, 5] From all the facts and circumstances surrounding the entire transaction, we are unable to agree with this contention of appellants. Boyd was the agent of the Federal Securities Corporation. Respondent gave him (Boyd) his property to be used by that corporation for a certain purpose, to wit, in exchange for stock in the Federal Securities Corporation. The stock was still the property of the respondent; the title was still in him until the exchange was made according to respondent's instructions. The Federal Securities Corporation, as long as it retained possession of this stock and did not apply it according to the instructions of respondent, held it purely as the agent of respondent. Respondent placed his stock in the hands of the Federal Securities Corporation for the single purpose of exchanging it for stock in that corporation. When they took it and converted the proceeds to their own use, they violated their trust and were guilty of at least misappropriating respondent's stock. Such an act was a tort, for which all persons concerned could be held personally liable. Respondent's stock was sold on May 15 and 16, 1924, when all of

the appellants were directors and in charge of the Federal Securities Corporation.

Appellants, as directors of the Federal Securities Corporation, held monthly meetings and went over the affairs of the corporation minutely. The appellant Welch had the books of the corporation audited, and, failing to find the company in as flourishing condition as he had been led to believe it was, resigned in August, 1924. Interest was paid to respondent on the Hool note from May 1 to December 1, 1924. Boyd was the agent of the corporation until it became bankrupt.

Appellants did not testify or offer any proof showing that they had no knowledge of how respondent's stock got into the possession of their company. Neither did they give any excuse why they could not have obtained such knowledge by the exercise of ordinary diligence.

[6, 7] We think that, in view of all the facts and circumstances in this case, the directors were presumed to know the relation existing between the corporation and the respondent, and if, by the exercise of reasonable diligence and care on their part, they could and would have known that they did not own respondent's stock, they are personally liable to him for the value thereof.

[8] We think, also, that the evidence is sufficient to show that they had actual knowledge of the conditions under which the Federal Securities Corporation held respondent's stock.

Dodge testified on cross-examination that when he became president and manager of Federal Securities Corporation there was turned over to him by Hool about \$15,000 in cash, and that of this amount \$5,000 still remained in his hands at the time of the trial of this action, but refused to give any portion thereof to respondent.

[9] Certainly directors of a corporation cannot take a man's property, sell it, and convert the proceeds to their own use or to the use of the corporation and escape liability to the owner of the property, by simply saying to him, "You cannot prove that we knew that the property converted by us belonged to you, and therefore we are not liable." Surely there is no principle of law or equity that would uphold such an unjust rule. We think the conclusion here reached is supported in principle by the following authorities: *Vujacich v. Southern Commercial Co.*, 21 Cal. App. 439, 132 P. 80; *Mercer v. Duscomb et al.* (Cal. App.) 293 P. 836; *Frontier Milling & E. Co. v. Roy White Co-op. M. Co.*, 25 Idaho, 478, 138 P. 825.

[10] There is no merit in the contention that there is no evidence showing that the respondent's stock was worth \$13,000. The Hool note was for \$13,000. The stock cost respondent

\$13,000, and all of the parties especially Hool, Boyd, and respondent, treated the stock as being worth \$13,000, and there is absolutely no testimony in the record to the contrary. This is surely a sufficient prima facie showing of the actual value of the stock to sustain the findings of the court.

[11] Strenuous contentions are made that certain findings are not supported by the evidence. There is considerable merit as to these contentions in a number of instances, but, under the view we have taken of the case, these findings are immaterial and can be disregarded.

We think the court's judgment was correct and should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

117 Cal.App. 334

PEOPLE v. BERMAN.

Cr. No. 2051.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1931.

Rehearing Denied Oct. 16, 1931.

Hearing Denied by Supreme Court.

Nov. 2, 1931.

Forgery $\S$ 44(1/2).

Defendant held properly convicted of forgery (Pen. Code, $\S$ 470).

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Jacob Berman, alias Jack Bennett, was convicted of forgery, and he appeals.

Affirmed.

See, also, 286 P. 1043, 104 Cal. App. 259; 287 P. 125, 105 Cal. App. 37, 287 P. 373, 105 Cal. App. 270.

William B. Beirne and Rush & Beirne, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, J.

This is an appeal from an order denying motion for a new trial and from judgments of

conviction on counts III, IV, and V of a grand jury indictment which contained five counts. Trial was had before the judge sitting without a jury. After 322 pages of the "brief" of the appellant, the most strongly emphasized points argued by appellant appear in the "conclusion" thereof, starting at page 323. In this conclusion, such phrases are used as: " * * * Are saturated with errors of law too gross even for the saving and redeeming power of section 4 1/2 of article 6 itself. * * * No candid and impartial mind can scan the testimony * * * without an uneasy and restless sense of the legal insufficiency of such evasive and equivocal testimony to support a judgment of conviction. * * * No candid and impartial mind can scan the testimony * * * upon which appellant was convicted on counts IV and V of the indictment without embracing the conclusion. * * *"

"A total abdication of candor and impartiality is required to distort acts of the appellant, mentioned in counts IV and V of the indictment, into a scheme or plan to defraud the very corporation. * * * No candid and impartial mind, reviewing the course of this proceeding from the finding of the indictment to the passing of judgment upon the appellant, can escape the disturbing and unpleasant impression, that the accused was tried, convicted and sentenced because of *who he was*, and not because of *what he had done under the charges against him*. * * *"

"The trial judge, in violation of express law, neglected and failed to make a frank disclosure of the bias and prejudice so clearly manifested by the exhibition of gross partisanship. * * *"

"Contemplating the flood of error that streams through this record from both the prosecution and the trier of the accused, we cannot bring ourselves to suppose that a judgment of conviction grounded thereon will be permitted to stand unredressed in this court."

This last clause could be taken by this court as a confession of the weakness of all the points urged in appellant's brief—at least to include in a brief any such language usually means that the attorneys presenting the brief have no confidence in any argument contained therein. Such language could only be intended to prejudice this court improperly in passing upon this appeal. The intemperate language used in such conclusion has compelled more than the usual examination of the record—that is, an examination of *other* parts of the record than those discussed in the brief, because the quotations from the evidence contained in appellant's brief hardly bear out the intemperate language herein quoted by us therefrom.

After such examination of the record in this case, we are of the opinion that there are but two questions of law raised in this volu-

minous brief that really merit any discussion by this court: Point 1: That section 170 of the Code of Civil Procedure, as amended in 1927 (St. 1927, p. 1403, § 1), made it necessary for the trial court, within five days after presentation and filing of the affidavit by which the appellant attempted to charge bias and prejudice, to file his consent in writing with the clerk that the action or proceeding be tried before another judge, or to file with the clerk his written answer admitting or denying any or all of the allegations contained in the statement filed herein, and that he should set forth any additional fact or facts material or relevant to the question of his disqualification.

It appears from the argument of appellant that his construction of this section is that he could file the affidavit after the issues of fact had been fully tried, even after a judgment had been rendered by the court, and after an extension of time had been granted within which to make a motion for a new trial. When this time had been extended to within two or three days of the time within which sentence would have to be pronounced or a new trial automatically awarded defendant only because it had *not been so pronounced, then, and not until then*, did appellant file his affidavit, which affidavit itself showed that he was relying upon facts which were within his knowledge during the course of the trial, and long before his motion for a new trial was made. It does not appear from said affidavit whether or not the feeling objected to was caused by the evidence introduced in such trial. If his contention is right as to the construction of the section regarding the disqualification of judges, and if his affidavit was sufficient, it would have actually precluded the sentencing of defendant under the judgment of conviction within the time required by law, automatically resulting in a new trial being granted, whether or not a new trial should have been granted in accordance with his notice of motion for a new trial. However, as we read this section, it does not so provide. It might be, in a case where a sworn statement objecting to the hearing of such matter, or to the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth a fact or facts constituting a ground or grounds of disqualification of such judge, had been filed, as provided by section 170, Code of Civil Procedure, with reference to matters that were only learned by the defendant immediately prior to the pronouncement of judgment. But this is a question which we do *not* have before us, and we do not have to decide if such affidavit *must* be filed before any evidence is introduced.

In the instant case, the statement filed does not contain any *statement of facts*, showing disqualification of the trial judge, although the language used by the trial judge in the

case of *People v. Johnson and Lavine*, when those defendants were before the court for sentence, during the time that the instant case was on trial, was probably unnecessary, and such comments might be construed by some people to be a reflection upon any one connected with the Julian Case. Yet there is nothing in this affidavit attempting to charge bias of the trial court which in any way shows a disqualification of the judge to proceed to hear the motion in this case, or which could be twisted into a statement that he in any way believed, at the time referred to, that defendant was guilty as charged in the information. In fact, no point was made of it by the appellant until long after the court had granted extensions of time for the hearing of his motion for a new trial to such a period of time, when defendant's attorneys must have known that to file the same, if it were in compliance with section 170, Code of Civil Procedure, *as construed by them*, would of necessity cause a new trial to be granted by reason *only* of the fact that the trial court would thereby be without power to impose sentence within the time required by law.

At the time of the ruling in the case of *Keating v. Keating*, 169 Cal. 754, 147 P. 974, section 170, Code of Civil Procedure, was in an entirely different form than it is to-day. It is true, of course, that almost all defendants, after they have been found guilty by a judge sitting without a jury in criminal matters, consider that the trial judge is prejudiced against them by reason of such verdict. The section as it now reads is evidently worded to avoid the difficulty that would be experienced under the new statute if it had been worded so that the affidavit could be filed after evidence had been introduced or after the decision of the court. That is evidently the reason for the insertion of the provision in the new section 170: "The statement of a party objecting to the judge, on the ground of his disqualification, shall be presented at the *earliest practicable opportunity, after his appearance and discovery* of the facts constituting the ground of the judge's disqualification, and in any event *before* the commencement of the hearing of *any* issue of fact in the action or proceeding before such judge." (Italics ours.)

In the given case, it is not clear whether the trial judge struck out the so-called affidavit of prejudice because it was filed too late, or because it did not contain any *statement of fact* that would make it "appear probable that by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial cannot be had before him." The statement as to the reference by the trial judge to the grand jury of the matters brought out in evidence before the trial judge could not in any way show any prejudice against defendant. The quoted statement made by the trial judge in sentencing the de-

fendants Johnson and Lavine in another case does not on its face show any prejudice on the part of the trial judge against the defendant here. The conclusion in the affidavit presented, that the trial court was prejudiced, was based and limited by such affidavit itself solely and only on the facts alleged in the affidavit; which facts, weighed in any light which is proper, could not be considered as showing any prejudice on the part of the trial court against this defendant. This being so, point 1 is not well taken.

The foregoing disposes, to our minds, of the questions raised under points 1, 2, 3, and 4.

Another point which we are asked to consider is the construction placed upon section 470 of the Penal Code. The construction placed by appellant upon this section is apparently that the first 28 words of said section, to wit: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * is guilty of forgery," cannot be construed as we have just quoted it with the last four words only added, but that for some reason it must be construed in toto with words that have no bearing on the instant charge. It is not necessary that the whole of said section be violated by a person to make him guilty of a crime denounced therein, because other than the portions quoted by appellant there is in such section also a proviso that: "Every person who * * * counterfeits or forges * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence * * * is guilty of forgery." Thus it appears that the acts charged against appellant and the proof adduced at the trial of the cause would clearly show violations of the portions of section 470, Penal Code, which we have quoted in this opinion.

We do not think the "saving and redeeming power" of section 4½ of article 6 of the Constitution is necessary to be invoked in this case in order to sustain a judgment of conviction. As we find no errors in the rulings of the trial court, and since there was sufficient evidence to justify the verdict, the judgments of conviction on counts III, IV, and V are affirmed, and the order appealed from is affirmed.

CONREY, P. J.

I concur in the judgment. I do not concur entirely in the criticisms of appellant's brief,

although it is too perfervid in its eloquence. While we may find that the positions taken by appellant are not sound, nevertheless his propositions are clearly stated, together with abundant citations of authority which appellant thinks are in support of his position.

The verified statement by which appellant sought to disqualify the trial judge from further proceeding in the case is found in the clerk's transcript, beginning at page 103. It was filed on the 8th day of August, 1930, only two days before the time when, in the regular course of procedure, the power of the court to pronounce sentence would have expired. When the time has thus expired without the imposing of sentence the defendant becomes entitled to a new trial, if he so demands. Pen. Code, §§ 1191 and 1202. It is argued by the Attorney General that section 170, Code of Civil Procedure, could not have been intended to apply in favor of a party who has delayed his attempt to disqualify the judge to so late a date as was done in this case, and that, if the defendant and appellant is sustained in his contention here, it would result that the defendant in a criminal case has it in his power to secure new trials ad infinitum. The appellant responds that under such circumstances the pendency of the proceeding for disqualification of the judge should be held to have suspended the requirements of the statute as to the passing of sentence until the matter of such disqualification has been determined. As authority for the principle involved he refers to *People v. Lauman*, 59 Cal. App. 144, 210 P. 421. However this may be, I am of opinion that appellant was too late in taking steps to establish the disqualification of the judge on the grounds of bias and prejudice. It is provided in section 170, Code of Civil Procedure (Stats. 1929, p. 958), as a limitation of the right of a party to institute a proceeding of this kind, that "the statement of a party objecting to the judge, on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge." Here it appears that all of the facts upon which defendant relied to establish the disqualification of the judge were known to him at least as early as the 25th day of July. No good reason appears why such charge of disqualifying bias and prejudice on the part of the judge should not have been made promptly at that time. Further, I am satisfied that, when a proceeding for disqualification of a judge is not instituted within the time permitted by the statute, it is appropriate for the court to order that the disqualifying statement be stricken from the files. This is an appropriate method of signifying on the record the fact that no disqualifying proceed-

ing is legally pending, and that the judge, notwithstanding the filing of such proceedings, will proceed to exercise his authority in the case.

On point 5: I do not think that the court erred in allowing the prosecution to reopen the case to introduce additional evidence as was done. On point 6: I do not think that the court erred in receiving in evidence testimony offered for the purpose of proving other separate and distinct offenses not charged in the indictment, in order to show defendant's intent to defraud, and his plan to do so. *People v. Whalen*, 154 Cal. 472, 476, 98 P. 194.

Point 7 presents a more serious and a more doubtful question. Appellant contends that the court erred in overruling his objections to the testimony of certain witnesses with reference to the purported overissue of the stock of the Julian Petroleum Corporation, and in denying appellant's motion to strike said testimony. (See appellant's opening brief, p. 183, et seq.) This evidence had relation to the question of overissuance of stock; that is to say, the question whether at a particular time there was or had been an issue of stock of the corporation in excess of the 600,000 shares authorized by the corporation commissioner. The court found that it was not reasonably practicable to present the original detailed evidence as the same might be found in the records of the corporation. These were so voluminous and involved so many details that the only practical method was to present the result of investigations made by witnesses. For that purpose these persons, having qualified themselves as accountants and auditors of account books, were allowed to testify. Of the propriety of such procedure I have no doubt. But in such case the expert ordinarily will have prepared himself by an examination of the original record. In the instant case in some instances the testimony was not based directly upon original records, and so did not to the fullest extent comply with the rule. But a reading of the entire testimony of these witnesses on the subject in question is very convincing to the fact that the stock books, ledgers, etc., of the Julian Petroleum Company had passed into the hands of a receiver, and that the testimony of these witnesses was based upon an examination of those documents as found in the possession of the receiver. With due regard to the right of the defendant to be confronted by the witnesses against him, the practical necessities of the administration of justice require that, in relation to complicated transactions involving the use of numerous and extensive documents, the results of examinations made out of court should be allowed to be received as evidence in such a case. So long as this is done without infringement upon the substantial rights of the defendant, no complaint of such procedure should be made. Another and further reply to this point of appellant is that

his own deposition as read in evidence shows that, at the period of time in question in this case, he was well aware of the fact that a large overissue of stock of the corporation had been accomplished, and that he himself had been dealing in such overissued stock. This being so, he could not be seriously prejudiced by an error of the character of that of which he now complains.

Point 8 of appellant's brief is that counts IV and V of the indictment on which he was convicted do not, nor does either of them, state facts sufficient to constitute a public offense under section 470 of the Penal Code. In count IV of the indictment the defendant was accused of "the crime of forgery of fictitious name on endorsement," a felony, committed as follows, to wit: That the defendant did willfully, unlawfully, feloniously, falsely, and fraudulently, and with intent then and there to cheat and defraud the Julian Petroleum Corporation and others to the grand jury unknown, make and forge the fictitious name of F. C. Waters to and upon the back of a certain certificate of stock of the Julian Petroleum Corporation, which said certificate of stock was in the words and figures as follows, to wit: Here follows a copy of the certificate of ownership of 100 shares of the stock of one F. C. Waters "transferable only upon the books of said corporation by the holder hereof in person or by duly authorized attorney upon the surrender of this certificate properly endorsed." On the back of the certificate was indorsed a form of transfer in blank to which was signed the name F. C. Waters. It was further charged that the defendant, well knowing that the fictitious name of Waters was so falsely made and forged to and upon the back of the said certificate of stock, did, then and there, willfully, unlawfully, fraudulently, falsely, and feloniously pass, utter, and publish the fictitious name of the said F. C. Waters, so falsely made and forged to and upon the back of the said certificate of stock as aforesaid, and the said certificate of stock with the fictitious name F. C. Waters so falsely made and forged to and upon the back thereof as true and genuine, with intent, etc. Count V is the same as count IV, except that it refers to another certificate of stock and another fictitious name. On page 165 of the appellant's brief he prints such parts of section 470 of the Penal Code as he considers pertinent here, as follows: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * any certificate of any share, right, or interest in the stock of any corporation * * * or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to

prejudice, damage, or defraud any person * * * is guilty of forgery." The contention of appellant that these two counts do not, nor does either of them, state a public offense, is amplified in the further propositions: (1) That there is no such specific offense known to the law of California as forgery of fictitious name on indorsement of a certificate of stock as set out in said count; and (2) that if, nevertheless, this court should be of opinion that the above-quoted section 470 of the Penal Code denounces forgery of fictitious name on indorsement of the certificate of stock as a specific offense, then, and in that case, said offense is not alleged in the said counts according to law. An examination of the section will show that, in addition to its enumeration of "any certificate of any share * * * in the stock of any corporation," the section also includes the words "any transfer or assurance of money, certificates of shares of stock," etc. Reading the words of the indictment, including the copies of the certificates of stock and of the blank certificates of transfer on the back of the certificates of stock, and considering with said language of the indictment the terms of the statute, it appears that the defendant must have understood that by the indictment he was charged with having forged the stated fictitious name to a blank certificate of transfer of the share of stock described in count IV, and likewise the similar blank certificate of transfer in count V. It is of course true, as counsel for appellant states, that a certificate of stock is not a negotiable instrument, and that there is no such thing as an *indorsement* of a certificate of stock in the sense of the Negotiable Instruments Law. But there are instances where the word "indorsement" is commonly used to express the meaning of a transaction which is not an indorsement of a negotiable instrument. This is illustrated in the instant case, where the certificate of stock itself provided for transfer of the shares "upon the surrender of this certificate properly endorsed."

HOUSER, J.

I dissent. Not that I am unable to agree with each of my respected associates in many of the different and most substantial factors which constitute the reasons for the conclusion reached by each of them respectively, but that in a few of the more important questions submitted by appellant to this court do I find myself unable to concur with the views expressed in either of the opinions hereinbefore set forth and upon which the affirmance of the judgment and the denial of the motion for a new trial must rest.

At the outset, in connection with the animadversions cast by one of my associates upon the brief presented in behalf of appellant, although fully recognizing the fact that in some respects the language to which objection

is made, as addressed either to an appellate court or to any other tribunal, is of a character not deserving commendation, nevertheless, in my opinion, it should be viewed more from the standpoint of an earnest and zealous advocate at the bar rather than from the more placid and seclusive situation of a jurist in chambers with nothing before him other than the "cold record" and the "dusty tomes of the law." In any event, the fault or dereliction of the attorney and counsellor in that regard should bear no weight in the scales of justice so far as a determination of the legal rights of the appellant is concerned; and I am more than convinced that in reaching his conclusion on each of the several points urged by appellant herein my learned and respected associate has been able to fully and completely discharge from his mind any thought of what he may have considered unethical conduct on the part of the attorney in the case.

The first obstacle to a concurrence by me in the opinion of either of my associates arises from the situation presented by the specification of error suggested by appellant to the effect that his substantial rights were prejudicially affected by the fact that, preceding the hearing of his motion for a new trial, the trial judge ordered stricken from the record appellant's verified statement by which the bias and prejudice of said judge was made to appear. My understanding of the basis for the conclusion reached in each of the prevailing opinions herein is that in the premises, in the exercise of a sound discretion, the trial judge was justified in his action in the particular of which complaint is here made, for the reasons that such verified statement was filed too late; and (at least according to the opinion of one of my associates) that, had said verified statement not been stricken from the files, by the provisions of sections 1191 and 1202 of the Penal Code the compulsory result would have been that, irrespective of the contents of the verified statement and its consequent merit or lack thereof, a new trial to the defendant would have eventuated. On examination of that part of the provisions of section 170 of the Code of Civil Procedure which relates to the time within which may be filed the verified statement of the party to an action who may seek to establish the disqualification of the judge before whom such action or proceeding is set for hearing, it will be noted that the statutory requirement is that such statement "shall be presented at the earliest practicable opportunity, after * * * discovery of the facts constituting the ground of the judge's disqualification. * * *"

Since it appears that the facts were discovered by appellant or his then counsel not later than the 25th day of July, and that the verified statement was not filed until August 8th following (a period of two weeks), the first

question to be considered is whether there was a sufficient compliance with the legal requirement that such statement be presented "*at the earliest practicable opportunity.*" As disclosed by the record herein, the facts which tended to establish the diligence of defendant in the premises are contained within his verified statement thereof as follows:

"Defendant avers that owing to his insolvency, he was compelled to request the services of the public defender of Los Angeles county in the preparation and presentation of his defense in this action; that said public defender represented him at said trial and during all the proceedings prior and subsequent thereto until after decision had been rendered herein finding defendant guilty as aforesaid; that thereafter said public defender filed herein a motion for a new trial of the action on the 30th day of July, 1930, at which time, and upon the performance of which service, said public defender deeming his professional obligation to this defendant terminated, withdrew from further participation in his defense and has since declined to further represent him herein; that on said 30th day of July the hearing on said motion for a new trial was, by the Honorable B. Rey Schauer, judge as aforesaid, set for August 8, 1930; that defendant has been put to great trouble and inconvenience in obtaining capable and competent counsel to prepare and present his defense herein, and defendant avers that he has been able to make suitable arrangements with other counsel to represent him herein only within the last 48 hours; that on the 6th day of August, 1930, he definitely effected an arrangement with the law firm of Rush and Beirne, counsellors at this bar, to represent him in his further defense herein, and especially to represent him in the matter of said motion for a new trial now pending herein; that immediately upon the engagement of such new and substituted counsel he instructed them to prepare the requisite papers and to take the requisite steps to secure the motion of said B. Rey Schauer, judge as aforesaid, from further hearing and determining any of the issues of fact or law to be heard and determined in this action, because of the facts hereinbefore shown; that this defendant is confined in the common jail of Los Angeles county and under strict guard of agents and officers of the federal government; that because of such confinement he has been greatly impeded and inconvenienced in consulting with his said counsel and in the preparation of his further defense herein, and his said counsel have been compelled to familiarize themselves with the merits of this action and of defendant's grounds of defense under the difficulties imposed by the confinement of this defendant; that the record made on the trial of this action filled 21 volumes of more than a thousand pages of the transcript; that it was necessary

for defendant's counsel to read and study this voluminous record in order to properly prepare and present defendant's further cause of defense herein, and to familiarize themselves with the proceedings therein prior to the filing of the motion for a new trial, by reason whereof defendant has been unable sooner to prepare and present this his statement of objections to the further hearing hereof before the said B. Rey Schauer, judge as aforesaid, and defendant now presents and files same at the earliest practicable opportunity after discovery of the facts shown herein."

It thus appears that on the same day on which the motion for a new trial herein was filed the public defender, who theretofore had represented defendant in all prior proceedings in the action "withdrew from further participation" in the defense of defendant, who then was in jail, financially insolvent, and, up to a time within 48 hours of the date of the filing of his verified statement, unable to procure the services of suitable counsel to further represent him in court; that the record in the trial of the action consisted of more than 1,000 pages of typewritten transcript; and that, in order to properly present the verified statement of defendant in the matter of the proposed disqualification of the trial judge, it was necessary for counsel for defendant to read such record and to familiarize themselves with the proceedings in the action which preceded the filing of the motion for a new trial.

It will be remembered that none of the alleged facts which tended to establish the disqualification of the trial judge came to the knowledge of defendant until after his trial had commenced, at which time it is most likely that defendant believed in his innocence of either of the crimes of which he was charged and hoped for an acquittal thereof. Nor is it beyond the realm of probabilities that, even after defendant's "discovery of the facts," because of fear of the effect upon the result of the trial in which he was engaged, he properly and in the exercise of due caution hesitated to make the charge of disqualification of the trial judge. Before the decision by the trial court was rendered in the action, manifestly defendant could have had no knowledge that it would be necessary that he make a motion for a new trial; and, after the trial was concluded, five days elapsed before his then counsel gave notice of his intention to make such motion; at which time he abandoned the cause of defendant. Notwithstanding the situation in which defendant thereupon was placed, but one week elapsed before he had secured new counsel to represent him; and it is most apparent that thereafter such counsel acted most expeditiously in the premises. Because of the limitations upon human capacity and endurance, it is almost incredible that within a space of 48 hours the volumi-

nous transcript of the testimony and precedent proceedings herein could have been read, digested, and mastered, and the verified statement, dependent not only thereon but as well upon other related but wholly independent facts, could have been prepared and presented to the trial court.

Considering the surrounding circumstances, to my mind it is clear that within the meaning and intent of the language of the statute the verified statement of defendant was "*presented at the earliest practicable opportunity.*"

Although it may be conceded that by no express language contained in section 170 of the Code of Civil Procedure is the judge whose disqualification is at issue forbidden to summarily determine whether such verified statement has been presented "*at the earliest practicable opportunity,*" from a reading of the entire statute it would seem that its spirit and intent is that, upon the filing of such a statement, the recused judge ceases to have authority in the premises.

Nor am I able to perceive the force of the argument in substance that, because (as asserted) at the time the verified statement was filed but two days remained before the statutory period within which judgment might be pronounced would expire, and thereupon the defendant would become entitled to a new trial, it should follow that no error was committed by the trial court in its order by which in effect consideration of the charge against the trial judge was refused. In the statute in question no direct provision may be found which in itself places any limitation upon the time within which the verified statement may be presented. Of course, in the construction of a given statute, the provisions of other related statutes may be taken into consideration; but it is plain that, where a positive right is conferred by the provision of one statute, such right may not be arbitrarily denied, because, forsooth, the provisions of some other statutes in their ultimate effect may create an apparent conflict with the absolute right conferred by the questioned statute. Then, too, since the statute here in question is later in its date of enactment than is either of the other statutes, why would it not be as reasonable to say that its or their provisions was or were held in abeyance, modified, or, if necessary, repealed, rather than that the statute here under consideration should be denied effect?

But in the instant case it is not certain that, because the verified statement was filed but two days before the statutory time for pronouncing judgment would expire, necessarily it would follow that the question of the asserted disqualification of the trial judge could not or would not have been determined within the statutory period for pronouncing the judgment. For aught that appears, there

was time yet remaining within which every act contemplated by either or all the statutes bearing upon the matter might have been fully, adequately, and fairly performed.

However, as is shown in the opinion herein of one of my respected associates, it is urged that the verified statement presented by defendant "*does not contain any statement of facts*"—from which it is inferentially argued that the trial judge was justified in making the order by which the verified statement was stricken from the files of the action.

An examination of the verified statement, as it appears in a space covering 22 pages of the clerk's transcript herein, discloses what ordinarily would seem to be many pertinent facts from which it might be possible to deduce the correctness of the charge preferred against the trial judge. Among other facts, the verified statement recites that each of the several offenses for the commission of which defendant was on trial arose out of what has been termed the "Julian mess"; that during the course of the trial of defendant proceedings were halted for the purpose of pronouncing judgment upon two certain other defendants who theretofore had been convicted of a separate and independent offense which purportedly was an "off-shoot" of the main crime; that in so doing the trial judge made remarks as follows:

"Another circumstance makes this case by comparison fade to far less significance than it might otherwise have. That circumstance is the fact that your crime is but an off-shoot of the great Julian crime-orgy. After all, you are but small fry. Before the Julian mess, you probably were, and but for it would be now, honorable, law-abiding citizens. You had seen paraded before your eyes and before the eyes of the whole world, the spectacle of the filching of many millions of dollars from forty thousand persons and those arch thieves going free, coddled, pampered and protected, corrupting and bringing disgrace and penalization as well as pecuniary loss to others, but themselves apparently immune from any penalty of law. No person has as yet been convicted in any court of any crime for any part of the great robbery itself. A little small change from the millions stolen and some liquor probably purchased with stolen money, plied to benumb the senses of almost a lifetime of service, ensnared one or two others and they are paying the penalty for their weakness—their weakness? Their lack of moral and intellectual stamina sufficient to cope with the great iniquitous power which conceived and has so far successfully executed the plan of stealing the millions from the forty thousand persons and of avoiding any punishment therefor. The great Julian whirlpool—you people were caught and wrecked by it and now like bits of flotsam are decked from its edges,—society has been

quick to be exacting with you—as it should be—but to its unutterable shame, the vortex of that Julian Charybdis is still intact.”

In the verified statement is then alleged the connection which defendant bore to the Julian Petroleum Corporation; and thereupon affiant attempts to and does therein set forth in great detail how and in what manner the said remarks made by the trial judge as aforesaid reflected upon defendant, and that in their significance such remarks disclose the fact that the said trial judge was biased and prejudiced against defendant.

In another particular does the verified statement contain a specification of alleged facts from which, if found to be true, the prejudice of the trial judge against defendant might have been inferred, to wit, it therefrom appears that in the course of the trial certain exhibits were either permitted to be introduced in evidence or were marked for identification which, if substantiated by competent evidence, would have tended to show that defendant was guilty of the commission of crimes other than and additional to those for which he was then on trial; that at said time, “and while this action was still in process of trial, and after the adjournment of the court for the day, and when this defendant was no longer present in the courtroom, said judge convoked a session of the criminal complaints committee of the grand jury of Los Angeles county in said courtroom, and then and there presented to said committee all of the above-mentioned documents, and recommended to said committee that an investigation be conducted by them of this defendant’s connection therewith, and by insinuation and innuendo suggested and recommended to said committee that it was their duty to lodge an indictment against this defendant based upon said certificates aforesaid.”

Following the narration of such incident, the verified statement contains the further alleged facts:

“That at the time of this action on the part of the said trial judge the taking and reception of testimony in the case then on trial had not been completed, and this defendant had not yet been given an opportunity to offer testimony in his own behalf, and the action of said trial judge in seeking to have this defendant indicted by the grand jury upon the incomplete and fragmentary testimony given by witnesses for the prosecution and before this defendant had been given an opportunity to explain said testimony, or counter-vail or contradict same, evidenced a fixed and irremovable belief and opinion on the part of said trial judge that any testimony given or offered by this defendant in contravention of the testimony of the prosecution witnesses would not be believed by said trial judge but would be disregarded by him, and that it

would be idle and useless for defendant to offer testimony on his own behalf as said trial judge had definitely and irrevocably closed and sealed his mind against the reception and judicial consideration thereof; that the said judge thus manifested his fixed opinion and belief that this defendant was guilty of having forged said names on said certificates, and thus further manifested his fixed opinion and belief as to the weight to which such evidence was entitled in the action then pending before him against this defendant, and that said evidence produced in his mind an irremovable conviction of the guilt of this defendant.”

For the purpose of reaching a decision herein, if that which has not been denied may be assumed to be true, to wit, each of the foundational facts, together with the conclusion that the trial judge was prejudiced against defendant as set forth in the verified statement, it becomes obvious that, within the meaning and intent of the law, defendant neither had a fair trial on the merits of the action, nor a fair hearing on his motion for a new trial.

Neither am I able to concur with the conclusion expressed by my associates in their respective opinions with reference to “Point 6.” Unless I mistake, the question presented by appellant is not as to whether on a charge of forgery, for the purpose of proving intent or system, evidence may be admitted which shows the commission by defendant of other criminal offenses of like character, but rather relates to a question of whether, in the circumstances as disclosed by the evidence in the instant case, the particular evidence received by the trial court and to which defendant objected was admissible against him.

The record herein discloses the situation that one of the alleged offenses for the commission of which defendant was on trial was that of forgery of the name of T. P. Conroy, as secretary of the Julian Petroleum Corporation, to a certain certificate of stock of said corporation; and that, although Mr. Conroy testified on the trial of the action that the signature in question was not his genuine signature, he positively and repeatedly declared that he did not know that either previous to the time when his signature was placed on the certificate he had not authorized defendant to do so or to cause it to be done, or that subsequent to such time he had not ratified the act. Although it appears that in the course of his direct examination as a witness for the people, on one occasion, in response to a repetition of the question as to whether he had ever authorized any one to sign his name to the certificate in question, he gave the categorical answer “No,” it also appears that immediately following such answer, when the witness was asked concerning the authorization by him of his signature to

another questioned certificate of stock, the following occurred: "A. I am answering that as far as I know I did not.

"Q. And People's Exhibit 18? A. I would like to qualify the answer to the former question to the same extent that so far as I know I didn't authorize any one to sign it.

"Q. You change your answer on that again? A. I want the same answer to all of them, same answer I gave yesterday.

"Q. Well, Mr. Conroy, has anything other than what you have stated caused you to change your testimony regarding those certificates since May, 1927? A. I am not aware that I have changed my testimony." In such a situation the prosecution introduced in evidence, over the objection of defendant, 40 other certificates of capital stock of the Julian Corporation, each of which purportedly bore the signature of Mr. Conroy as secretary thereof, but each of which signatures were by him denied as genuine. However, as to none of such signatures did Mr. Conroy testify that it was not previously authorized by him, or that, if such were not the case, subsequent to the time of the execution of his signature thereon he had not ratified the act. More in detail, he testified that in a "vast majority" of his signatures as such secretary they were appended by his secretary, who was authorized to do so; and that as to others, which readily might have included each and all the signatures attached to the 40 certificates of the capital stock represented by the exhibits in question, he had specially instructed the person who had executed such signatures as to the manner in which the genuine signature of Mr. Conroy might be more correctly copied or simulated.

In cases of the character of that here under consideration, the rule with reference to the introduction of evidence as to the commission by defendant of other crimes is succinctly stated in 8 California Jurisprudence, p. 67, as follows:

"Upon a prosecution for forgery, evidence of other forgeries by the defendant of similar instruments about the same time is relevant to show guilty intent, provided it is first proved that the instrument described in the accusation *is itself a forgery*, and provided, further, that it is proved *the other instruments are forgeries*, and that the defendant was connected therewith."

From the record in the instant case it is apparent that on the trial of the action the foregoing rule was violated, in that neither the corpus delicti of the crime for the commission of which defendant was then on trial had been or ever was established as to the particular count in the indictment in question; nor was the signature attached to either of the stock certificates offered in evidence

as constituting another forgery by defendant shown not to have been either previously authorized or subsequently ratified by the person whose signature was claimed to have been forged.

As hereinbefore has been indicated, with many of the different phases of the law applicable to the facts of the instant case, I am in complete accord with the views expressed in each of the prevailing opinions herein; but, at least in those respects to which attention has been directed, my mind is out of harmony either with the respective conclusions reached by my associates or with the specific reasoning upon which such conclusions are founded.

116 Cal.App. 740

PEOPLE v. MOE et al.

Cr. 2093.

District Court of Appeal, Second District, Division 2, California.

Oct. 9, 1931.

1. Homicide $\S$ 234(5).

Circumstantial evidence showed that defendant drove automobile and waited therein while associate shot deceased, justifying conviction of murder.

2. Criminal law $\S$ 552(3).

To justify conviction on circumstantial evidence, circumstances proved must be susceptible of explanation on no reasonable hypothesis consistent with innocence.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 3 P.(2d) 354.

C. J. Orbison, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J.

It appears to be necessary to give some extended consideration to the voluminous petition for a rehearing in this cause. The paper is specious and might mislead our higher court upon the application for hearing before that tribunal which is sure to be made, if its inaccuracies were not exposed by ourselves, who have taken, of necessity, a long period of time in reaching a conclusion upon the merits of the cause. We may perhaps aid the Supreme Court because it is so strict-

ly limited by law as to the time it may consume in passing upon petitions for hearings before it.

It may be said here, as a preface to what we shall say later and in order to accentuate the discussion presented in our main opinion, 3 P. (2d) 354, 361, that this crime with which we have dealt was what is generally known as a "gang" murder—a killing by gangsters. This truth stands out clearly from the record. No other conclusion can possibly be reached under the evidence, and counsel for appellant of course know that the assertion is correct, for they heard the evidence and have diligently studied it since its transcription. We did not make the assertion in our former opinion, for the reason that the nature of the crime seemed so plain as not to require the giving of a specific name to it, but it may not be so obvious to one who has not read the record in the case.

[1] Counsel still argue so strenuously that the evidence was insufficient to support the verdict that we must dwell for a moment upon the question as to what motivated the tragic events which occurred on January 20 of this year at the little town of Waleria. We said in our opinion heretofore rendered, in commenting upon an instruction that the trial judge refused to give: "There is not the slightest evidence in the record, direct or circumstantial, tending to show that Ward and Brown entered the Lassen home with intent to commit any of the offenses mentioned in the proffered instruction. Indeed, an analysis of the evidence * * * shows strong circumstantial evidence to the contrary." It now becomes proper to state what that circumstantial evidence was. It will be noted from the facts set forth in the opinion that, when Ward and Brown entered the house in Waleria, they brushed aside first Mrs. Lassen and then Lassen as if they were flies, passed them by and stalked toward the kitchen, a place in which it was not to be expected that treasure could be found. Moreover, Mrs. Lassen testified that no money was in the house, nor any portable thing of any value except a comparatively cheap ring which she wore on her hand. The kitchen could not have been the objective of Ward and Brown, and they must have been seeking Lord, or perhaps Huffine, for the only outlet from the kitchen, except to the outdoors, was into Lord's bedroom. The direct and determined movement of the two toward the bedroom, via the kitchen—and that was the only means of ingress to the former room—would justify a belief that from some coign of vantage they had located their intended victim before entering the house. We mention Huffine in this connection because it is reasonable to believe from the evidence that the two men had seen Huffine enter the place. It will be observed that the Ford car with its three occupants had been driven up and down the block, twice

each way, before being parked in front of the Lassen house, and that Mrs. Lassen and Huffine had seen it, after parking, when the latter was admitted to the premises. At any rate, however, when Ward and Brown reached the kitchen they saw that it was Lord with whom they must deal, at least for the moment, for there he stood at bay, pistol in hand. Here is another circumstance which is worthy of mention. Huffine testified that he did not see from what place Lord produced his weapon. That place must have been near at hand, as the firearm was procured quickly, and it was possibly on Lord's person. Certainly it was within easy reach, a circumstance which tends, though perhaps slightly, to justify a belief that Lord was the intended victim, that he knew that he had been "put on the spot," and that he proposed to save his life if he could or to sell it as dearly as he must. That he did the latter is shown by the casualty list: One dead and one severely wounded, out of an enemy force of two. There is another circumstance. Both Lord and Huffine were workers along the water front, and in their employment they might have learned too much about the liquor traffic, for every intelligent person in Los Angeles county believes from common and persistent report that immense quantities of liquor enter Los Angeles by means of the coast at Long Beach and San Pedro or near thereto. The members of the jury might very well have been influenced by this belief, translated in their minds into knowledge, for jurors are bound to be affected by knowledge they have acquired or by beliefs they entertain merely because they are men and women who associate with other men and women and have ears to hear. On the whole, Ward, Brown, and their driver went to the Lassen house with intent to commit murder, and no other crime; their prospective victim doubtless being Carlisle Lord.

We have taken time and space properly to give name to the kind of murder this was in order to emphasize certain language contained in the opinion: "The jurors, with all this common knowledge in their possession, were well on their way to a finding that Moe acted with guilty knowledge when they considered the evidence that Moe sat in Brown's car awaiting the return of his companions from within the Lassen home and that he drove the survivor of the two to Branson's home, for with that proof, granting that the jurors considered it as proof, many pertinent reflections came to their minds, among them" those mentioned in six numbered paragraphs. The common knowledge referred to in the first few words of this quotation was knowledge concerning the use of automobiles in the present-day commission of crime and the employment of lookouts to operate them when in motion and to stand by when they are at rest. If what is contained in the quotation and in the paragraph which immediately precedes it in the

opinion has an application to ordinary crimes—robbery, for instance—how much more strongly does it apply in the case of a gang murder! The annals of city life of Chicago, New York, and even in Los Angeles, as depicted in the daily press, have clearly and fully informed the world of the *modus operandi* when a gang moves with sinister intent upon a racketeer or a hijacker, or upon a subordinate of either, in an automobile. In such a case there is not the slightest doubt that the driver of the car is one of the gang. So it was in the instance of Moe, as we determined, upon most satisfactory evidence, in our opinion. This having been a gang murder, how apposite is this language of the opinion: "We conclude that the evidence firmly supports findings that Moe drove Ward and Brown to the place where the car stood before the Lassen residence, that he sat in the standing vehicle while his two companions did their bloody work and until the surviving one came, sorely wounded, to the car, and that he drove the stricken Brown to the Branson residence. But appellant contends that the record fails to show that he did all these things with a guilty knowledge of the purpose of his companions. The fact that he did them all is some evidence that he was possessed of that knowledge. * * *" In truth, "that he did all these things" is enough to show that he was possessed of guilty knowledge in all its blackness, and it was only out of an abundance of caution that it was necessary to "proceed more specifically with a discussion of the subject" and to set down the six numbered paragraphs.

Dealing with both the question whether Moe was the person who sat in the Ford car while it stood by the curb at Waleria and the question whether he was possessed of a guilty knowledge of the purpose of his companions, the author of the petition for a rehearing clings persistently to the theory that in fastening guilt upon Moe the jury based inference upon inference. The point runs through and colors practically the entire petition, and the assertion is set forth with pomp and circumstance in very many places. We are not shaken from our position by this prolixity of presentation, and we shall show in a moment, after a method which we did not exhibit in the main opinion, how the evidence proves that it was Moe who sat in the car, as we have already shown that whoever rested there was possessed of guilty knowledge. There is certainly no escape from this latter proposition. Before we go further and take up the evidence as to who sat in the car, we pause to assert, granting that there was any inference whatever drawn by the jury in the matter of the two propositions, there was no more than one inference. The fact of guilty knowledge on the part of the person in the car was most satisfactorily proven. There was no inference in that regard. The *possible*

inference to which we refer was upon the point as to whether Moe was the person in the car. If there was such an inference drawn, it arose from all the evidence, including, especially, the abundant proof that the person in the car, whoever he may have been, was possessed of guilty knowledge.

As we have already said, however, not even that inference could have been drawn. It was proven that Moe drove Brown to the Branson home, and that Brown was bleeding profusely when he arrived there. The evidence as to the blood spot on the back of the car seat is fully stated in our opinion, but the petition for a rehearing sets forth a theory concerning the cause and location of the spot which we pause to notice. Indeed, the same theory was stated in appellant's brief, but we regarded it as so futile, as so completely founded upon imagination, that we deemed it unworthy of even a passing notice in our opinion. It now reappears with an added refulgence, and it may be well to refute it. The theory is that when, as stated in the brief and petition and as imagined by Moe, Brown picked up Moe at Twentieth and Orange, Brown moved over from behind the steering wheel of the car to the opposite side of the seat, and that, in so doing, he imprinted the telltale blood stain upon the cushion. This fantastic idea is based upon the view that Brown sat at the wheel upright, and that the stain was somewhat horizontally elongated and showed evidence of a rubbing from side to side. It is absurd to suppose that Brown could have sat upright at the wheel during an imagined drive by him from Waleria to where Moe so fortunately appeared, wounded and weakened by loss of blood as he was. Indeed, it is doubtful whether he could have driven a car at all. Certainly, it is doubly doubtful whether he could have driven from Waleria to Long Beach. Surely, as we have already determined, he must have left a stain on the cushion back of the steering wheel if he had driven the car from Waleria. That the blood stain could have been made by Brown's movement away from the steering wheel is, we think, most unlikely. One reason for this view is that the stain, according to the witness whose statement is most favorable to counsel's theory, commenced three inches from the middle line of the back cushion, therefore at a point where the wounded man was clear of the wheel, and no necessity existed for scraping against the cushion. The fact that the stain was horizontally elongated is most satisfactorily explained upon another theory than that advanced by counsel. On the long drive from Waleria to Branson's the car naturally swayed to some extent from side to side, as all cars will do even on the best of roads, and Brown's body was thus also caused to move from side to side in opposition

to the movement of the car. There is yet another thing to be mentioned. No blood was found on any part of the seat of the car. If Brown had sat erect at the wheel his blood must have reached the seat. Much has already been said as to the amount of blood shed by him, but there is more testimony on the subject.

Mrs. Branson testified as to the man's condition after he arrived at her home: "Q. Did you see any blood that night? A. Yes sir.

"Q. Where did it come from? A. From a wound in Mr. Brown's back and one in his chest.

"Q. Did it drip on the floor? A. Yes sir.

"Q. Did you see any part of his apparel that was bloodstained? A. Yes sir.

"Q. Where? A. As they took it off of him.

"Q. Took what off of him? A. His clothes.

"Q. Where was the bloody region? A. It ran down—dripped down on the floor off his clothes, from both his back and his chest.

"Q. What did you do after Mr. Brown went to bed? A. I washed the blood up off the floor, I think, about the first thing; and gathered his clothes up and put them in the bathroom.

"Q. Did it drip from the front door to the bedroom? A. He came to the back door.

"Q. You had to wipe the blood from the back door to the bedroom? A. Yes."

This testimony shows plainly that Brown's clothes were so saturated with blood that it dripped from them, while he yet wore them. The only reason that no blood was found on the seat at the right side of the car was because Brown evidently pressed hard against the back cushion, a most natural thing for him to do, thus causing an absorption of the blood at that place. In the consideration of this subject, it must be remembered that Brown was probably shot in the chest, the ball passing out at the back. He was the man, and not Ward, who was seen to fire at Lord at almost the same time that Lord fired at him. He doubtless faced Lord throughout the fusillade that followed; Ward, so far as the evidence discloses, never having exhibited a weapon. The point to this is that Brown's bloodshedding must have been greatest at the back, as it is common knowledge that a bullet, on entering a body leaves a small hole, and at its exit makes a large one. Thus is explained the presence of blood on the right side of the back cushion, while none was left on the right side of the seat.

There are several other items of evidence which go to complete the proof that Moe was the person who sat in the Ford car as it stood before the Lassen home. The first of these is Moe's fabrication to the effect that Brown

picked him up at Twentieth and Orange. That his assertion was a fabrication is conclusively shown by the undisputed evidence as to the bloodstain on the cushion of the car. That evidence shows, as we have already declared, that Brown never drove the car to Twentieth and Orange. Moe says that he did. Why did he make the statement? Certainly because an admission of the truth would have been harmful to him. Certainly, also, he did not make it to shield some other person who may have driven Brown to the street intersection mentioned. That degree of altruism was not to be expected of him. To say that John Doe or Richard Roe, some stranger, drove Brown to the intersection might have saved Moe, and he would doubtless have made that assertion if he had known of the bloodstain and had realized the unanswerable arguments to which its presence give rise. The evidence clearly shows, then, that Moe drove Brown to the intersection named. How is it proven that Moe drove the car from Waleria? Moe was with Joe Ward the greater part of the afternoon and up to a time not long before the start for Waleria, and the evidence of their association is strong enough to prove that they were intimate acquaintances, even if they became so only on that day. But this latter is hardly to be believed. Why should Ward have undertaken the excursion to San Pedro with Moe if the two were not acquainted before? Another item: Moe admitted, nay asserted, that he was so haply located at Twentieth and Orange that he was picked up by Brown in the latter's dire need. We recapitulate:

(1) Moe was with Ward, one of the murderers, during the afternoon.

(2) Ward and Brown acted together in precipitating the shooting at Waleria which led to the death of Lord.

(3) Some person sat in the Ford while Ward and Brown did their deadly work and drove Brown away.

(4) Moe drove Brown, the second murderer, to Twentieth and Orange and thence to Branson's.

[2] Who can doubt how the missing link in this chain is to be supplied? The association of Moe with one of the murderers before the murder, and with the other so shortly after it, alone speaks volumes. But, taking all the evidence together, the missing link is firmly put in its place. The evidence, though circumstantial, *proves* that it was Moe who waited in the car and who drove Brown from Waleria to Branson's. If all the circumstances do not make this proof, then it is impossible to prove anything by circumstantial evidence, and that kind of evidence merely enables jurors to draw inferences. We have never heard it said that circum-

stantial evidence is so limited in its operation. We have seen no case which discusses this question, but the books are full of assertions to the effect that any case susceptible of the admission of such evidence upon all the issues may be proven by that evidence. Of course, there are certain rules which circumscribe the use and effect of circumstantial evidence. For instance, "the circumstances proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused." Jones, Evidence, § 899. This rule has not been infringed by anything we have said, for no hypothesis consistent with Moe's innocence can be drawn from the evidence, but only the sole one that he is guilty.

We have already caused to be entered an order denying a rehearing.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

117 Cal.App. 466

TRIPLETT v. TRIPLETT et al.
Civ. 7989.

District Court of Appeal, First District,
Division 2, California.

Oct. 15, 1931.

1. Partnership *↪*328(3).

Findings that partnership had been dissolved, and that partnership transacted no business during its existence, *held* supported (Civ. Code, § 2451).

2. Partnership *↪*298.

Partner not having contributed anything to assets of partnership, which was dissolved without having transacted any business, *held* not entitled to accounting (Civ. Code, § 2451).

3. Partnership *↪*296(1).

Partner's remedy, if any, for another partner's alleged breach of partnership agreement by dissolving partnership before transacting business, was by way of action for damages.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by C. C. Triplett against J. B. Triplett. During the pendency of the action the defendant died, and W. H. Maxwell and another, executors of the last will and testament of J. B. Triplett, deceased, were substituted as defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Arthur E. Koepsel, of Orange, and Fred F. White, of Long Beach, for appellant.

A. P. Michael Narlian, Joseph N. Beardslee, and Evans, Pearce & Campbell, all of Los Angeles, for respondents.

SPENCE, J.

Plaintiff brought this action against J. B. Triplett, since deceased, seeking an accounting. After the death of J. B. Triplett, his executors were substituted as defendants. From a judgment in favor of said defendants, plaintiff appeals.

The complaint was drawn upon the theory that plaintiff and said J. B. Triplett had formed a partnership on September 10, 1925, for the purpose of the manufacture and sale of certain patented tools, and that said partnership had continued down to the time of the filing of the complaint on August 27, 1926. It was alleged on information and belief that said J. B. Triplett had started the manufacture and sale of said tools. The answer alleged that the partnership had been dissolved on October 12, 1925, and denied that any business had been carried on by said partnership at any time. It was further alleged by way of defense that said J. B. Triplett was induced to enter into the partnership agreement by the promise of plaintiff to contribute \$30,000 for the purpose of erecting a factory, and that there was a failure of consideration, as plaintiff had failed to supply said sum or build said factory.

Upon the trial, it appeared that prior to September 10, 1925, said J. B. Triplett had applied for certain patents on tools designed for use in the oil industry. About one month after the parties had entered into their partnership agreement, said J. B. Triplett, on October 12, 1925, notified plaintiff by letter, as follows: "This is to notify you that the agreement of copartnership entered into by you and J. B. Triplett on Sept. 12, 1925, is hereby terminated." During the period between the above-mentioned dates, no tools had been manufactured or sold. The controversy in the trial court centered largely around the question of whether certain tools known as underreamers, which were manufactured and sold by said J. B. Triplett subsequent to October 12, 1925, were included in the tools contemplated by the partnership agreement. Plaintiff contended that they were, but the court found against the plaintiff's contention on this issue. It further found that the partnership terminated on October 12, 1925, had existed in name only, and had transacted no business at any time. The court thereupon concluded that there was nothing on which an accounting could be had, and rendered judgment for defendants.

HANNON et al. v. GOUCHER.

Civ. 7693.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1931.

Rehearing Denied Nov. 13, 1931.

1. Pleading $\S$ 53(2).

Count in indebitatus assumpsit for services as attorney and count alleging agreement of employment in detail *held* not inconsistent.

Second count alleged, in substance, agreement with defendant employing plaintiffs as attorneys in partition action at fee to be fixed by the court, the performance of the work for which plaintiffs were employed, the fixing of a fee of \$7,000 by the court for the work done, and its nonpayment.

2. Attorney and client $\S$ 166(1).

Evidence in action for attorney's fee *held* to support count in indebitatus assumpsit and count alleging agreement in detail.

3. Attorney and client $\S$ 166(2).

In action for attorneys' services rendered in action to partition property, contract covering previous services through which attorneys established defendant's community interest in property *held* inadmissible (Code Civ. Proc. $\S$ 437).

The contract was inadmissible, as against the contention that because the contract, which on its face seemed to employ the attorneys to establish the claim of defendant that certain property was community property, provided that the attorneys were to be paid 15 per cent. of all property that might be declared to be community property, the parties intended that the services were to be continued until by litigation some property actually passed into the separate ownership of defendant, since the paragraph of the contract regarding the attorneys' fees was not that of employment, but one fixing compensation and did not show that the contract covered the services rendered in the partition suit. Furthermore, the contract being new matter should have been pleaded in the answer under Code Civ. Proc. $\S$ 437.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by J. Vincent Hannon and another against Samuel Grant Goucher. Judgment for plaintiffs, and defendant appeals.

Affirmed.

See also 298 P. 528.

[1-3] Appellant contends that the findings are not supported by the evidence; that the court failed to find on material issues raised by the pleadings; and that the "facts are not sufficient to justify the decision." In our opinion, these contentions are without merit, and we deem it unnecessary to discuss each of these contentions separately. It does not appear that appellant had contributed anything to the partnership assets, and, if the partnership was dissolved without transacting any business, appellant is not entitled to an accounting. The evidence showed that the partnership had been terminated on October 12, 1925, by the expressed will of said J. B. Triplett. It is immaterial whether said J. B. Triplett had the right to dissolve the partnership under the agreement providing that the partnership should continue "until both agree to disagree," for even if such right did not exist, section 2451 of the Civil Code, as it read at that time, gave a partner the power to effect a dissolution subject only to liability to his copartner for any damage suffered. The complaint did not seek damages for any alleged breach of the partnership agreement based upon any alleged wrongful termination of the partnership, but asked for an accounting of money received, on the theory that the partnership was still existing and had transacted business. The only reference in the testimony to any business transacted, related to an attempted sale of the "cathead" to the Union Tool Company, but it did not appear that such sale had ever been consummated, or that anything of value was received. In fact, appellant testified that they had only the model, and had manufactured none for sale or distribution. In his deposition he conceded that they "never manufactured anything together." We therefore conclude that the evidence supports the findings relating to the dissolution of the partnership on October 12, 1925, and the findings to the effect that the partnership transacted no business during its existence. These findings support the judgment denying an accounting, and we deem it unnecessary to discuss appellant's further contentions relating to the sufficiency of the evidence to support the remaining findings and relating to the failure of the trial court to find upon the issue of failure of consideration. If, as contended by appellant, said J. B. Triplett breached the partnership agreement by dissolving the partnership before it had transacted any business, appellant's remedy, if any, was by way of an action for damages for such breach. Appellant made no attempt to plead or prove such cause of action.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

Charles W. Cradick, of Los Angeles, for appellant.

J. Vincent Hannon and Wm. F. McLaughlin, both of Los Angeles (T. G. Dalton, of Los Angeles, of counsel), for respondents.

ARCHBALD, Justice pro tem.

Plaintiffs brought suit against defendant to recover the sum of \$7,000, alleged to be due them for services as attorneys in a certain partition action. The amended and supplemental complaint contained two counts, the first in indebitatus assumpsit for the recovery of the amount, and the second alleged in substance an agreement with defendant employing plaintiffs as attorneys in said partition action at a fee to be fixed by the court, the performance of the work for which they were employed, the fixing of a fee of \$7,000 by the court for the work done, and its nonpayment. The answer consisted of a general denial of the allegations of each count. The court found that all the allegations of the amended and supplemental complaint were true and that the denials and allegations of the answer thereto were untrue, and rendered judgment for plaintiffs in the sum mentioned. From such judgment this appeal is taken.

Appellant contends: (1) That the evidence is insufficient to support the findings; and (2) that the court erred in excluding a certain written contract as evidence.

McLaughlin, one of the plaintiffs, testified that defendant came to his office and stated that it was impossible for himself and his wife to agree "upon an amicable division" of certain property which it apparently had been theretofore declared was held by them as tenants in common, "and that a suit would have to be brought to divide" it; that to this the witness replied: "Very well, Mr. Goucher, you understand this is a new and independent suit; it has nothing whatever to do with the contract of employment you had with Judge Earle and myself," and that he (McLaughlin) "was not feeling well enough" to handle the litigation alone, but would want associate counsel; and that in response to such statement Mr. Goucher said, "All right." McLaughlin further stated that he told defendant that "in this class of cases it is incumbent upon the court to fix the attorney's fees, and if it is agreeable to you I will have Mr. Hannon associated in the case and ask the court to fix reasonable fees for us as attorneys in the case"; that defendant replied "that was all right with him," and that immediately thereafter the suit was prepared and filed; that plaintiffs acted as attorneys for defendant during the trial; that "immediately following the argument" the judge asked if they had a "contract for any definite sum as attorney's fees," to which the witness replied, "No, we do not * * * and I asked him to fix a reasonable amount as attorney's fees for Mr. Goucher." That Mr.

Goucher was present at the time and made no objection. Other witnesses testified substantially the same as to what took place in court. It was further shown that nothing had ever been paid for the services performed in the case. The judgment roll in the partition suit was then introduced in evidence, which shows that the complaint therein alleged that defendant and his wife were the owners in common of the property described in the complaint, which allegation was admitted by the answer of defendant's wife. It was so ordered by the interlocutory decree, which decreed that the property should be divided equally between defendant and his wife and designated a referee in partition to assist in effecting such division. On the hearing of the referee's report, findings were made to the effect that \$14,000 was a fair and reasonable sum to be allowed as counsel fees for services rendered for the common benefit of defendant and his wife, to be apportioned between the parties equally as costs and expenses. The final decree ordered plaintiff and his wife to pay into court, within thirty days from the entry of the decree, the share of said costs and expenses so apportioned; that the same should constitute a lien upon the respective shares of the land and premises partitioned; and that if paid into court \$7,000 thereof should be paid by the clerk to the plaintiff Samuel Grant Goucher, being the award on account of his attorney's fees. No appeal was taken from such decree and it was a final decree at the time it was received in evidence in the instant case. Defendant's evidence herein is in direct conflict with that of plaintiffs' as to the employment as well as to the fixing of the fee by the court, but that cannot be considered as long as the testimony introduced supports the findings and judgment.

[1, 2] Appellant seems to be laboring under a misapprehension as to the count in assumpsit alleged in plaintiffs' amended and supplemental complaint. Plaintiffs' evidence shows a contract of employment at a fee to be fixed by the court. It shows that the court fixed the fee at \$7,000; so all that remained under plaintiffs' theory of the case, the work having been performed, was the payment of the fixed fee. The complaint very properly alleged the indebtedness under the common counts. It is in no sense based upon the reasonable value of the services rendered. The second cause of action alleges in detail the agreement of employment at a fee to be fixed as stated, the rendering of the services thereunder by plaintiffs, the fixing of the fee, the finality of the decree, estoppel of defendant to question it, demand for payment, and nonpayment. We find no inconsistency between the two counts, and the evidence seems to support both.

[3] On cross-examination defendant sought to introduce in evidence a contract dated

September 23, 1921, between the law firm of Earle & McLaughlin and himself. An objection thereto was made on the ground that it was incompetent, irrelevant, and immaterial, not cross-examination, and not within the issues raised by the pleadings. The court sustained the objection. Appellant contends that the court erred in so doing. The contract in question recites that Samuel Grant Goucher, party of the first part, and Grace Coe Goucher are husband and wife; that during their married life said Grace Coe Goucher purchased certain described property with community funds and took title to same in her own name, claiming it as her own separate property; that in fact it was community property, and that said first party was "desirous of asserting and claiming said property as community property of the said spouses"; that said Grace Coe Goucher had refused to give or grant party of the first part any part or interest whatever in and to any of said property; and that "therefore it will be necessary for the party of the first part to assert his claim in and to said property by an appropriate proceeding in court; and whereas, party of the first part does hereby retain and employ the said parties of the second part * * * to institute such proceeding as may be necessary to establish the claim of the said party of the first part in and to said property now appearing in the name of Grace Coe Goucher, and to have the said property declared community property of the said party of the first part and the said Grace Coe Goucher. * * *" The contract then continues: "Now therefore, in consideration of the premises, and the consideration of the retaining and employing the said parties of the second part as attorneys, and the legal services rendered and to be rendered in the litigation to declare and establish the said property community property for and on behalf of the said party of the first part, and for the legal services in any and all litigation that may appertain to the declaring of the said property as community property, and defending any action by Grace Coe Goucher wherein she claims said property as her separate property, the said party of the first part does hereby agree to pay the said parties of the second part for the legal services rendered and to be rendered as herein stated, fifteen (15%) per cent of any and all property that may be declared to be community property and going to party of the first part from and out of the property now held and declared by the said Grace Coe Goucher to be her own and separate property." The writing further provides that in the event first party fails to recover any of the property then appearing in the name of his wife or fails to have the same or any part of it declared to be community property, said second parties shall not receive any attorney's fee for the services to be rendered by them.

The record shows that appellant brought suit in September of 1921 to have the property named adjudged to be the community property of the spouses; that it was so adjudged on March 8, 1924, the judgment becoming final on June 21, 1927; and that a decree of divorce was also entered in a suit brought by the wife on the ground of desertion, likewise dividing the property equally between the parties. At the time of the filing of the partition suit, therefore, the parties were tenants in common, as alleged in the complaint in partition and admitted by the answer of Grace Coe Goucher therein. It is the theory of appellant that the contract in question covered the services rendered in the partition suit and consequently that such contract was material evidence on the question whether or not the contract alleged in the partition suit was entered into, for the reason that if appellant already had a contract covering such services he would hardly have entered into a new contract with reference to the same matter, and that the court was misinformed in the partition suit. Not being disclosed by the pleadings in any way, such contract would seem to be new matter (*Bridges & Hall v. Paige*, 13 Cal. 640) and should have been pleaded in the answer, under section 437, Code of Civil Procedure. *Michalitschke Bros. & Co. v. Wells, Fargo & Co.*, 118 Cal. 683, 50 P. 847. Appellant urges that because McLaughlin, while testifying regarding the verbal employment of himself and Mr. Hannon by appellant, stated, among other things, "Very well, Mr. Goucher, you understand this is a new and independent suit; it has nothing whatever to do with the contract of employment you had with Judge Earle and myself," it made such contract admissible on cross-examination, even though it had not been specially pleaded. The contract on its face seems to employ the firm of Earle & McLaughlin to do a certain thing, viz., to establish the claim of appellant that said property was community property "and to have the said property declared community property of the said party of the first part and the said Grace Coe Goucher." Appellant claims that because the contract provides that said attorneys are to be paid "fifteen (15%) of any and all property that may be declared to be community property and going to party of the first part from and out of the property now held and declared by the said Grace Coe Goucher to be her own and separate property," the parties intended that the services were to be continued until by litigation some property actually passed into the separate ownership of appellant. This paragraph of the contract, however, is not that of employment, but one fixing compensation. If it were not for the language italicized there might be a question whether the 15 per cent. was not to be computed on the total value of the property adjudged to be community, instead of only that portion of the community

to which a spouse would ultimately be entitled on a division; but we are of the opinion that it was the purpose of such language to limit the compensation, and nothing more. Our conclusion is that the trial court correctly held that the contract did not apply to the suit in partition and did not err in sustaining the objection to its introduction.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

117 Cal.App. 433

PEOPLE v. PAHRMAN.

Cr. 2076.

District Court of Appeal, Second District, Division 1, California.

Oct. 13, 1931.

Rehearing Denied Oct. 27, 1931. Hearing Denied by Supreme Court Nov. 12, 1931.

Perjury $\Rightarrow$ 29(2).

Failure to prove one-half of conjunctive allegation of falsehood held not fatal; there being no such relation between two statements that proof of one was inconsistent with or fell by failure to prove other.

Indictment for perjury charged defendant with falsely testifying regarding series of events happening on two consecutive days, while the evidence established that all the events actually happened on the first day.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Fred A. Pahrman was convicted of perjury, and he appeals.

Affirmed.

Paul W. Schenck, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BISHOP, Justice pro tem.

We are asked to free appellant from the effects of a conviction of perjury, because, technically expressed, the assignment of perjury was in solido and the proof failed to establish the falsity of the totality. Stated more plainly, the claim is that, because his testimony was averred to be contrary to the truth in two instances, set out conjunctively, and it developed that only in one instance had he departed from the truth, he has not been shown guilty of the offense charged. This plea does not commend itself to our minds.

Appellant, in his opening brief, correctly senses the impression made by his argument when he says: "The layman would, perhaps, say that it was all pure technicalities." His answer to this criticism is: "We must not break down fixed and fundamental principles of law because of the layman's cry of technicalities." With this we agree; but it is the part of wisdom, nevertheless, when we are confronted by a rule which outrages common sense, to scrutinize it carefully to make sure that it is a fixed and fundamental principle of law, required by the administration of justice, and is not just a phrase worthy of respect on no ground other than its venerable appearance.

The indictment, under which appellant was brought to trial, alleges that appellant was a properly sworn witness at the trial of his fellow police officer, Bost, who was charged with murdering one Sierra. The materiality of three questions (or groups of questions) was then shown: (a) Was Sierra at and in the vicinity of and in the neighborhood of the intersection of Utah and Las Vegas streets on the evening of July 4th, and on the morning of July 5th? (b) Did the appellant see Sierra at said locations, or either of them, at either of said times? (c) Did Bost fire a revolver at either location, at either time? Called upon to answer concerning these questions, the indictment continues, appellant falsely swore that Sierra was not, and appellant did not, on the evening of July 4th, see him at or in the vicinity of or in the neighborhood of the intersection of Utah and Las Vegas; nor was Sierra, nor did appellant see him, at any of the places mentioned on the morning of July 5th; and that Bost did not fire a revolver on either of said times or at either of said places. The indictment continues in these words:

"Whereas, in truth and in fact, as he, the said Fred A. Pahrman, then and there well knew, said Christobal Silvas Sierra, also called and known as Christopher Silvas Sierra, was, on the evening of the fourth day of July, 1929, and on the morning of the fifth day of July, 1929, present at and in the vicinity of and in the neighborhood of the intersection of Utah and Las Vegas Streets in the City of Los Angeles, State of California; and

"Whereas, in truth and in fact, the said Fred A. Pahrman, on the evening of the fourth day of July, 1929, and on the morning of the fifth day of July, 1929, did see said Sierra at and in the vicinity of and in the neighborhood of the intersection of Utah and Las Vegas Streets in the City of Los Angeles, State of California; and

"Whereas, in truth and in fact, said William J. Bost did, on the evening of the fourth day of July, 1929, and on the morning of the fifth day of July, 1929, at and in the vicinity

of and in the neighborhood of the intersection of Utah and Las Vegas streets, in the City of Los Angeles, State of California, fire and discharge a gun and revolver. * * *

Appellant was tried by the court without a jury and without witnesses, except as they appeared by the stipulation that the witnesses who testified at the Bost trial should be deemed to have given the same testimony again in the case under review. So adduced, the evidence, though conflicting, was sufficient on this trial, as it had been found before (see *People v. Bost* [1930] 107 Cal. App. 550, 290 P. 513) to warrant the conclusion that Sierra was at the corner and in the vicinity of the corner and in the neighborhood of the corner of Utah and Las Vegas streets on the evening of July 4th, in plain sight of appellant, and that Bost discharged a revolver that evening, in the vicinity and neighborhood of the corner, while he and appellant were there on their official errand. The evidence shows, however, that the shooting occurred shortly before midnight, and Sierra was taken away in a dying condition before 12:01 a. m. of July 5th. So far as the indictment alleges the truth to be that the several events took place July 4th and July 5th, therefore, it is not supported in its entirety by the evidence. This is the discrepancy to which appellant points.

In order the better to understand his quotations from the authorities, appellant introduces his argument with the proposition that that portion of the indictment for perjury, wherein is contained the averments showing that the truth and the statements made by the defendant do not agree, is called the "assignments of perjury." In our case this is the part of the indictment quoted above. Appellant is correct in his contention. *People v. Bradbury* (1909) 155 Cal. 808, 103 P. 215; *De Bernie v. State* (1851) 19 Ala. 23; *Fudge v. State* (1909) 57 Fla. 7, 49 So. 128, 17 Ann. Cas. 919. And see Archbold's form of indictment for perjury, contained in *Bishop on Criminal Procedure* (1866) vol. II, § 847. Having established the meaning of the term "assignments of perjury," appellant quotes from three sources in support of his main proposition. From Wharton's *Criminal Law* (11th Ed.) § 1586, p. 1727, he gives this quotation: "It is necessary, however, that every fact which goes to make up any particular assignment of perjury should be so disproved." From section 1571, p. 1719, of the same work, this is taken: "It is necessary, at all events, for the prosecution to prove in substance the whole of what was set out in a particular assignment as what was sworn to by the defendant referable to such assignment; proving only a part is not sufficient." A similar conclusion is quoted in these words from 48 *Corpus Juris*, p. 890: "But if the indictment is in one assignment, failure to

prove all the statements substantially as alleged is fatal to the prosecution."

The weight of these several statements may be fairly measured by the authorities cited in support of them, as they appear to be based, not on abstract reasoning, but on cases cited. Four early English cases are given in the footnote appended to the first quotation from Wharton's work. Each of these cases deals with the rule that the falsity of the assignment must be established by two witnesses or one witness and corroborative circumstances. None of the four even tend to support the statement that "every fact * * * should be * * * disproved." The emphasis is on "so." The second quotation from Wharton's stands on a footnote containing two cases: *Rex v. Jones* (1791) *Peake N. P. Cases*, p. 51 (erroneously given in the footnote as page 37), 170 *English Rep.* 75, and *State v. Ah Sam* (1879) 7 *Or.* 477. The value of the first case as an authority for the text may be accurately gauged by a quotation from Lord Kenyon's remarks: "The whole of the defendant's evidence on the former trial should be proved, for if, in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury." This case did not deal at all with the necessity of proving false all the testimony assigned as perjury. In the *Ah Sam* decision it was held that there was a material variance between the allegation that defendant had falsely testified that he saw John Doe at a certain house October 30th, and proof that his testimony was that he saw him there October 29th. Such a conclusion is plainly not authority for the text, if we interpret the text as supporting appellant's proposition.

The statement quoted from *Corpus Juris* first appeared in 30 *Cyc.* 1452, at which time but one case was referred to in its support, viz., *Brown v. State* (1898) 40 *Tex. Cr. R.* 48, 48 *S. W.* 169, 170. An examination of the opinion in that case discloses that the holding is, not that all of each assignment in perjury must be proven, but that it must be shown that the defendant stated all that he was alleged to have stated. In support of which conclusion the court quotes Mr. Wharton as saying: "It is necessary that every fact which goes to make up any particular assignment of perjury should be disproved." This quotation, if correct in omitting the word "so", does not uphold the court's decision, and is itself not warranted, as we have noted, by the decisions most lately given in its behalf.

The footnote in *Corpus Juris*, connected with the text quoted, contains in addition to *Brown v. State*, just reviewed, and *Rex v. Jones*, already found to be of no help, two later Texas cases. In the first of these, *Adams v. State* (1906) 49 *Tex. Cr. R.* 361, 91 *S. W.* 225, 226, the court "takes it" that it

was incumbent on the state to prove the falsity of all the facts in the affidavit charged to be a perjured statement, but continues: "We believe the state made such proof." In the second case, *Welch v. State* (1921) 88 Tex. Cr. R. 346, 227 S. W. 301, for the first time, in any of the cases, we find a definite pertinent statement in support of appellant's position given, this time for the guidance of the trial court on a new trial: "Having alleged it in solido and that all the testimony alleged to be false was in fact false, the state must so prove it in order to secure a conviction." No authority or argument was given for this statement of principle, but we may concede that by virtue of this case it is the law of Texas.

Two other cases, to which attention was directed in the footnote of the *Corpus Juris* text, should be mentioned. The first is a decision of this court, *People v. Senegram* (1915) 27 Cal. App. 301, 149 P. 786. It was contended, in the *Senegram* action, that a conviction could not be sustained unless all the answers, charged as false, were so proven. To express appellant's position, the quotation from 30 Cyc. 1452, was given, and some of the language of *Brown v. State*, supra, employed. Neither were commentated upon favorably or unfavorably; the conclusion being that the case under review was not one where the falsity of the testimony was assigned in solido, for each answer was the subject of a separate assignment of perjury. The second case to which the footnote directed attention is *State v. Saunders* (1927) 122 Kan. 840, 253 P. 572, 573. There also the statement in 30 Cyc. 1452, is given as expressing the appellant's contention, followed by this comment: "This rule has been applied in somewhat extreme cases"—citing *Welch v. State* and *People v. Senegram*, both of which we have considered. "Whatever its force generally, we think it is not substantially violated here."

In addition to these authorities, to which we have been led by appellant, we found, in *McClain on Criminal Law* (1897) vol. II, § 883, this statement: "But if the entire matter alleged to have been falsely stated is set out in one averment the whole must be proved." Two cases are given as authority by the authors. *Rex v. Leefe* (1809) 2 Camp. 134, 170 Eng. Rep. 1106, and *State v. Blaisdell* (1879) 59 N. H. 328. The first of these cases is practically the same as *Rex v. Jones*, supra, in its holding. The second, as does *State v. Hascall* (1833) 6 N. H. 352, to which it refers, contains language in support of the text, but both cases hold that there are distinct assignments of perjury, and proof of one is sufficient, and was made. What is said about the necessity of proving all, is dicta, unenforced by authority or reasoning.

This somewhat lengthy review of the authorities satisfies us that the rule contended

for not only is not established in this state, but also that it is not so rooted in the common law that it is a "fixed and fundamental principle of law" to which we must bow. Nor are we conscious of any rule of reason which would require a reversal in this case, because the state failed to prove that appellant's sworn testimony was false in both particulars alleged. We do not say that there might not be cases where a failure to prove one-half of a conjunctive allegation of falsehood might not be fatal, but there is here no such relation between the two statements that proof of one is inconsistent with or falls by failure to prove the other. With a trial by the court, without a jury, there can be no question of a verdict reached without unanimity as to the day involved. The allegations that the events happened on July 5th may be treated as surplusage and disregarded. *State v. Herrera* (1922) 28 N. M. 155, 207 P. 1085, 24 A. L. R. 1134.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 476
PEOPLE v. LAYMAN.
Cr. 2091.

District Court of Appeal, Second District, Division 1, California.
Oct. 15, 1931.

1. Perjury $\S$ 34(1).

On prosecution for perjury regarding street car accident, testimony of all motor-men and conductors on line that no street car had been in accident was equivalent to only one witness' testimony, and required corroboration (Pen. Code, § 1103a; Code Civ. Proc. § 1968).

2. Perjury $\S$ 34(5).

Accused's failure to produce testimony in perjury prosecution did not furnish necessary corroboration (Pen. Code, § 1103a; Code Civ. Proc. § 1968).

3. Perjury $\S$ 34(4).

In prosecution for perjury regarding street car accident, conductors' and motor-men's testimony that no accident took place on line was sufficiently corroborated by proof that no accident was reported; accidents usually being reported (Pen. Code, § 1103a; Code Civ. Proc. § 1968; Code Civ. Proc. § 1963, subd. 20).

4. Criminal law $\S$ 419, 420(1).

In prosecution for perjury regarding street car accident, train dispatchers' testi-

mony that they received no report of accident *held* not hearsay (Code Civ. Proc. § 1963, subd. 20).

Train dispatchers' testimony was not hearsay, but direct proof of the material fact that no report of the accident had been turned in.

5. Perjury ⚡32(8).

In prosecution for perjury regarding street car accident, train dispatchers' testimony that they received no report of accident *held* material, because of statutory presumption that ordinary course of business was followed (Code Civ. Proc. § 1963, subd. 20).

6. Perjury ⚡34(4).

Corroborating evidence required to prove perjury may be slight (Pen. Code, § 1103a; Code Civ. Proc. § 1968).

7. Criminal law ⚡507(9).

In perjury prosecution based upon deposition regarding street car accident, deposing witness upon another false deposition regarding accident *held* not accomplice, under facts (Pen. Code, § 1111).

Facts disclosed that so far as appeared the false testimony accused gave at the taking of his deposition was entirely his own idea, unaided in conception or execution by the other deposing witness.

8. Criminal law ⚡507(9).

Suborned witness *held* not accomplice of defendant accused of subornation (Pen. Code, § 1111).

This is so, since under Pen. Code, § 1111, an accomplice is defined as one who is liable to prosecution for the identical offense charged against defendant on trial in the cause in which the testimony of the accomplice is given, and the words "one who is liable to prosecution for the identical offense charged" limit the statute to one who is so liable, because he is a principal in fact, as distinguished from one who is a principal only, because of Pen. Code, § 31, which provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, advise and encourage its commission, are principals.

9. Criminal law ⚡757(4).

Instruction that accomplice's testimony should be viewed with distrust, and evidence of oral admissions of party received with caution, *held* properly refused as invading jury's province.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Ralph J. Layman was convicted of perjury and subornation of perjury, and he appeals. Affirmed.

Davis & Thorne and W. H. Brawner, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Dep. Atty. Gen., for the People.

BISHOP, Justice pro tem.

We are of the opinion that appellant was properly found guilty of both perjury and subornation of perjury. Two depositions were taken in an action which had been brought by appellant against the Los Angeles Railway Company, for injuries alleged to have been inflicted upon him as he was pushing his stalled automobile away from the street car tracks. In the first deposition, appellant himself testified as to the details of the accident. In the second, a Mrs. Miller testified, at appellant's instigation, that she witnessed the accident. The evidence, in the case under review, warranted the jury's conclusion that as a matter of fact Mrs. Miller had not seen the accident, both because she was in the state of Texas when it supposedly happened, and because it never happened, but was merely a child of appellant's fancy.

[1-6] To prove the falsity of appellant's word picture of his mishap with a street car at the time and place he described, the prosecution placed upon the witness stand all the motormen and all the conductors who were operating cars on the line where the accident was supposed to have taken place. None of the street cars in charge of the motormen had been in an accident, according to their testimony. This composite testimony of the motormen is, of course, the equivalent of that of but one witness to the fact that no accident had taken place (People v. Burcham [1923] 62 Cal. App. 649, 217 P. 558), and the law requires another witness or proof of corroborating circumstances. (Section 1103a, Pen. Code; section 1968, Code Civ. Proc.) This proof we do not find, as respondent suggests we may, in the failure of appellant to produce testimony. We do, however, find the statute satisfied by the testimony of the conductors, taken together, that they knew of no accident; and by proof of the fact that no accident was reported, whereas in the usual course of events, if there had been an accident, it would have been reported. Appellant complains that it was error, in violation of the hearsay rule, to permit the train dispatchers to testify that they had received no report of an accident. It was not hearsay, but direct proof, of course, of a fact; the fact being that no report had been turned in. This fact was material because of the presumption that the

ordinary course of business had been followed (subd. 20 of section 1963, Code Civ. Proc.); that is, that if there had been an accident it would have been reported to the dispatchers. "The corroborating evidence may be slight." *People v. Follette* (1925) 74 Cal. App. 178, 204, 240 P. 502, 513.

[7, 8] Appellant further complains of the refusal of the trial court to give two requested instructions. The first of these was to the effect that the jury should, in weighing the evidence, consider Mrs. Miller as an accomplice. This instruction was properly refused. As to the perjury charge, plainly she was not an accomplice, for, so far as appears, the false testimony appellant gave at the taking of his deposition was entirely his own idea, unaided in conception or execution by Mrs. Miller. A closer legal question is presented by the contention that she was his accomplice in the other crime of which he stands convicted; that of subornation of perjury. Prior to the change effected by the 1915 amendment to section 1111 of the Penal Code, it is quite possible that she would have been considered an accomplice, for the crime "subornation of perjury" could not be committed without two parties, one of whom would have to commit perjury as a result of a corrupt agreement to accomplish that unlawful act. See the discussion in *People v. Coffey* (1911) 161 Cal. 433, at page 446 et seq., 119 P. 901, 903, 39 L. R. A. (N. S.) 704. The amendment of 1915 (St. 1915, p. 760) consisted in adding these words of definition, by limitation, to the section: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." One's first impression is that this definition makes no change in the law, for in *People v. Coffey*, supra, accomplices are defined as being: "All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." But this definition is a quotation from section 31 of the Penal Code, stating such persons to be principals, and, by section 971 of the same Code, they are to be prosecuted as such. The break in this chain of reasoning is made by interpreting the words "one who is liable to prosecution for the identical offense charged," as limited to one who is so liable because he is a principal in fact, and as not applying to one who is a principal only by the effect of section 31. So, it has been held, both parties to the crime of incest are accomplices, if adult and competent, because each is in fact a principal. See *People v. Adinolfi* (1930) 106 Cal. App. 261, 289 P.

176. The witness was held an accomplice in *People v. Allison* (1927) 200 Cal. 404, 253 P. 318, not because he aided in the burglary with which the defendant was charged, but because as principal in fact he had a part in it. But the complaining witness, under fourteen years of age, with whom one accused committed an act in violation of section 288, can under no circumstances be an accomplice where the defendant was thirty-eight years of age, for under section 288, the act, to be a crime, must be with a person under fourteen years of age. *People v. Troutman* (1921) 187 Cal. 313, 201 P. 928. In the case of *In re Morton* (1918) 179 Cal. 510, 177 P. 453, it was held that one who receives stolen property is not an accomplice of him who steals, the amendment of 1915 serving to make inapplicable the case of *People v. Kraker* (1887) 72 Cal. 459, 14 P. 196, 1 Am. St. Rep. 65, where it appeared that the thief was possibly an accomplice of the recipient of that which was stolen. See, also, *People v. Viets* (1926) 79 Cal. App. 576, 591, 250 P. 588. In *People v. Davis* (1930) 210 Cal. 540, 557, 293 P. 32, 39, our Supreme Court stated: "It is likewise true that since 1915 * * * the giver and receiver of a bribe are no longer accomplices one to the other (although that was formerly the law of this state, *People v. Coffey* * * *), inasmuch as the asking or receiving a bribe is made a separate offense from offering or giving a bribe."

We conclude, therefore, that Mrs. Miller was not an accomplice of the defendant, although she actively participated with him, and committed the crime of perjury, without which his crime of subornation of perjury would not have been complete. *People v. Ross* (1894) 103 Cal. 425, 37 P. 379. The court did not err in refusing to instruct the jury to regard her as an accomplice.

[9] By the other instruction requested, but not given, the jury would have been told that a witness false in one part of his testimony is to be distrusted in others; that the testimony of an accomplice ought to be viewed with distrust; and the evidence of oral admissions of a party should be received with caution. The first portion was covered in the instructions given; the balance of the requested instruction should never be given, because it is an invasion of the exclusive province of the jury. *Hirshfeld v. Dana* (1924) 193 Cal. 142, 156 to 160, 223 P. 451; *People v. Northcott* (1930) 209 Cal. 639, 653, 289 P. 634, 70 A. L. R. 806.

No further matter merits discussion. The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 469

PEOPLE v. COTTON.

Cr. 1967.

District Court of Appeal, Second District,
Division 1, California.

Oct. 15, 1931.

In robbery prosecution, deputy district attorney, in argument, made statement respecting instruction as to flight of defendant, but, upon objection, court instructed jury to disregard the statements of counsel as to flight or anything pertaining to any instructions as to flight.

1. Criminal law §695(2).

No amplification of objection to evidence of extrajudicial identification of defendant in robbery prosecution could have aided prosecution to extent that by reframing question or laying different foundation ultimate fact would have been admissible.

It appeared that the only objection to each of the questions propounded to witnesses which resulted in admission of evidence here under consideration was either that such question was incompetent, irrelevant, or immaterial, or that it was subject to some combination of such grounds.

2. Robbery §23(1).

In robbery prosecution, evidence of extrajudicial identification of defendant *held* inadmissible.

3. Criminal law §404(4).

In robbery prosecution, trial court was not required to deny admissibility of gun because witness identifying gun was not so certain on cross-examination that it was weapon used by defendant.

4. Robbery §23(3).

Identity of weapon used by defendant in robbery having been sufficiently established to warrant its introduction in evidence, prosecution could show situation and circumstances with which defendant was directly connected immediately preceding discovery of weapon.

5. Criminal law §1169(5).

Court's instruction to disregard prejudicial testimony cured error.

Answer of witness suggested thought that a milkman had just been robbed and that person who committed such robbery was defendant, such testimony being given by police officer who assisted in making arrest of defendant, but, since record showed that on motion of defendant court immediately instructed jury to disregard such testimony, legal presumption is that jurors followed such instruction and eliminated from their minds not only assumed fact itself, but also any deduction or inference which might arise therefrom.

6. Criminal law §730(1).

Any injurious effect of deputy district attorney's remark *held* cured by court's instruction.

7. Criminal law §785(2).

Under evidence in robbery prosecution, court committed abstract error in instruction that witness might be impeached by proof of conviction of felony.

The record disclosed that the only evidence which related to the possibility that any person called as a witness had been convicted of felony was that defendant was asked whether he had ever been convicted of felony, and responded that he had not.

8. Criminal law §1186(4).

Abstract error in instruction and error in admission of evidence in robbery prosecution *held* harmless (Const. art. 6, § 4½).

Abstract error in instruction that witness might be impeached by proof that he had been convicted of felony and error in admission of testimony respecting extrajudicial identification of defendant was harmless, in view of other evidence which tended strongly to directly establish guilt of defendant.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Lawrence D. Cotton was convicted of robbery, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and Franklin Padan, Chief Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

HOUSER, J.

Defendant appeals from a judgment which resulted from his conviction on each of two counts of the crime of robbery. He also appeals from the order by which his motion for a new trial was denied.

No point is made by appellant to the effect that the evidence was insufficient to support the verdict returned by the jury. However, in that connection it is contended by appellant that, considering particularly the evidence introduced as to one count of the information, the alleged errors to which attention is directed were relatively increased in importance, and thus became so prejudicial to the case of the defendant that because thereof he should be awarded a new trial.

It is urged that the trial court erred in admitting in evidence, over objection by defendant, testimony given by certain witnesses in substance that preceding the trial of the action they and each of them had identified defendant as one of the men who committed the robbery, and that such identification was accomplished not only by the aid of photographs submitted to each of such witnesses by members of the police department at the city jail, but as well, later, at the same place, by means of a "show up" of defendant in company with several other persons who at that time and place were then and there in confinement.

With reference to the point thus presented, it appears that the only objection to each of the many questions which were propounded to each of the witnesses and which resulted in the admission of the evidence here under consideration, was either that such question was incompetent, irrelevant, or immaterial, or that it was subject to some combination of such grounds. In but a single instance was any attempt made by defendant to further enlighten the trial court regarding either the foundation or the underlying reason for such objection, and on the particular occasion referred to, which occurred after the question had been fully answered, the only objection by defendant was that the question was "immaterial, and an attempt to bolster up the evidence given here at the trial. It don't make any difference how many times he may have seen him."

In the case of *People v. Watts*, 198 Cal. 776, 791, 247 P. 884, 890, the following restatement of a rule is made: " * * * It is well established that where the trial court has overruled a general objection to the admission of evidence, i. e., an objection that it is incompetent, irrelevant, and immaterial, the party against whom the ruling was made will not be permitted to urge in the appellate court a particular objection which could have been readily cured had it been openly urged in the trial court"—citing authorities. To the same effect, see, also, *People v. Foo*, 112 Cal. 17, 21, 44 P. 453, and *People v. Owens*, 123 Cal. 482, 490, 56 P. 251, in each of which cases the authorities of this state are referred to or reviewed.

[1, 2] But it is obvious that, with whatever particularity or definiteness any objection might have been made to the admission of evidence of the character of that here under consideration, the defect in its foundation could not have been either readily or at all cured. No amplification of the objection made by defendant to the offered evidence either could or would have aided the prosecution to the extent that either by reframing the question, or by laying a broader or a different foundation therefor, the ultimate fact would have been admissible against defendant. That in the existing circumstances in no form should such evidence have been re-

ceived is attested by many substantial and well-considered authorities. *Murphy v. State*, 41 Tex. Cr. R. 120, 51 S. W. 940; *People v. Jung Hing*, 212 N. Y. 393, 106 N. E. 105, Ann. Cas. 1915D, 333; *Warren v. State*, 103 Ark. 165, 146 S. W. 477, Ann. Cas. 1914B, 698. In principle, see, also, *People v. Doyell*, 48 Cal. 85, 90, 91; *Barkly v. Copeland*, 74 Cal. 1, 15 P. 307, 5 Am. St. Rep. 413; *People v. Fong Ching*, 78 Cal. 169, 174, 20 P. 396; *People v. Feary*, 85 Cal. App. 433, 434, 259 P. 491.

[3, 4] Appellant further contends that the trial court erred in admitting in evidence, over the objection of defendant, a certain "gun," together with evidence relating to the time when, and the place where, it was found. From the record herein it appears that on his direct examination a witness identified the weapon as one which defendant had in his possession at the time when the crime in question was committed; and that other witnesses in substance testified that the weapon was found at a point included within a course pursued by defendant in his flight from police officers immediately preceding the time when defendant was placed under arrest. The fact that on cross-examination the witness who identified the "gun" was not so certain that it was the weapon used by defendant, but stated that it was "similar to" and "favored" the "gun" in question, did not present a situation by reason of which the trial court was required to deny the admissibility of the weapon in evidence. *People v. Ferdinand*, 194 Cal. 555, 229 P. 341; *People v. Stoerkel*, 87 Cal. App. 336, 339, 262 P. 825.

The identity of the weapon used by defendant in the commission of the offense having thus been sufficiently established to warrant its introduction in evidence, for the purpose of corroborating such evidence, the prosecution was clearly entitled to show the situation and the circumstances with which defendant was directly connected and which immediately preceded the discovery of the weapon.

[5] Another alleged error to which appellant directs attention arose from the direct examination of one of the police officers who assisted in making the arrest of defendant. As shown by the reporter's transcript of the proceedings at the trial of the action, the irregularity to which appellant refers occurred as follows:

"Q. What first attracted your attention to the car being there?

"Mr. Benedict: Objected to as immaterial.

"The Court: Overruled.

"Mr. Benedict: Nothing to do with any of the issues in this case.

"The Court: Overruled.

"A. Why, we were coming up—going north on Obispo, and we got to the corner of Anaheim and Obispo and a milkman stopped us—or shouted at us and said that he had been

held up, and he pointed to the car going down the street, and he said, 'That is the car.'

"Mr. Benedict: Now, we move to strike all of that, your Honor, and ask that the jury be instructed to disregard it.

"The Court: Motion granted. The jury are instructed to disregard the testimony of the witness in answer to the last question, in giving what somebody said to him. Don't tell what somebody said to you, but tell what you did."

It must be conceded that that part of the answer of the witness which suggested the thought that the milkman had just been robbed and that the person who committed such robbery was none other than the defendant in the action on trial, was prejudicial to the rights of defendant. But, since the record shows that on motion of defendant the trial court immediately instructed the jury to disregard such testimony, the legal presumption is that the jurors followed such instruction and eliminated from their minds not only the assumed fact itself, but also any deduction or inference which might arise therefrom. 24 Cal. Jur. 763; 2 Cal. Jur. 1021, and authorities there cited.

[6] Appellant also complains of alleged misconduct on the part of the deputy district attorney, who was in charge of the case for the people, in that in his argument to the jury he made the statement that, "in the trial of this case, among the instructions which his Honor will give you, he will instruct you that under certain circumstances that the flight of the defendant, while not of itself sufficient to establish the guilt of the defendant of these charges with which he is charged here now before you, but that it is a circumstance tending to show a consciousness of guilt."

It appears that immediately following such statement counsel for defendant addressed the court and said: "I submit, your Honor, that is not the law, and your Honor has said that no instruction will be given as to flight at all." Whereupon the judge of the trial court responded: "Yes. I now instruct the jury to disregard the statements of counsel as to flight, or anything pertaining to any instructions as to flight."

Assuming, without conceding, that the remark of the deputy district attorney was improper and that in the circumstances of the case it should not have been made, it is clear that even its original injurious effect, if any, upon the rights of defendant, was trivial, and that in any event, from a legal standpoint, by the prompt and unequivocal instruction given by the court to the jury, any prejudice to defendant, which otherwise might possibly have been created by reason of such remark, was effectively obliterated.

4 P. (2d)—16½

[7] It is further contended by appellant that the trial court erred in giving to the jury an instruction in substance that "a witness may be impeached by proof that he has been convicted of a felony."

The instruction to which objection is thus made was as follows: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial; and a witness may also be impeached by proof that he has been convicted of a felony."

The record herein discloses the fact that the only evidence which related to the possibility that any person called as a witness on the trial of the action theretofore had been convicted of a felony was that defendant was asked the question, "Q. Have you ever been convicted of a felony, Mr. Cotton?" to which he responded, "A. No, sir; I was not even arrested on a felony."

It thus appears that no foundation existed in the evidence sufficient to authorize the giving of that part of the instruction to which objection is now made, and consequently, in that respect, that at least abstract error was committed by the trial court.

[8] Although considering the evidence with reference to whether defendant theretofore had been convicted of a felony, by reason of the instruction in question the jury possibly may have been induced to disbelieve his statement in that regard, it is much more probable that the jury conscientiously performed its sworn legal duty in that behalf and decided such incidental question solely on the evidence submitted to it. But in any event, assuming that by reason of the giving of such instruction the jury may have disregarded its duty in the premises and indulged in the conjecture that because the court gave such instruction the fact was contrary to the testimony given by defendant in that regard, also considering the situation that, as hereinbefore indicated, error was committed by the trial court in admitting in evidence testimony given by certain witnesses relating to their extrajudicial identification of defendant, in view of the other evidence in the case which tended strongly to directly establish the guilt of defendant as to each of the counts preferred against him, this court is of the opinion that the errors to which attention has been directed did not result in a miscarriage of justice. Section 4½, art. 6, Const.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

117 Cal.App. 507

NEALE v. STERLING et al.

Civ. 7986.

District Court of Appeal, First District,
Division 2, California.

Oct. 16, 1931.

1. Insane persons ⇨99.

In suit to recover personal property, finding that plaintiff was incompetent when entering contract made other findings respecting incompetency unnecessary (Civ. Code, § 39).

It was contended that findings were insufficient because there was no finding that plaintiff had been adjudicated incompetent prior to time she entered contracts; because there was no finding that defendant had any knowledge of plaintiff's incompetency; and because there was no finding of fraud on part of defendant. However, the right of rescission by an incompetent is predicated under Civ. Code, § 39, upon incompetency at time contract was made, and is not dependent upon knowledge of incompetency or fraud on part of the other party.

2. Insane persons ⇨73.

Even voidable contracts of incompetent person are subject to rescission (Civ. Code, § 39).

Civ. Code, § 39, providing that conveyance or other contract of person of unsound mind, but not entirely without understanding, made before incapacity has been judicially determined, is subject to rescission, confers on incompetent person right to rescind voidable contract made before judicial determination of incompetency, and while such person was in fact incompetent.

3. Insane persons ⇨97.

Complaint by incompetent to recover personal property was sufficient, and judgment for plaintiff proper, without specific allegation or finding that parties could be placed in statu quo.

By failure to deny, defendant admitted allegation that prior to commencement of action plaintiff had offered to restore to defendant all of stock issued to plaintiff, which was everything of value which she had received.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Ann M. Neale, by and through her guardian, Walter F. Kogler, against D. Sterling and others. From the judgment, defendant Sterling Corporation appeals.

Affirmed.

McGee & Sumner and William A. Sumner,
all of Los Angeles, for appellant.

A. E. Koepsel, of Orange, for respondents.

SPENCE, J.

Shortly prior to January 12, 1926, plaintiff, a woman seventy-five years of age, had certain dealings with defendants, as the result of which she transferred to the defendant Sterling Corporation certain cash, bonds, and other property in exchange for stock in said corporation. On January 12, 1926, she was adjudged an incompetent person, and Walter F. Kogler was appointed as her guardian. Following the appointment, plaintiff, through her guardian, offered to restore the stock received upon condition that defendants return the money and property received from her. Upon defendants' failure to accept said offer, plaintiff brought this action to recover said money and property delivered to defendants, or the value thereof. From a judgment in favor of plaintiff and against the defendant Sterling Corporation, said corporation appeals upon the judgment roll.

[1, 2] It is appellant's contention that the findings do not support the judgment. Three of the specifications of insufficiency of the findings are: First, that there is no finding that respondent had been adjudicated incompetent prior to the time she entered into the contracts; second, that there is no finding that appellant had any knowledge of respondent's incompetency; and third, that there is no finding of fraud on the part of appellant. In our opinion, such findings were not required, as the trial court found that respondent was, in fact, incompetent at the time she entered into the contracts. Counsel for appellant states that respondent was not entirely without understanding, and therefore her contracts were not void, but merely voidable (*Maionchi v. Nicholini*, 1 Cal. App. 690, 82 P. 1052; *McNeese v. McNeese*, 190 Cal. 402, 213 P. 36); but under such circumstances, even voidable contracts of an incompetent person are subject to rescission. Section 39 of the Civil Code provides that "A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code." That section confers upon an incompetent person the right to rescind a voidable contract made before a judicial determination of incompetency, but while such person was in fact incompetent. That right is entirely predicated upon incompetency at the time the contract was made, and is not dependent upon knowledge of the incompetency or fraud on the part of the other party.

[3] Appellant further calls our attention to the fact that "there is no finding that the parties can be placed in statu quo." It is difficult to understand appellant's contention in this regard. By failure to deny, appellant admitted the allegation that prior to the commencement of the action respondent had offered to restore to appellant all of the stock issued to respondent, being everything of value which she had received. The trial court by its judgment ordered respondent to return the stock to appellant, and ordered appellant to return to respondent the money and property received, and, in the event that the property could not be redelivered by appellant to respondent, ordered judgment in favor of respondent for the value thereof. In our opinion, the complaint was sufficient and the judgment proper without a specific allegation or finding that the "parties can be placed in statu quo."

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

117 Cal.App. 163

In re JONES' ESTATE.

LAWRENCE v. PRENTICE et al.

Civ. 7957.

District Court of Appeal, Second District,
Division 2, California.

Sept. 28, 1931.

Rehearing Denied Oct. 27, 1931. Hearing
Denied by Supreme Court Nov. 25, 1931.

1. Appeal and error ⇨ 1010(1), 1011(1).

Findings supported by substantial evidence or based on conflicting evidence cannot be disturbed on appeal.

2. Wills ⇨ 55(7).

Evidence held insufficient to sustain finding that aged testator lacked testamentary capacity even if, as testified by physician, he was suffering from senile dementia.

3. Wills ⇨ 166(1).

Evidence held insufficient to sustain finding that will of aged testator was result of undue influence.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Proceeding by Bessie R. Prentice and another, to probate the will of Andrew J. Jones, also known as A. J. Jones, deceased, opposed by Carrie Lawrence, as administratrix of the estate of Edgar Lawrence, deceased. From

an order denying the petition for probate, proponents appeal.

Reversed.

Victor H. Kendrick, of Los Angeles, for appellant and proponent Bessie E. Prentice.

William Dellamore, of Los Angeles, for appellant and proponent California Trust Company.

Frank R. Willis and Will H. Willis, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal from an order denying proponents' petition to probate a will.

Decedent, Andrew J. Jones, had conducted a hotel and restaurant business for many years, bought and sold homes and engaged in the real estate business until he became financially independent, although unable to read and write, and since 1912 had largely been occupied in taking care of his own properties. He was interested in church work, and he and his wife saw much of proponent Bessie E. Prentice in their charitable work, and apparently they became warm friends. In 1923, decedent suffered a serious attack of rheumatism. In 1924 his wife died, the proponent Mrs. Prentice visiting the wife sometimes two or three times a week during her last illness, and, when the wife passed away, she aided in the funeral arrangements. In the latter part of 1924, decedent, being then about seventy-two years of age, had further trouble with his rheumatism, whereupon he sold two houses belonging to him, including his residence, and on October 2d started to visit his nephew, Edgar Lawrence, husband of contestant herein, and decedent's only living relative. He first visited some hot springs in Wyoming, and later went to the home of his nephew in Colorado, where he arrived about January 7, 1925. Inducing his nephew to come to California with him, he returned to Los Angeles about January 14, of the same year. The nephew lived with decedent and took care of him until about February 20, 1925, at which time the latter was taken to a hospital on account of a severe burn, occasioned by his using a lighted lantern in bed for heating purposes. While in the hospital, and on February 21, he made a will which gave all of his property, except the sum of \$100 cash bequeathed to a church in which he was interested, to contestant's husband, and stipulated that in the event of the latter's death prior to his own such share was to go to a son of his deceased wife's brother. Decedent was later taken from the hospital to a house which he rented, where he lived with his nephew until March 24, 1925, when he moved to the home of proponent Prentice. While living there, and on April 4, 1925, the will which was denied probate herein was executed. The latter part of April, decedent

and proponent Prentice and her husband moved into a home on East Fifty-Second street, Los Angeles, which decedent had just purchased, where they resided until August 19, 1928. At about the time decedent moved to the home of Mrs. Prentice and her husband, he gave his nephew \$200 to tide the latter over until he could get a job, after which decedent relied upon Mrs. Prentice to care for him, instead of the nephew.

Contestant alleged, in opposition to the probate of the will filed by proponent trust company, that decedent was incompetent to make a will at the time the last one was executed; that at such time he was so weakened in body and mind that he was easily influenced by those having his care, and that proponent Prentice and the attorney who drew the will, who acted as guardians and custodians of his person and property and who were constantly with him and upon whom he was entirely dependent for the care and attention he needed, had and exercised a controlling influence over his mind and will and were able to and did dictate to him what he should do with his property, and that the will in question was the result of such influence, and not the result of decedent's free and voluntary act.

The findings of the court are that the allegations of the contest are true, except as to the allegation that said attorney influenced the execution of the will in question in any way. Appellants contend that there is no evidence to support either the finding that decedent was incompetent at the date of the execution of the challenged will, or that the same was the result of undue influence on the part of Mrs. Prentice.

[1] If there is any substantial evidence supporting either finding, the judgment must be affirmed, as also it must if there is a conflict in the evidence supporting such finding.

[2] Some thirteen witnesses, including the nephew mentioned, since deceased, testified for contestant. One of them, W. J. Cudger, who the record shows was an intimate acquaintance of decedent, testified that the latter was a religious fanatic, but that he "would not consider him insane." Two others, Estelle M. Porter and Carrie Lawrence, the latter being the wife of the nephew Edgar Lawrence, and the first being superintendent of the hospital to which decedent was taken when he burned himself, did not express any opinion as to decedent's soundness of mind. The other ten each said that in their opinion decedent was of unsound mind. Two of such witnesses were physicians, one being a friend, and the other eight qualified as intimate acquaintances. Edgar Lawrence, the nephew and only heir, gave as his reason for such opinion that decedent was "full of rheumatism; he could not walk"; that he was "notionable"—meaning, as he expressed it, that "he wanted everything his way"; that he wanted the house

overheated; that he put a lighted lantern in his bed and burned himself. The witness testified, with reference to the latter incident, that he, the nephew, lit the lantern and gave it to decedent when requested so to do, and that that was the first time he, the witness, made up his mind his uncle was of unsound mind. Yet the record shows that after that the witness was in the room at the hospital when decedent made the will in the former's favor. Lawrence also testified that decedent did not know he was burned; that he had a pain but "didn't know what it was"; that he was disagreeable to get along with and did not want to stay in the hospital; that he transferred the bank account on which the witness could draw checks into the name of decedent's trusted attorney, Mr. Dellamore, and "kept Mr. Dellamore over me"; that after the witness and decedent had been at "Mother Felix's" home (after leaving the hospital) a few days "he became cranky" and would not let anybody be in the room; that while decedent was in the hospital "he told me to go and look and see if I could get a house. He suggested it first. He didn't want to stay in the hospital. He wanted to rent a house and instructed me to go out and rent one. Pursuant to those instructions we were searching three or four days. We kept reporting back to him. He seemed to grasp what it was all about." According to the understanding of the witness, a man could be said to be of unsound mind who "is not capable of doing his own business."

Cyrus Simpson, decedent's chauffeur, testified that decedent was a degenerate—explaining that he was "immoral"; that he went to the hot springs in Wyoming in the winter time; that he belonged to almost every Christian organization in Los Angeles; that he was "notionate" at times and "irrational all the time I knew him"; that he was "irrational when he was running his restaurant business" (the witness did not specify any acts which he denominated "irrational"). "He didn't do the right thing by me." The witness complained because he was not paid as he thought he should have been for his services, and was not remembered in decedent's will. We will not quote, summarize, or comment on the testimony of the other lay witnesses, more than to say that their testimony for the most part was similar to that we have quoted, except that one or two of them added that decedent would catch cats and burn them and dead chickens in the cookstove, this in 1912, and bring turkeys in the room where his sick wife was and then turn them loose; that he would sit by the fire after he had a bath and talk to himself, would laugh and talk to himself for twenty minutes at a time, and that sometimes in the Holiness Church he would talk in "this unknown language and almost break up the meeting." Such testimony falls far short of furnishing any basis for the opinion that de-

cedent was of unsound mind in the sense that he lacked testamentary capacity, and of course the opinions of lay witnesses are no stronger than the reasons given for them.

Dr. Gordon, the physician who attended decedent at the hospital, testified that he had known decedent "from 1916, off and on, until February, 1925"; that "I thought when I saw him in 1925 he was of unsound mind"; that he based this opinion "on having known him before, and having known that he was a man of good judgment, of ideals, and was cleanly about his person, rather proud I might say; that then, the last time I saw him (in February, 1925) he had changed to a marked extent." The witness evidently thought it was lack of good judgment that led decedent to make "the trip in the dead of winter in Colorado and Wyoming," and to place the lighted lantern in bed with him the night he was burned. The witness also said decedent "was rambling" in his talk and "would go from one subject to another, his ideas were not clear"; that "while his mental condition was a secondary condition to me at that time, because of the severe burns he had, and I was treating him for the burns," the "opinion as formed at the time was simply that his mind was deteriorating"; that "his sight was very poor" and "his eye reflexes were absent"; that at that time he was "dirty about his bed and about his things around; and he did not have a cleanly aspect at all." The witness testified that in the hospital, if no one happened to be in decedent's room when the former entered, "I would find him lying and looking over the wall and holding a regular conversation," and "he did not seem to know anything about it"; that "as I would talk to him he would ramble off into something else part of the time," and "I would ask him about dressing his wound, or if his bowels had moved, or something of that sort, and he would not know anything about it"; that "in talking of that trip he had made, to him it seemed that he had just come back from it"; that "all those things tended to give me the idea that his mind was not sound." The doctor testified that he had made no special study of mental diseases and did not consider himself an alienist or psychiatrist; that decedent was suffering from "senile dementia," and that he first concluded the latter's mind was unsound during his first visit after the burn, February 19, 1925.

Dr. Charles S. Diggs was one of the owners of the hospital where decedent was treated, and observed him for about three days after Dr. Gordon was discharged. The doctor testified that from his observation of the patient for the three days he looked after him he formed the opinion that decedent was of unsound mind. The reason for this, he said, was that decedent seemed to think Dr. Gordon was "trying to take advantage of him in some way and mistreat him"; that "he had delusions" regarding the doctor; that some-

times "he would be muttering when I would go in and talk to him; and, of course, I did not think a sane man would do that." "He was suffering from senile dementia." The doctor further testified that the third day he went in to see his patient "he was all up in the air about his hospital fees, and saying he would have to leave this place because it was going to take all of his money and he could not stay there; he had to go somewhere; these fellows were trying to take advantage of him." "He said the hospital fees were too high."

Dr. Williams, a dentist who had known decedent for five or six years and who pulled sixteen teeth for him in January, 1925, testified that in his opinion decedent was of unsound mind "in the latter state of his life"; that when he first knew decedent "he used to speak of the growth of Los Angeles and its beauty and tell how he made good in the restaurant business, and later there was a marked change in his mental condition"; that he would speak "about people, his friends and relatives, and the 'gang,' as he called it—they were all trying to beat him out of his money." "He said the gang took advantage of him, they were trying to prove he was crazy." (This was after the execution of both wills and after the guardianship proceeding.) The witness said: "I don't know that I could say there was any special act he did which caused me to believe he was of unsound mind"; "he would be talking about his property at one time and then he would jump off and talk about his relatives and then talk about my fixing his teeth—bring all those things up in one conversation." Dr. Williams also said that his understanding of the words "unsound mind" was that they applied to a man who was "not capable of taking care of himself or his business affairs," which is not the true standard of testamentary capacity. Estate of Sexton, 199 Cal. 759, 768, 251 P. 778.

The picture we get from the testimony of the last three witnesses mentioned is that of a physically handicapped man of a ripe old age, who nevertheless seemed to retain a rather vigorous mentality and will power. There is not a thing in the testimony of the two physicians inconsistent with testamentary capacity, although the mental condition might not measure up to the witnesses' ideas of complete sanity from the medical standpoint. Decedent might have been suffering from "senile dementia," as they both testified, and so in their opinion have been mentally unsound, and still it would not be "the sort of incompetency or insanity which, in the estimation of law and of men of ordinary sagacity and prudence, renders a person incapable of executing contracts or making a will." Estate of Purcell, 164 Cal. 300, 306, 128 P. 932, 935. The evidence in this case shows without contradiction that decedent, after leaving the

hospital and after making the will in question, exchanged a note and mortgage for \$10,500, owned by him, for the property in which he lived until the time of his death. He first looked at that property in company with his nephew, and apparently liked it. The person from whom he purchased it testified that "he hit the walls to see if the walls were solid," and otherwise acted in examining the place like a man who had ample mental capacity to do business. This was before he went to the hospital, and he visited it again after he came out of the hospital. At that time, he looked around again and asked how soon he could move in, exchanging "a mortgage for \$10,500" for the place, although the owner had held it for \$11,000. He apparently impressed the owner, as she testified: "Mr. Jones on the occasion that I saw him appeared to be rational. Of course, I considered an old gentleman like that, who talks like that and investigates things like that must have been of sound mind. He did not refer to his attorney." But when it came to the point of escrowing the papers, he turned the matter over to his attorney to attend to which, we may remark incidentally, showed good judgment. The attorney, Mr. Dellamore, was the one who drew the questioned will, as well as the prior one, and acted as a witness thereto. He testified how he was called to decedent's home at the time of the purchase of the property mentioned. "At that time I called there he discussed the matter of the purchase of his home. He had arranged to buy this home on East 52nd street and he wanted me to take care of the escrow on his behalf. He said Mr. Holzel (the seller) would be at the Bank of Italy at 7th and Broadway the following day and for me to * * * take care of his side of the deal. He told me of his plan, how he had a mortgage of \$10,500 on a piece of property on North San Pedro street and how he had negotiated the exchange for the East 52nd street property for this note and mortgage, an even exchange. * * * He said, 'Here I have a \$10,500 note which remains stationary in value,' or words to that effect, 'and I am getting a nice piece of property which in my opinion will advance in value.' He said, 'If I went into the open market to sell this mortgage and note very likely I would have to discount it from 10 to 30 per cent,' and he said he was able to get Mr. and Mrs. Holzel to take it at face value without any discount. He carried on all negotiations for the purchase of the property as far as I know, and he gave me instructions as to just what he wanted about the insurance * * * and that I should examine the deed which they (Mr. and Mrs. Holzel) were to put in escrow, to see that everything was regular. * * * In my opinion Mr. Jones at all times seemed to be of sound mind and in my opinion was of sound mind on April 4, 1925, the day he executed the will. My reason for that belief is the general intelligence

displayed by Mr. Jones on all my visits to him and on his calls at my office. He was perfectly rational and intelligent in all his remarks to me." Mr. Dunlap, the other witness to the will, had known decedent since 1910. He said: "In my opinion Mr. Jones was of sound mind on April 4, 1925. * * * On April 4, 1925, he appeared to me to be rational. He appeared sound to me. When I was called into the room Mr. Jones said, 'I am making a will and I want you to sign it.' He told Mr. Dellamore the reason he wanted me on his will; that he knew me for a long time and I was right there and he didn't have to go out and find somebody."

About fifteen other witnesses, including Dr. Barker, who was called in attendance upon decedent after he had discharged his doctor at the hospital, and who attended him almost constantly until his death, and Dr. Speicher, who attended him on several occasions after decedent left the hospital, all testified that decedent was of sound mind at the date the will was executed; and while in some particulars that have no bearing on decedent's mental condition, and yet which seemed to enter largely into the formation of the opinions given by contestant's witnesses, they corroborated the testimony as to the physical condition and cranky, determined characteristics of decedent, in other particulars their reasons had a sound basis for the opinions given. We are forced to the conclusion that the opinions of contestant's witnesses, founded as they are upon reasons that have no real bearing on the testamentary qualifications of decedent, do not amount to evidence of lack of such testamentary capacity and do not create a conflict with the positive and undisputed evidence of acts of decedent that required more mental capacity than the making of a will, performed by him at and about the time the will was made, with which the record in this case abounds. And even if they be considered sufficient, standing alone, to sustain the judgment, they would, "In the light of all the facts, be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence." *Estate of Casarotti*, 184 Cal. 73, 78, 192 P. 1085, 1087. Here there was no jury, but in our opinion such statement is applicable for the reason that there is no real conflict between the testimony of such witnesses and that of the attesting witnesses. Dr. Gordon does not even attempt to say that the rambling talk, the changing from one subject to another and the cloudy ideas, were conditions which existed at all times, or even at all of the times he visited the patient, and the last time he saw him was about two months prior to the execution of the will. In addition to the conclusions of the witness mentioned, the witness related the substance of conversations which he had with decedent at the latter's home before he

went to the hospital, and in the hospital, which show very clearly that such conditions did not prevail at all times, and so cannot conflict with the undisputed testimony as to acts of decedent occurring after the doctor was dismissed by Mr. Jones as well as at the time of the execution of the will. The same is true of the testimony of Dr. Diggs, who relates incidents showing that the patient was not by any means either affected by any delusions or mental unsoundness that incapacitated him from making a will, even at the time he was still in the hospital, to say nothing of two months thereafter. Dr. Williams, in addition to having the wrong idea of the test of testamentary capacity, gives the substance of conversations with testator that are consistent only with the possession of a mind having such capacity. We are disposed to say here of the testimony of the two doctors what the Supreme Court said in the case of *Estate of Collins*, 174 Cal. 663, at page 670, 164 P. 1110, 1112: "It is obvious that the physicians who gave their opinions that she was of unsound mind were measuring it by a more exact and perfect standard than is required by the law, the mind wholly normal and healthy, free from any defective co-ordination arising from disease or decay. In a medical sense anything short of this may constitute insanity or unsoundness of mind; but the law does not demand such perfection to give capacity to manage one's affairs and make valid dispositions of property. * * *

"But mere proof of mental derangement or of insanity, in a medical sense, is not sufficient to invalidate a will. The contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of a specific insane delusion which affected the making of the will in question." *Estate of Russell*, 189 Cal. 759, 769, 210 P. 249, 254. In our opinion, contestant has failed to do this.

[3] Is there any evidence to support the finding of undue influence? The written contest charged Mrs. Bessie E. Prentice and William Dellamore with using undue influence on decedent in various ways, with the result that the will in question was executed contrary to the testator's real intention. The findings are to the effect that all the allegations of the written contest are true except as thereafter expressly found to be untrue. It is expressly found to be untrue that said Dellamore exercised any undue influence over decedent at any time, and, further, that at all times mentioned in said contest said William Dellamore "acted as attorney and counsellor for said Andrew J. Jones in the conduct of his business and the preparation of said will in a proper, unbiased and ethical manner and independently of Bessie E. Prentice, and

without any collusion on his part with said Bessie E. Prentice." The undisputed facts immediately surrounding the execution of the will are as follows: While decedent was in the hospital he rented a house on East Santa Barbara street, Los Angeles, and his nephew moved him there from the hospital and took care of him at that place. Apparently the nephew's wife had been sent for, and she arrived just before decedent went to the hospital. She had stopped in Arizona on the way out and "got her daughter and her daughter's man, and brought them with her." It seems the daughter had a child. When they called at decedent's residence he wanted to know how many came. He was told, "three women, a child and a man," to which he said, "My God, I didn't send for an army." Decedent complained of the noise at the Santa Barbara street place and insisted on moving. Negotiations were then in progress for the purchase of his home, and Mrs. Prentice offered him a room in her establishment during the interim, to which he went. Apparently before leaving the Santa Barbara street house, decedent became dissatisfied with his nephew, and, as the nephew expressed it, "the old man had fired us out." Before this, the nephew was authorized to sign checks on decedent's bank account and did draw money therefrom on a few occasions at decedent's request. After the incident referred to, however, decedent called in his attorney and arranged to have the latter take charge of the bank book. Decedent gave his nephew \$200 at that time "to go back to Durango [his former home] with or to do what I wanted." On April 4, 1925, while decedent was living in the home of Mrs. Prentice, he said to her: "Call my attorney and tell him I want to have a conference with him," with which request Mrs. Prentice complied. Mr. Dellamore came out, telling Mrs. Prentice that he had come in response to Mr. Jones' call. He went into decedent's room and closed the door and was in the room alone with decedent until the will was ready to be witnessed, when Mr. Dunlap was called in for that purpose.

With regard to communicating the purpose of his visit to Mrs. Prentice, the witness Dellamore said: "I did not tell her anything about the will having been drawn. * * * I told no one anything concerning Mr. Jones' business at any time. * * * I felt that was a confidential matter and that no one should know anything about it." He further said: "At the time of his [decedent's] disagreement with Lawrence he had all his relationship cancelled. Mr. Jones had a disagreement with Mr. Lawrence, I think, during the month of March. I didn't investigate or ascertain what that disagreement was. I didn't think it was any of my business. Mr. Jones stated several times to me that he was disappointed in Edgar; that he

was not the boy he thought he was and that he was through with him, and that was the reason for the cancellation of any business relationship which he had prior to that time with him. That was the reason for changing the will. He said he was through with Edgar and didn't want him to have any more of his property and that on account of his disappointment he was satisfied that he was not the boy who should profit by his prior frugality and industry." Mr. Dellamore took the will with him when he left the house, and kept it until after the testator's death. Mr. Dunlap, the other witness to the instrument, testified that he was called into the room on that occasion, Mr. Jones, Mr. Dellamore and himself being the only ones present, and that the door was shut; that Mr. Jones told him he was making a will and was glad he got there in time "to sign my will—be a witness"; that nothing was said in his presence about the way he wanted the property to go, but he was sure Mr. Dellamore read the will to him—"but I was not paying attention"; that Mr. Dellamore asked decedent if that was his last will and if he was satisfied with it, to which Mr. Jones replied "he was"; that after the execution of the will he left.

It is apparent from the foregoing that at the time the will was drawn the testator was not in the immediate presence of the beneficiary charged with exerting the undue influence of which it is alleged to be the result, but was in the presence of his personal attorney, who also drew the first will, who was familiar with his affairs, and who was found by the court to have acted in so doing in a proper, unbiased, and ethical manner, and independently of and free from any collusion with said beneficiary. There was consequently no such influence exerted at the time the will was made, and if any such influence was exerted it must have been in poisoning the mind of decedent against his nephew prior to that time and to such an extent that testator was not free from it at the time of the execution of the questioned instrument. If there had been any such influence at work, it seems incredible that the attorney, who, as we have said, drew the first will and apparently was familiar with the waning popularity of the nephew, did not observe and correct it, if the dissatisfaction had no foundation in fact and rested only on the supposedly secretly exerted power of the beneficiary over the mind of decedent. As an example of her power over decedent, respondent urges that Mrs. Prentice dominated Mr. Jones' mind to the extent of causing him to sign "the two blank checks by which the bank account was transferred to Mr. Dellamore"; but a reading of the testimony of the nephew, referred to in support of such statement, shows that decedent made the demand on Lawrence that the two checks be

signed, and did all the talking, and that "Mrs. Prentice was standing over next to the bed and she handed the checks out" after the uncle's demand; that the witness "noticed on the checks there was a cross on one of them," and said, "Anything you want, uncle. I will sign these checks," which he did and handed them back to Mrs. Prentice. As a further evidence of such domination, the brief of respondent quotes from the testimony of Lawrence a statement which he says was made by Mrs. Prentice to decedent, viz.: "That is your nephew, make him do what you want him to do." The nephew evidently did not consider it as "domination," for he immediately said, following such statement: "I have nothing against Mrs. Prentice. Mrs. Prentice and I always got along well. She always talked to me like she would to her own son. I was respectful to her. She didn't talk bad against me, only that she would say, 'He is your nephew; make him do what you want him to do.'"

Mrs. Carrie Lawrence, widow of the nephew and administratrix of his estate, as well as respondent herein, is quoted in support of the finding of domination: "I am the wife of Edgar Lawrence, the contestant herein. I came to California March 12, 1925, and located on East Santa Barbara street, a place secured by Mr. Jones. Mr. Jones was there at that time. I was there two weeks. Mrs. Prentice was there at that time. Mrs. Prentice was in the room where uncle was. She was hugging and kissing him. She was a stranger to me then. I went out and asked my husband who she was. He said she was a particular friend of uncle's. I said to him, 'Well, you will soon see what your uncle's particular friend will hand you.' She was there every day, and when she would come and go we could not have any control over him whatever. He was just cross and hateful as could be. He was very disagreeable. You could not get along with him if she was there." It might be inferred from such testimony that Mrs. Prentice was forcing her attentions on decedent, as "she was there every day." This inference, however, cannot be indulged. The nephew, a very interested witness in vouching the will, clearly explains why she was there so much, and in this corroborates the story of Mrs. Prentice herself. He says: "While at the Santa Barbara street house he [decedent] was always sending for Mrs. Prentice," and "he was cranky at times when I did not send for Mrs. Prentice—when he wanted her to come." A careful reading of the evidence discloses only a few visits made by Mrs. Prentice except at the request of decedent, and seems to show that instead of being the "pursuer" she was the "pursued."

Respondent's brief further says that Mrs. Prentice dominated the mind of decedent to such an extent "that she rented a house and

caused him to be moved away from the Dunbar Hospital about March 3, 1925," and quotes the superintendent of the hospital as saying that decedent "was remarkably satisfied in the hospital until Mrs. Prentice came in and talked to him; he didn't say anything about getting out of the hospital" until after she talked to him. Just how all this could have any bearing on the act of executing the will we fail to see, but in the face of the evidence of all the other witnesses that decedent strenuously opposed going to the hospital in the first place, and his continually expressed desire to leave, as shown by the testimony of the hospital doctor, the nephew, and others, it is positively stamped as the conclusion it appears to be. So far as the renting of the house is concerned, the evidence shows that decedent had his nephew and a number of friends looking for one. The nephew found a place that had two rooms and a kitchen, in which decedent and his nephew and wife were supposed to live, but no private room for decedent. Mrs. Lawrence and Mrs. Prentice both said it was "not private enough," and they reported the situation to decedent, who "said no." Mrs. Prentice testified that Lawrence was with her when the Santa Barbara house was rented, but even if he was not it would not seem to be material on the question of undue influence.

Nowhere in the evidence have we found where anything that might be considered derogatory of the nephew was said by Mrs. Prentice, except in the testimony of the superintendent of the hospital, whose conclusion was that Mr. Jones was satisfied at the hospital until he talked to Mrs. Prentice. She testified that Mrs. Prentice came in to see Mr. Jones the day after the first will was made, "and told Mr. Jones that if he would change his will and make her administrator she had a room in her house and she would take Mr. Jones in and look after him in his lifetime, because the nephew was not capable of looking after him." In answer to this, the witness says Mr. Jones "didn't say very much of anything; just laid there and listened." The witness also said that outside the door "Mrs. Prentice said to me that if I could get Mr. Jones to leave the hospital she would get him to do what she wanted him to do and have." These statements all stand denied, but giving them the full effect that we must, they show in the first instance an attempt merely to influence decedent to appoint Mrs. Prentice executrix of the will just made, which did not seem to have any effect so far as results are concerned. The statement made as to the ability of the nephew to care for decedent would seem to be true, from the evidence before us, as he lighted the lantern upon the occasion above mentioned and gave it to decedent, with the disastrous result following. The

last statement would seem to be but a statement that if Mrs. Prentice had decedent out of the hospital she could make him do what she wanted, the only thing disclosed as having been then wanted was to be made executrix. Nowhere in the evidence is there a word, other than quoted, that we have been able to find, said to the decedent or to anyone else, in any way derogatory of the nephew or that could in any way be said to have prejudiced decedent against him.

It is also said that "in order to perpetuate her domination over the mind of decedent" Mrs. Prentice "attempted to prevent intimate old friends from visiting A. J. Jones." The testimony of Cyrus Simpson, the chauffeur, is referred to in support thereof, and is as follows: "I visited him [decedent] at Mrs. Prentice's house. They attempted to stop me from visiting him, but they didn't succeed. I went in myself. The first time Mr. Prentice was the first one who attempted to stop me. Mrs. Prentice did not try to stop me, but she made things so unpleasant I didn't go around." Such evidence certainly falls short of showing an attempt to keep old friends away. The record fails to show that any old friend was kept away from decedent, and no one complained of not being able to talk freely with him except the witness W. H. Joyce, who testified for contestant. Mr. Joyce stated that when he would visit Mr. Jones, Mrs. Prentice "would come in and sit, or if she did not come in Mr. Prentice would come in and sit. In between that time he managed to say, 'I want to change that will; I don't want it, but I have to do these things to keep peace.'" No others, however, seemed to have any such trouble, and possibly these two witnesses, for some reason personal to decedent or the Prentices, were not welcome visitors. The declaration of decedent testified to by the last witness mentioned certainly shows that the former knew of the existence of the will, and it is passing strange that he said nothing to his nephew about wanting to change it or to the trusted attorney who drew it.

We must remember that this is not a death-bed will. Decedent left the hospital March 3, 1925, the will was made April 4, 1925, and decedent passed away August 19, 1928, more than three years thereafter. The testator was evidently a man of strong will. His nephew says of him: "The fact of the matter is that Mr. Jones was a man of very firm will. When he wanted anything he wanted it. * * * He directed me from time to time about his wants. I wouldn't have to ask him what he wanted. He told me what he wanted. * * * He was very strong in his instructions." We fail to find any evidence to support the finding that the will was the product of undue influence. There is evidence which, taken by itself, might give rise to suspicions of undue influence, but we fail to find any that

could be the basis of an inference of that nature. There is nothing we have been able to find in the record which conflicts with the clear, convincing evidence as to the execution of the will, and any other evidence "falls far short of showing such undue influence as in effect destroyed the testator's free agency and overpowered his volition at the time of the making the will." Estate of Shay, 196 Cal. 355, 363, 237 P. 1079, 1082. "Mere proof of opportunity to influence the mind of a testatrix, even though shown to be coupled with an interest, or a motive to do so, does not sustain a finding of undue influence in the absence of testimony showing that there was pressure operating directly on the testamentary act." Estate of Stump, 202 Cal. 308, 260 P. 543, 544. It is evidently, as we have said, the theory of respondent that the supposed influence of Mrs. Prentice affected the decedent at the time the will was made. The language of the Supreme Court in the case of *In re Langford*, 108 Cal. 608, at page 615, 41 P. 701, 702, is peculiarly applicable to such a contention, under the facts of this case: "The contention of respondents, when thoroughly sifted, seems to be about this: That there is evidence to the point that appellant had a general influence over the deceased, which ought to be classified as 'undue,' and that, therefore, although when he made his will, under the circumstances above stated, he was apparently free to act as he pleased, yet it must be inferred that this general influence of appellant accompanied him, subverting his volition, and coercing him to act against his real wishes. To maintain such a strained and difficult theory would require evidence very different from that presented in the record."

Order reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

117 Cal.App. 451

STEPHENS v. COMMERCIAL NAT. BANK.
Civ. 7999.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1931.

1. Warehousemen ⇐45.

Bank held not negligent in permitting entry to safe deposit box by holder's agent having unrevoked general authority, notwithstanding prior entry was under special letter.

2. Warehousemen ⇐43.

Bank authorized to grant access to safe deposit box to holder's duly appointed deputy

held under duty to grant access to person presenting unrevoked general authority.

3. Negligence ⇐2.

Actionable negligence involves violation of duty.

4. Warehousemen ⇐47.

No question of identification of person entering safe deposit box being involved, evidence of bank's custom respecting identification, held irrelevant.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Catherine Bayne Stephens against the Commercial National Bank. From a judgment against her, plaintiff appeals.

Affirmed.

Edward T. Sherer and Welburn Mayock, both of Los Angeles, for appellant.

LeRoy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

SPENCE, J.

Plaintiff sought to recover damages, basing her alleged cause of action upon the allegations that defendant had "negligently, carelessly and wrongfully and without any authority from plaintiff" permitted certain certificates of stock to be taken from her safe deposit box. The trial court directed a verdict in favor of defendant, and, from the judgment entered upon the verdict, plaintiff appeals.

In 1922, plaintiff and her son George Bayne Stephens jointly rented a safe deposit box in the defendant bank. They signed an agreement with the bank which provided, among other things, that the bank was authorized to grant access to the box to either of them "or the duly appointed deputy of either." It further provided that plaintiff and her son would hold the bank harmless against any loss or claim for damage caused by reason of the bank granting access to, and the removal of, the contents of the box by either of them "or the duly appointed deputy of either." The box was of the ordinary type having two keys, a master key held by the bank, and another key which was given to plaintiff. Plaintiff deposited various papers in the box including unindorsed certificates for 175,000 shares of the preferred stock of the Interstate Oil Corporation. On June 27, 1924, plaintiff executed a general power of attorney to one W. F. Peterson. Plaintiff then left Los Angeles and while in Chicago, on July 23, 1924, executed a second general power of attorney to the said Peterson. Both instruments were entitled "Power of Attorney, General." They were in the form commonly used

in this state, and purported to confer upon said Peterson the power and authority to do every act and thing which plaintiff could do if personally present. The second differed from the first only in the addition of deeds of trust to the instruments specifically referred to therein. Both documents were recorded in the office of the county recorder of Los Angeles county. Neither was ever revoked, and both were in full force and effect at all times mentioned herein. On February 24, 1925, plaintiff wrote a letter to Peterson from Chicago specifically authorizing and directing him to take certain stock certificates from her safe deposit box. Peterson went to the bank with this letter and plaintiff's key in his possession. After being identified, he was permitted to withdraw the stock referred to in the letter, and no complaint is made concerning this withdrawal. On March 16, 1925, Peterson again went to the bank, having in his possession plaintiff's key and the second general power of attorney above mentioned. The defendant bank granted him access to the box. Among other things, he withdrew certain certificates of the stock of the Interstate Oil Corporation representing 100,000 shares for which he left a receipt. These are the certificates involved in this action. On the same day, he took these certificates to the National City Bank of Los Angeles, where he indorsed the certificates on behalf of appellant, and pledged them as security for a loan in the amount of \$23,500, signing the note in the name of plaintiff by himself as her attorney in fact. The proceeds of this loan were used in part to pay off a matured note of George Bayne Stephens to the National City Bank in the sum of \$18,000, and a check for the balance made out to plaintiff was indorsed by Peterson as attorney in fact and appropriated by him to his own use.

[1-3] Appellant contends that the trial court erred in directing a verdict for respondent, and further erred in excluding evidence relating to general custom, but in our opinion both contentions are without merit. Although appellant alleged that respondent permitted the certificates to be taken without any authority from appellant, the uncontradicted testimony shows that Peterson had such authority by virtue of the general powers of attorney. It is apparently conceded on this appeal that Peterson was authorized to enter the box as appellant states that "this is an action for the alleged negligence of the respondent bank in allowing an authorized person to enter the safe deposit box which appellant had leased from respondent." However, appellant cites *Cussen v. Southern California Savings Bank*, 133 Cal. 534, 65 P. 1099, 85 Am. St. Rep. 221, in support of her contention that she established a prima facie case of negligence, but the authority relied upon by appellant is not in point. There is no dispute

here concerning the facts, and no question concerning the burden of proof. The certificates were admittedly taken by Peterson and power of attorney was admittedly broad enough to authorize the taking. It was the duty of the bank to grant access to the box to Peterson upon presentation of the authority conferred upon him by appellant. Actionable negligence involves the violation of a duty, and the respondent bank may not be charged with such negligence solely by reason of doing an act which it was under a duty to perform. In the reply brief, appellant calls attention to the fact that a short time before Peterson took the certificates in question, the respondent bank had granted access to the box to Peterson by virtue of the authority contained in appellant's letter of February 24, 1925, which letter referred solely to certain other stock certificates. This letter, however, did not purport to revoke any authority previously granted, and the power and authority previously granted and conferred under the general power of attorney remained unrevoked when the securities here involved were subsequently taken.

[4] The objections to the questions relating to general custom were properly sustained. These questions pertained to custom regarding identification of persons seeking to gain access to safe deposit boxes, and were entirely irrelevant. It is only necessary to point out that it was conceded at the trial that Peterson and no other person had entered the box, and no question of identification was involved.

From what has been said, it is obvious that appellant's loss was occasioned by the wrongful acts of her trusted and duly authorized attorney in fact, and not by any negligence on the part of respondent. It is therefore unnecessary to discuss other grounds urged by respondent in support of the judgment.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

117 Cal.App. 511
CAZAURANG v. CARREY et al.
Civ. 910.

District Court of Appeal, Fourth District,
California.

Oct. 16, 1931.

Rehearing Denied Nov. 10, 1931. Hearing
Denied by Supreme Court Dec. 15, 1931.

1. Frauds, statute of §75.

Statute requiring agreement to devise or bequeath property to be in writing should be liberally construed with view to carrying out object (Code Civ. Proc. § 4, and § 1973, subd. 7).

2. Frauds, statute of §75.

Agreement not to revoke will is within statute requiring agreement to devise or bequeath to be in writing (Code Civ. Proc. § 1973, subd. 7).

3. Frauds, statute of §129(1).

Agreement not to revoke will *held* not taken from statute requiring writing by performance (Code Civ. Proc. § 1973, subd. 7).

There was no performance of agreement not to revoke will already made. In no manner had the agreement been executed, and in fact it could hardly be fully executed prior to the death of the party making the will.

4. Appeal and error §761.

Question whether court had power to change ruling on demurrers *held* not sufficiently presented to require attention, where point was not supported by argument or authority.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Marie Cazaurang against Robert P. Carrey and others. From a judgment of dismissal and from an order sustaining demurrer without leave to amend, plaintiff appeals.

Affirmed.

A. M. Thompson and H. J. Bischoff, both of San Diego, for appellant.

Adam Thompson and Renwick Thompson, both of San Diego, J. O. Hughes, of Los Angeles, and Fitzgerald & Selleck, of San Diego, for respondents Carrey and Haines.

Edward W. Brewer, Jr., of Los Angeles, and Gray, Cary, Ames & Driscoll, of San Diego, for respondent Lees.

BARNARD, P. J.

The plaintiff was the wife of Jean Cazaurang for more than twenty years before he died on June 15, 1929. After his death, three purported last wills were offered for probate in the superior court of San Diego county. One dated April 25, 1928, was offered by this plaintiff; another dated March 5, 1929, was offered by Martin L. Haines; and a third, dated June 11, 1927, was offered by Marie Lees. This action was brought by the plaintiff, seeking an injunction for the purpose of restraining the interested parties from probating the last two of the above-mentioned instruments.

The complaint alleges that the plaintiff and her husband were the owners of a certain ranch containing approximately 16,000 acres; that on February 28, 1926, Jenn Cazaurang

represented to the plaintiff that it would be to their mutual interest to make reciprocal wills to the end that in the event of the death of either, there might be no necessity for partitioning the ranch property; that pursuant to such representations she entered into an agreement with her husband to make reciprocal wills; that such wills were executed on February 28, 1926, copies of the wills being attached to the complaint; that the said parties did then and there agree that these wills were not to be revoked or modified except by mutual consent, and that they should be left in the possession of the attorney for both parties and should not be delivered to either party until the death of the other; that on April 25, 1928, by mutual agreement, the parties executed two new reciprocal wills, copies of which were attached to the complaint; that it was then and there agreed between the parties that these wills should not be revoked or modified without the mutual consent of the parties and that the same should be deposited with the same attorney, to be retained in his possession and not delivered to either party until the death of the other; that plaintiff did not revoke or modify her will prior to the death of her husband; that plaintiff had no notice of any later or purported will made by her husband, and at no time consented to any revocation, modification, or change in his will; that said reciprocal wills remained in the possession of the attorney until after the death of the husband; and that after the said will of April 25, 1928, was offered for probate by this plaintiff, the other purported wills dated June 11, 1927, and March 5, 1929, were also offered for probate. It is then alleged that any and all attempts of the said Jean Cazaurang to revoke, modify, or change the said will of April 25, 1928, were and are a fraud upon this plaintiff. An order to show cause was issued and demurrers were filed on behalf of Robert P. Carrey and Martin L. Haines. After a hearing these demurrers were overruled and a preliminary injunction issued. Thereafter, a demurrer to the complaint was filed by Marie Lees, and after argument, the demurrer was sustained without leave to amend, and judgment was entered dismissing the complaint. Thereafter an order was made which, after reciting that counsel for Carrey and Haines had moved the court to reopen their argument on their demurrers, ordered that these demurrers be sustained, without leave to amend. From the judgment of dismissal and from the last order sustaining the demurrers of Carrey and Martin, the plaintiff has appealed. The demurrers were sustained by the trial court upon the ground that it appeared from the complaint that the agreement of Jean Cazaurang not to revoke his will of April 25, 1928, was oral, and therefore unenforceable under the statute of

frauds. It is conceded that neither the agreement to make reciprocal wills nor the agreement not to revoke the same was in writing.

[1] Appellant contends that while the statute of frauds applies to an agreement to make a will, it does not apply to an agreement not to revoke a will already made. This contention is based upon the argument that the statute must be strictly construed, and that the matter of revocation of a will is not mentioned therein. Section 1973 of the Code of Civil Procedure makes certain agreements invalid unless the same or some memorandum thereof is in writing, and subdivision 7 of this section reads as follows: "An agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."

This section is to be liberally construed with a view to carrying out the object thereof (section 4, Code Civ. Proc.). In *Monsen v. Monsen*, 174 Cal. 97, 162 P. 90, the court said: "It may not be amiss to point out the manifest danger of fraud, perjury, and injustice that may inhere in a recognition of the right to alter by parol testimony, the course of disposition of the property of a decedent. It was, no doubt, a recognition of this danger that led the Legislature to adopt the amendments to section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, bringing agreements of this character within the scope of the statute of frauds."

[2] Whether an agreement be to make a will or whether it be not to revoke one already made, the essence of the agreement is to have a will in existence at the time of the death of the promisor which designates the promisee as a beneficiary in accordance with the agreement. In either case, such an agreement is one to make a provision by will which is the situation specifically covered by the statute. An agreement not to revoke a will already made is just as much an agreement to make a provision for another by will as an agreement to make a will devising or bequeathing property to the promisee, and in our opinion the former is just as much within the statute as the latter.

[3] It is next contended that the making of these reciprocal wills was such full performance of the contract as takes the contract to make a will and the contract not to revoke the same out of the statute, and that therefore the will of April 25, 1928, was irrevocable. Appellant disclaims any reliance upon the claim of part performance and relies only upon the claim that the contract was fully performed by the making of the reciprocal wills, and that nothing remained to be done which could be done by either party. It will be noted that the complaint in fact alleges two oral agreements, the first of

which was one to make reciprocal wills, which was later done, and the second, made after the wills were executed, being an agreement not to revoke or modify the same except by consent of the other party. Aside from the question as to whether the making of a will is a full performance of an oral agreement to make one, no performance, full or otherwise, appears here of the subsequent agreement not to revoke the will already made. We think no such full performance is here shown, as takes this agreement or these agreements out of the statute. *Hughes v. Hughes*, 49 Cal. App. 206, 193 P. 144, 145; *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84, 86; *O'Brien v. O'Brien*, 197 Cal. 577, 241 P. 861, 864. In the case of *Hughes v. Hughes*, the court said: "The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds."

In *Zellner v. Wassman*, the court said:

"Agreements to leave property by will must be reduced to writing or evidenced by some written note or memorandum; for, by virtue of the 1905 amendment to section 1624 of the Civil Code, they are within the purview of the statute of frauds. It is admitted that the agreement of the son to leave \$5,000 by will herein sued upon was not reduced to writing, and that no written note or memorandum thereof was made unless the will executed by deceased, a copy of which was attached to the complaint, fulfills the requirements of the statute in that respect. The will in question contained a simple bequest of \$5,000 to plaintiff, without reference to any agreement in respect thereto. The pre-eminent qualification of a memorandum under the statute of frauds is 'that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.' 5 *Browne on Statute of Frauds*, § 371. Accordingly, it has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land therein described when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. *Swain v. Burnette*, 89 Cal. 564, 570, 26 P. 1093. In other jurisdictions the same reasoning has been applied to a will, for some reason ineffective upon the death of the testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed. *Allen v. Bromberg*, 163 Ala. 620, 50 So. 884; *McClanahan v. McClanahan*, 77 Wash. 138, Ann. Cas. 1915A, 461, 137 P. 479. A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest per-

mitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit.

"Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (*Schultz v. Noble*, 77 Cal. 79, 19 P. 182; *Colon v. Tosetti*, 14 Cal. App. 693, 113 P. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing \$5,000 to plaintiff. The mere execution of a will was not a performance of the contract."

In *O'Brien v. O'Brien*:

"It must be taken as the settled law in this state that by the amendment of 1905, adding subdivision 7 to section 1624 of the Civil Code and by the corresponding provision of subdivision 7 of section 1973 of the Code of Civil Procedure as amended in 1907, 'an agreement * * * to devise or bequeath any property, or to make any provision for any person by will' is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. * * *

"Prior to 1905 an oral contract to make a will was enforceable in a court of equity. *Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 P. 710; *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008; *Rogers v. Schlotterback*, 167 Cal. 35, 138 P. 728; *Wolfsen v. Smyer*, 178 Cal. 775, 175 P. 10. The reason prompting the amendment of 1905 is aptly stated by the Code commissioner in his note appended to section 1624, as follows: 'The change consists in the addition of subdivision 7. The cases in which it (is) sought to establish by parol evidence alleged agreements to provide for a person by will are becoming so numerous as to warrant the assumption that the reasons inducing the original enactment of the statute of frauds apply with especial force to agreements of this class and that they ought to be brought within that statute.' Since that amendment, the effect of the new subdivision as applied to numerous and varying states of facts has been before the courts, but nowhere has it been decided, so far as we are advised, that the amendment should not be given the same force and effect as other provisions of the statute of frauds. Especially with reference to the new provision it has been held that neither subsequent marriage nor the execution of a will pursuant to an oral antenuptial agreement to make a will is such part performance as will relieve the contract from the operation of the statute."

In our opinion, the reasoning underlying these cases is especially applicable to such a

case as this, where the main part of the oral agreement is the agreement not to revoke a will. In no manner has this agreement been executed, and in fact it could hardly be fully executed prior to the death of the party making the will. This entire agreement was to devise property to the appellant and to make provision for her by will. The reasons for the statutory inhibition against an oral contract for that purpose are most cogent. The agreement here sought to be established seems to be exactly the sort of agreement which this portion of the statute was intended to prevent, and nothing in this action differentiates it from the usual case which the statute was designed to cover. While it may be true that equity may relieve a party from the effects of such a statute in a proper case and upon a sufficient showing, no equitable circumstance, such as fraud or the like, here appears to entitle the appellant to any such equitable relief. As pointed out by the authorities we have cited, the mere failure to carry out the contract is not a sufficient showing of fraud. No more appears than that the appellant relied upon an oral agreement, and under the plain terms of the statute this is not sufficient.

Appellant maintains that her case falls squarely within the holding in *Freitas v. Freitas*, 31 Cal. App. 16, 159 P. 611. In that case, there was an antenuptial agreement that in consideration of marriage the plaintiff would be made a beneficiary in a life insurance policy then issued. Following the marriage the other party caused the plaintiff to be named as beneficiary in the insurance policy and delivered the same to her. Subsequently, without her knowledge or consent, he secured possession of the policy and changed the beneficiary. It was held that she had irrevocably changed her position; that her husband had done all that he agreed to do; that there was a full execution of the contract; and that under the circumstances the plaintiff had an equitable right to retain the benefits she had received. In the instant case, the appellant had not irrevocably changed her position and her husband had not done all that he agreed to do. The most important part of the agreement, that not to revoke the will, remained unperformed and the appellant has shown no such equities as removes her from the effect of the statute. In our opinion the case relied upon is not controlling.

[4] As one specification of error, appellant sets up in her opening brief that the court erred in vacating the order overruling the demurrers of Carrey and Martin. The point is supported by neither argument nor authority. This being pointed out by respondent, in her reply brief appellant merely restates the point without argument. As a matter of fact the previous order overruling these de-

murrers was not vacated, although another order was entered sustaining them. We think the question as to whether the court had the power to change its ruling on these demurrers is not sufficiently presented to require attention. *Bell v. Southern Pacific Railway Co.*, 144 Cal. 560, 77 P. 1124; *Perry v. Ayers*, 159 Cal. 414, 114 P. 46. A further consideration is the fact that the question is largely academic, so far as this case is concerned, as the real question at issue, and the only question argued, is whether the other demurrer should have been sustained.

For the reasons given, the order and judgment are affirmed.

We concur: MARKS, J.; ALLISON, Justice pro tem.

4. Homestead §145.

Widow's right to homestead *held* not affected by quitclaim deed from her to decedent covering claimed homestead property (Code Civ. Proc. § 1465).

Such deed raised possibility that property thereby became husband's separate property, but whether it was his separate property or community property it would be set aside as homestead.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

In the matter of the estate of Robert T. Hale, deceased. Petition by Rosetta Hale against the Citizens' National Trust & Savings Bank, executor, and another, to set aside homestead and exempt personal property and for family allowance. From judgment denying the application, petitioner appeals.

Reversed.

Edward W. Forgy, of Los Angeles, for appellant.

Hedley Richmond, of Los Angeles, for respondent Citizens' Nat. Trust & Savings Bank.

William H. Robinson, of Los Angeles, for respondent Elmy.

BISHOP, Justice pro tem.

[1] We believe that appellant's petition that a homestead be selected and set apart for her use, that the exempt personal property be set aside for her use, and that she be granted an allowance for her support should have been acted upon favorably. Appellant is the widow of the decedent whose estate is being administered. An inventory of the estate had been returned, fixing the value of the exempt property as \$166.50; of the property sought as a homestead as \$1,750. The property which appellant wants awarded to her as a homestead is fit for such a purpose, for it was formerly the residence of herself and the decedent. Whether or not, on such a showing, a petition to have the three orders made as sought should be granted is not a matter of discretion with the court, but is a mandate of the statute. Sections 1465 and 1466, Code Civ. Proc.; *Estate of Ballentine* (1873) 45 Cal. 696; *In re Lux* (1893) 100 Cal. 593, 35 P. 341; *Estate of Barkley* (1928) 91 Cal. App. 388, 267 P. 148, and cases cited.

[2] Respondents resisted the petition, and now defend its denial, on the fact that for some time previous to the death of her husband appellant was living apart from him. After living together some twenty-six years, appellant left him for reasons which do not appear, and brought an action for separate maintenance. In 1926, an order was made

117 Cal.App. 545

In re HALE'S ESTATE.

HALE v. CITIZENS' NAT. TRUST & SAVINGS BANK et al.

Civ. 7956.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1931.

1. Executors and administrators §194(1).

Homestead §150(1).

Application to set aside homestead and exempt personal property and for family allowance should have been granted, there being no discretion under circumstances (Code Civ. Proc. §§ 1465, 1466).

Petitioner was widow of decedent whose estate was being administered. The inventory of estate fixed value of exempt property as \$166.50; of property sought as homestead as \$1,750. The property which petitioner wanted awarded to her as homestead was fit for such purpose, being formerly residence of herself and decedent.

2. Executors and administrators §188.

Homestead §141(2).

That widow was receiving separate maintenance at time of husband's death did not affect right respecting homestead, exempt property, and family allowance.

3. Executors and administrators §188.

Homestead §141(2).

Widow's right respecting exempt property *held* not defeated by order in separate maintenance action that she could take some family furniture for separate use.

that he pay her \$60 per month for her support, during the pendency of the action, an order that he complied with up to his death. These facts come far from constituting an obstacle to the relief sought by the petition. Nowhere does it appear that she surrendered any claim she might have in his estate or as his wife. The contrary appears. Nor does the fact that she was not living with him at the time of his death affect her right to the orders she seeks. This case is controlled not by *In re Noah* (1887) 73 Cal. 583, 15 P. 287, 2 Am. St. Rep. 829; *Wickersham v. Comerford* (1892) 96 Cal. 433, 31 P. 358; *Estate of Lufkin* (1901) 131 Cal. 291, 63 P. 469; *Estate of Bose* (1910) 158 Cal. 428, 111 P. 258; *Estate of Miller* (1910) 158 Cal. 420, 111 P. 255; and *Estate of Yoell* (1913) 164 Cal. 540, 129 P. 999; but falls within the principles recognized in *Eproson v. Wheat* (1879) 53 Cal. 715; *Estate of Gould* (1919) 181 Cal. 11, 183 P. 146; *Estate of Parkinson* (1924) 193 Cal. 354, 224 P. 453; *Estate of Henningsen* (1926) 199 Cal. 103, 247 P. 1082; and *In re Ehler* (Cal. App. 1931) 1 P.(2d) 546.

[3, 4] Some point is also made of the provision of the order in the separate maintenance action that she could take some of the family furniture for her separate use. It does not appear that this is the exempt property she now seeks, but, if it is, we fail to see how what has transpired defeats her right to it now. Nor is there any significance to be attached to the quitclaim deed from appellant to the decedent covering the property now sought as a homestead, beyond the possibility that it thereby became his separate property. *Paduveris v. Paris* (Cal. Sup. 1931) 1 P.(2d) 986. Whether it did or not will depend upon the view of the evidence taken by the trial court on a retrial. Whether found to be his separate property or to be community property, it must be set aside as a homestead. Section 1465, Code Civ. Proc.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 618

BOURNE v. ROOT et al.

ROOT et al. v. BOURNE et al.
Civ. 729.

District Court of Appeal, Fourth District, California.

Oct. 21, 1931.

1. Appeal and error ⇨773(2).

Appellants' failure to file brief until after notice of motion made after expiration of period for filing briefs to dismiss appeal is

ground for dismissal, unless reasonable excuse for delay is shown (Rule 5 for District Courts of Appeal).

2. Appeal and error ⇨771.

Sufficiency of showing necessary to excuse appellants' failure to file brief in time is question for court (Rule 5 for District Courts of Appeal).

3. Appeal and error ⇨772.

Court may relieve party from default, for excusable neglect, in failing to file brief within specified time (Rule 5 of District Courts of Appeal).

4. Appeal and error ⇨771.

Appellants' excuse for failure to file brief until after motion, made after expiration of period for filing briefs, to dismiss appeal, held sufficient (Rule 5 for District Courts of Appeal).

Facts disclosed that appellants' chief counsel dictated points and authorities to be filed; that he was appointed judge of Superior Court, and immediately assumed his duties as judge, after arranging with his son, an attorney, to take over the case; that the son became ill and had to give up all legal work; that a little over a month after appellants' period for filing brief notice of motion to dismiss the appeal was served and filed, which notice appellants' original chief counsel received about a week later; that he thereupon caused another attorney to be substituted as appellants' attorney; that points and authorities were at once presented to the court ready for filing; and that the appeal was taken in good faith.

Appeal from Superior Court, Tulare County; J. S. Clack, Judge.

Action by Murray Bourne against Alfred C. Root and another, in which a cross-complaint was filed by defendants against plaintiff and another. From a judgment for plaintiff, defendants appeal. On motion to dismiss appeal by defendants.

Denied.

Manley C. Davidson, of Los Angeles, and Bradley & Bradley, of Visalia, for appellants.

F. H. Pearson, of Fresno, for respondent.

ALLISON, Justice pro tem.

The motion to dismiss the appeal in this case is based on the ground that the appellants have not filed their opening brief on such appeal, and that the time provided for filing of appellants' brief herein has expired. The transcript was filed on the first day of

August, 1931. The time for appellants to file their opening brief expired on the 31st day of August, 1931. Notice of presentation of the motion to dismiss the appeal was served and filed on the 2d day of October, 1931.

[1-4] It appears from the affidavits filed on behalf of the appellants in opposition to the motion that Lewis H. Smith was, until his appointment as judge of the Superior Court of Los Angeles county, chief counsel for the appellants in this action; that on or about the 19th day of August, 1931, he dictated the points and authorities to be filed in this action; that on the 20th day of August, 1931, he was notified by the Governor of the state of California that he had by him been appointed to said office of judge of the Superior Court; that on the 21st day of August, 1931, he qualified as such judge of the Superior Court and entered upon the performance of his duties; that on the 14th day of August, 1931, there became effective an act of the Legislature of the state of California (St. 1931, p. 2234) prohibiting judges of the municipal courts from presiding in the Superior Courts of Los Angeles county; that theretofore municipal judges of Los Angeles county had been assigned by the judicial council of the state of California to preside in the various departments of said Superior Court, in order to relieve the congestion that had arisen in the trying of cases; that, after said act of the Legislature became effective, the congestion of business of said courts began to greatly increase, and that he felt it incumbent upon himself to at once assume the duties of his office, which he accordingly did on the 21st day of August, 1931; that previous to his induction into office he had arranged with his son Archie A. Smith, an attorney at law who had been associated with him in the practice of law, to take over all of the law business which he had before him, including the carrying on of the appeal in this action; that within a few days after his induction into said office the said Archie A. Smith was by reason of ill health compelled to stop all legal work, and he has not been able to nor has he attempted to carry on any business whatever since the week following affiant's induction into office; that upon the leavetaking of said Archie A. Smith as aforesaid he requested Manley C. Davidson, an attorney, to look after affiant's affairs; that he has been much engrossed with the duties of his office and his endeavors to close the affairs which had been intrusted to him; that it was impossible for him to give the attention to the uncompleted matters which he would have been able to do under normal conditions; that in the confusion resulting from the combination of circumstances referred to the typewritten points and authorities of appellants inadvertently remained in the files in his former office, and were not sent to the printer or filed herein; that on the 8th day of October, 1931, he re-

ceived respondent's notice of motion to dismiss this appeal; that thereupon he caused Manley C. Davidson to be substituted as attorney for appellants; that said points and authorities were at once placed with the printer for printing, and are now presented to this court, ready for filing herein; that the delay in filing appellants' points and authorities was due solely to his inadvertence, and was the result of the confusion ensuing from the unusual combination of facts and circumstances above set forth; that this appeal is taken in good faith and in his opinion is of great merit; that Messrs. Bradley & Bradley are appearing as attorneys in the matter of this appeal in name only; and that it was understood and agreed that the appeal would be carried on solely by the affiant. The affidavit of Lewis H. Smith is corroborated in several material respects by the affidavit of the present attorney of record.

Under rule 5 of the rules governing this court, if the brief is on file at the time the notice of motion to dismiss the appeal is given, that fact alone is sufficient to defeat the motion. If the brief is not filed until after notice of motion to dismiss has been given, unless a reasonable excuse for delay is shown, the appeal will be dismissed. The sufficiency of such showing is a question to be determined by the court. *Carter v. Paige*, 77 Cal. 64, 19 P. 2. Where no sufficient excuse is shown, an appeal may be dismissed, even though the brief is filed two days after service of the notice of motion. *Coats v. Coats*, 146 Cal. 443, 80 P. 694. In passing upon the sufficiency of the showing made in the case of *Chapman v. Bank of California*, 88 Cal. 419, 26 P. 608, the court said:

"This shows that the appeal was taken and prosecuted in good faith. The delay in filing the transcript was trifling, and the hearing and decision of the cause on its merits will not thereby be delayed, at least not appreciably. The circumstances which occasioned the delay and oversight of counsel were such as to appeal strongly to the discretionary power of the court, and would, without doubt, have procured an order extending the time for filing the transcript if they had been brought to our attention before the motion to dismiss was made. If so, there is no reason why we may not after the motion relieve the appellant from the consequences of his delay.
* * *

While it is true that the rules of the court requiring briefs on appeal to be filed within the time specified undoubtedly conferred rights which may be enforced by litigants (*Wood v. Mesmer*, 39 Cal. App. 108, 178 P. 314, and cases there cited), it is equally certain, however, that the rights so conferred are subject to the right and power of the court upon proper showing to relieve the party from his default upon the ground of mistake, inadvertence, or excusable neglect. *Brooks v.*

Union Trust Co., 146 Cal. 134, 79 P. 843. In the case of Pacific Power Company v. State, 31 Cal. App. 719, 162 P. 641, 643, the court said:

"It has been often stated that courts in the determination of such motions as far as possible should lean toward a hearing of the case upon its merits. It may be said, also, that manifestly a large discretion is committed to the court in the exercise of its judgment as to whether a party should be relieved from such default. The rule itself is, of course, somewhat flexible, and may be set aside when justice requires it."

The appellants have presented their brief to this court, ready for filing. We have no reason to question the good faith of appellants or their counsel, and we are impressed with the showing made that the appeal has been taken in good faith and the delay has not appreciably, if at all, postponed the hearing of the appeal on its merits.

The motion for relief from default is granted. The motion to dismiss the appeal is denied, and the clerk of this court is directed to file the appellants' opening brief.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 462

WHITEFORD v. YUBA CITY UNION HIGH SCHOOL DIST.

Civ. 4382.

District Court of Appeal, Third District, California.

Oct. 14, 1931.

1. Schools and school districts ⇨89.

Motorist, injured when student on school premises threw orange through windshield, was not injured by dangerous or defective condition of grounds or property, within statute concerning school district's liability (St. 1923, p. 675, § 2).

Injured motorist alleged that principal and trustees directed students to hold rally on school premises and instructed students to take rubbish and missiles, including oranges, to school premises, and permitted them to throw missiles at passers-by. St. 1923, p. 675, § 2, makes school districts liable under certain circumstances for injuries from dangerous or defective condition of buildings, grounds, works, or property, but it could not be successfully contended that school district was liable merely because oranges, stones, and clubs might be found on school grounds, for if left on school grounds they could have caused no injury to motorist.

2. Schools and school districts ⇨89.

Statute makes school district liable only for negligence, as regards dangerous or defective condition of property (St. 1923, p. 675, § 2).

3. Schools and school districts ⇨89.

Student's throwing orange from school premises through windshield of automobile held "willful misconduct," not "negligence," precluding school district's liability (St. 1923, p. 675, § 2).

"Negligence," signifying absence of care, is opposed to diligence and is negative in its nature, implying a failure of duty, which excludes the idea of intentional wrong, and it follows that, whenever the element of knowledge and willfulness enters in, the conduct ceases to be negligent and becomes at least willful misconduct, regardless of what degree of negligence is being considered.

[Ed. Note.—For other definitions of "Negligence" and "Willful Misconduct," see Words and Phrases.]

4. Schools and school districts ⇨89.

Statute making trustees liable for judgment against school district for negligent injury to pupil could not be invoked by one not a pupil (School Code, §§ 2.800 to 2.802).

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by Oscar Whiteford, a minor, by Fay Whiteford, his guardian ad litem, against the Yuba City Union High School District. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Ray Manwell, of Marysville, for appellant.

Arthur Coats, of Marysville, and D. A. Winship, of Yuba City, for respondent.

PRESTON, P. J.

Oscar Whiteford, a minor, brought this action through his guardian ad litem against the Yuba City Union High School District for damages for personal injuries received by him at the hands of students of said school district, which resulted in the loss of his left eye.

The complaint alleges: "That on the 5th day of November, 1930, in the night time, the principal and members of the Board of Trustees directed the students of the school to hold a rally on the school premises and instructed the students to take upon the school premises rubbish and missiles, including Osage oranges; that the students in the presence of the school authorities were permitted to throw these missiles at passers-by;

that plaintiff was riding in an automobile on the public highway and one of the oranges, thrown by the students, struck the windshield, shattered the glass, and as a result thereof plaintiff's left eye was injured, and became blind." The prayer is for damages on account of this injury in the sum of \$20,-250.

To this complaint the defendant school district interposed a general demurrer. This demurrer was sustained without leave to amend. Judgment of dismissal was thereupon entered. From this judgment, the plaintiff prosecutes this appeal.

[1] The liability of the school district is the only question to be determined. Appellant contends that the facts alleged in the complaint are sufficient to constitute a cause of action against the school district under section 2 of chapter 328, Statutes of 1923 (Stats. 1923, p. 675). Section 2 of said chapter reads: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Appellant, however, was not injured by reason of the dangerous or defective condition of any of the buildings, grounds, works, or property of the school district. He was not injured upon the school grounds, nor did his injuries result from any dangerous or defective condition existing upon the school grounds. He was injured by an Osage orange deliberately thrown from the school grounds by one of the students. It cannot be successfully contended that the district is liable because Osage oranges, stones, and clubs might be found upon the school grounds. If left upon the school grounds they could do appellant no harm. Some such missiles could doubtless be found upon any school grounds.

An unlawful and wanton assault, such as was made upon appellant by the students of this school, could have been made with some of the tools or the athletic equipment, still, if made in that manner, we could not hold that such an assault and resulting injury was the result of any dangerous or defective con-

dition of the property of the school district, which was used in making such an assault, so as to bring the case within the purview of section 2 of the Statutes of 1923 above set forth. It seems absolutely clear to us that said statute (1923, p. 675) does not and was not intended to cover such a situation as here presented.

[2] We think the judgment of dismissal must be affirmed for another reason. The act of 1923 (page 675), as its title shows, creates a liability for *negligence* only. This act does not purport in its title or in its body to create any liability on the part of the school district for the unlawful or willful misconduct of its students, officers, or agents, etc.

[3] The complaint in this case is not based upon *negligence*, but upon an unlawful act and, therefore, something entirely different from mere negligence. In this kind of an action, the wrong complained of can properly be termed "willful misconduct." In law, there is a well-defined distinction between negligence and willful misconduct. Willful misconduct means something different from and more than negligence, however gross. Negligence is opposed to diligence, and signifies the absence of care. "It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong; and it follows that the moment a person wills to do an injury he ceases to be negligent." *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 P. 540, 543.

Whenever the element of knowledge and willfulness enter into the case, it ceases to be negligent, and becomes at least "willful misconduct," and this is true no matter what degree of negligence is being considered. The distinction between negligence and "willful misconduct" is discussed and clearly pointed out in the following authorities: *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 P. 510; *Tognazzini v. Freeman*, supra; *Eylenfeldt v. United Railroads*, 28 Cal. App. 56, 151 P. 293; *Malone v. Clemow* (Cal. App.) 295 P. 70. Therefore, if it be conceded for the sake of argument that appellant was injured as a result of the dangerous or defective condition of the grounds or property of the school district, still the facts alleged in the complaint would not bring the case within the provision of said act of 1923, for the reason that the action is not based on negligence.

[4] The only other statute pertaining to the liability of school districts is sections 2,800, 2,801, 2,802, of the School Code of 1929, being formerly section 1623 of the Political Code. These sections provide that the trustees of the district shall be liable in the name of the district for any judgment against the district for any injury to any pupil arising because of the negligence of the district, or its officers, or employees. The case at bar cannot come

under these sections for the simple reason that it is not alleged or claimed that the appellant was a pupil of the Yuba City Union High School District. *Ahern v. Livermore Union High School Dist.*, 208 Cal. 782, 284 P. 1105.

We are of the opinion that the trial court was correct in sustaining the demurrer without leave to amend, and that the judgment of dismissal should be affirmed and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

117 Cal.App. 530

PEOPLE v. SMITH et al.

Cr. 2095.

District Court of Appeal, Second District,
Division 1, California.

Oct. 19, 1931.

1. Burglary ☞41(1).

Larceny ☞65.

Evidence *held* to support conviction of burglary and grand theft of automobiles.

Evidence showed automobiles were stolen, that defendant stored stolen automobile which when recovered was powered by motor other than one originally in it, that substituted motor came from disabled car purchased by defendant, and that defendant told where personal property taken with car could be found; and such evidence goes beyond proof of mere possession of stolen property.

2. Criminal law ☞878(4).

Acquittal of one charge respecting theft of automobiles *held* not to operate to release from conviction of another (St. 1923, p. 564, § 146).

It was not necessarily inconsistent for defendant to be found guilty of charge that he drove car without owner's consent while he was cleared of charge that he had stolen car. Elements necessary to grand theft charge may not have been established to satisfaction of jury, though they were satisfied that he had been seen driving car contrary to St. 1923, p. 564, § 146.

3. Criminal law ☞877.

Acquittal of codefendant *held* not basis for setting aside another defendant's conviction.

4. Criminal law ☞878(4).

Where evidence supported conviction, it was immaterial that jury acquitted on another charge (St. 1923, p. 564, § 146).

This is true notwithstanding that there was some inconsistency, defendant being convicted of crime of grand theft of automobile but acquitted of charge of violating St. 1923, p. 564, § 146, notwithstanding there was no pretense that jury could have believed that car was stolen in any other manner than by driving it away.

5. Criminal law ☞1165(3).

In criminal case defendants cannot complain of error in their own favor.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Emmet M. Smith and another were convicted of burglary and grand theft, and they appeal.

Affirmed.

Orbison & Irwin, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, Justice pro tem.

[1] Appellants, Smith and Hall, were jointly charged with having broken into two garages, stolen two automobiles, and driven them without the consent of the owners. These accusations were embodied in six counts, two charging burglary, two grand theft, and two alleging violations of section 146, California Vehicle Act (St. 1923, p. 564). Appellant Smith was convicted on five counts, appellant Hall on three. Contrary to their contention, the evidence, we find, warranted the convictions.

Appellants' guilt of the crimes of burglary and grand theft was established by evidence purely circumstantial. That some one entered the garage where a Studebaker was housed and stole it and a bag, a lamp, and other articles, was proven. Also, there was evidence that some two weeks before, some one had entered a garage where a Buick was kept and had stolen it and an army blanket. There was no direct proof that either appellant entered either garage or stole either car. From the evidence it appeared, however, that appellant Hall stored a Studebaker which was identified as being the one stolen. His explanation to the garage man was that it belonged to bootlegger friend, Adkins. When recovered it was powered by a motor other than the one originally in it. This motor came from a disabled Studebaker, purchased by Hall and hauled to a private garage rented by him under the name of Adkins. In this garage, at one time, was seen the purchased wreck with its motor removed. Here also was found the registration white slip of the

stolen car. To this garage, appellant Hall drove up in a Buick sedan, but observing an officer's face framed in the open doors, dashed down the alley and made his escape. Smith, too was connected with the Studebaker. At his residence were found scattered Studebaker parts. He admitted delivering a Studebaker motor to the address which Hall, as Adkins, had rented. In his possession was found a memorandum of the license number of the stolen Studebaker car, which he said was the number of a car located at the rented place. In what amounted to a confession, he told where the personal property taken with the car could be found, and there it was found.

The Buick, which Hall drove slowly to and hurriedly from his Adkins' location, was found at Smith's residence when he was apprehended. Again, there had been the substitution of a motor, but otherwise its owner identified it as the car taken from his garage. Both appellants participated in the purchase of the Buick, burned beyond redemption, from which the motor was salvaged to substitute in the stolen car. The army blanket that was on the robe rail when the car was stolen was found on Hall's bed.

[2, 3] This evidence goes beyond proof of mere possession of stolen property, and is clearly sufficient to warrant the jury's verdicts of guilty. *People v. Lang* (1904) 142 Cal. 482, 76 P. 232; *People v. Le Roy* (1923) 192 Cal. 498, 221 P. 353; *People v. Fain* (1929) 100 Cal. App. 439, 280 P. 162. We have detailed the evidence as much as we have because of the stress appellants place upon the fact that the jury returned verdicts of guilty and not guilty scattered among the six counts against each appellant, on a basis defying rational explanation. There is a rational explanation of the jury's determination that while Hall was guilty of driving the Studebaker without the owner's consent, Smith was not; for the only driving directly witnessed, after the burglary and theft, was by Hall and not Smith. The other seeming inconsistencies are either susceptible of explanation or do not permit a reversal. It was not necessarily inconsistent for Hall to be found guilty of the charge that he drove the Buick without the owner's consent while he was cleared of the charge that he had stolen the Buick. Elements necessary to the grand theft charge may not have been established to the satisfaction of the jury, though they were satisfied that he had been seen driving the car, contrary to section 146 of the California Vehicle Act, after the burglary and theft. In such a case an acquittal of one

charge will not operate to release from the conviction of the other. *People v. Day* (1926) 199 Cal. 78, 248 P. 250; *People v. Kimmerle* (1928) 90 Cal. App. 186, 265 P. 525; *People v. Cordish* (Cal. App. 1930) 294 P. 456; *People v. McCollum* (Cal. App. 1931) 2 P.(2d) 432. On the same authorities, Hall's acquittal of the charge of burglary in the case of the Studebaker must be held not to relieve him of his conviction on the charge of stealing it. Nor, in view of the abundance of the evidence warranting Smith's conviction of burglary on both counts charging that crime, is it a valid basis of complaint on his part that the jury did not convict Hall on either count; although why they did not do so is plain neither to appellant Smith nor us. It has been held that the conviction of a co-defendant for a lesser crime than that of which an appealing defendant was found guilty is no basis for setting aside the appellants' conviction. *People v. Black* (1927) 80 Cal. App. 605, 251 P. 321; *People v. Richardson* (1927) 83 Cal. App. 302, 256 P. 616; *People v. Burdg* (1928) 95 Cal. App. 259, 272 P. 816. We apply the principle of these cases to this case, where the codefendant was released by the jury.

[4] Still another inconsistency is presented by Smith's conviction of the crime of grand theft, but his acquittal of the charge of violation of section 146, California Vehicle Act, for there is no pretense that the jury could have believed that the Studebaker was stolen in any other manner than by driving it away. A situation identical with this was reviewed in *People v. Stovall* (1928) 94 Cal. App. 635, 271 P. 576, 577, where it was held to be "immaterial that the jury acquitted on the other charge" if the evidence was sufficient to uphold the one.

[5] The record before us so clearly establishes the guilt of appellants on all the charges of which the jury found them guilty, that we are not disposed to grant them relief because the jury failed to convict them of the commission of the other crimes which the evidence as clearly established. They had the benefit of the jury's compassion, rather than suffering a burden because of its passion, as they claim. If error was committed, it was in appellants' favor and of this they cannot complain. *People v. Edwards* (1925) 72 Cal. App. 102, 236 P. 944.

The judgments and orders denying new trials are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

117 Cal.App. 659

Ex parte STAMBAUGH.

Cr. 59.

District Court of Appeal, Fourth District, California.

Oct. 23, 1931.

1. Habeas corpus ☞3.

Habeas corpus writ cannot be made to subserve office of demurrer or motion in arrest of judgment.

2. Habeas corpus ☞30(1).

Writ of habeas corpus cannot be made vehicle of determining mere errors, where conviction has been had and commitment thereon is in due form.

3. Habeas corpus ☞30(2).

Liberality of construction must be indulged in favor of complaint attacked in habeas corpus proceeding.

4. Habeas corpus ☞30(2).

Complaint in prosecution for selling gasoline, misrepresented to be gasoline of manufacturer other than true manufacturer, held sufficient when attacked on habeas corpus (St. 1929, p. 1207, § 1).

The complaint based on St. 1929, p. 1207, § 1, charging that defendant wilfully and unlawfully sold gasoline, and falsely represented such gasoline to be gasoline of manufacturer or producer, other than true manufacturer or producer, was sufficient, as against contention made in habeas corpus proceeding that it failed to allege gasoline was for internal combustion engine, since such defect could have been reached by demurrer for uncertainty, or by motion in arrest of judgment.

5. Habeas corpus ☞30(2).

That complaint in prosecution for misrepresenting manufacturer of gasoline sold did not charge wilful misrepresentation, held not fatally defective when attacked on habeas corpus, since complaint charged wilful and unlawful sale (St. 1929, p. 1207, § 1).

6. Indictment and information ☞91(1).

Word "wilful" need not be repeated in connection with each averment of acts detailed as making up charge contained in complaint.

Application by F. S. Stambaugh for a writ of habeas corpus to be directed to the sheriff of Orange County to secure release of petitioner from custody after conviction of selling gasoline, which he falsely represented to

be gasoline of manufacturer or producer other than true manufacturer or producer.

Writ discharged, and petitioner remanded.

McFadden & Holden and S. F. Gallagher, all of Anaheim, for petitioner.

Sam L. Collins, Dist. Atty., of Santa Ana, Leo J. Friis, of Anaheim, and Albert Launer, City Atty., and Raymond Thompson, Asst. City Atty., both of Fullerton, for respondent.

JENNINGS, J.

Petitioner was convicted by a jury in the recorder's court of the city of Fullerton, in Orange county, of the offense of selling gasoline which he falsely represented to be gasoline of a manufacturer or producer other than the true manufacturer or producer thereof, and was sentenced to pay a fine of \$75, and, in default of the payment thereof, to be confined in the county jail of said county at the rate of one day for each \$2 of said fine. The complaint filed in said cause purported to charge petitioner with a misdemeanor under the provisions of section 1, chapter 697, p. 1207, of the Statutes of 1929.

That portion of the provisions of said section within which it was sought to bring the alleged act of petitioner by the charging part of the complaint, reads as follows: "It shall be unlawful for any person, firm or corporation to sell, attempt to sell, offer for sale or assist in the sale of any gasoline, distillate, or lubricating oil for internal combustion engines, and wilfully and falsely represent such gasoline, distillate or lubricating oil to be gasoline, distillate or lubricating oil of any dealer, manufacturer or producer other than the true dealer, manufacturer, or producer thereof. * * *

It is contended by the petitioner that the complaint which purports to charge him with the offense of which he was convicted fails to state a public offense under the provisions of section 1 of the statute cited, and that therefore the judgment of the court rendered pursuant to the verdict of the jury is void, and that petitioner is illegally restrained and deprived of his liberty.

The charging part of the complaint is in the following language: "The crime of misdemeanor was committed by F. S. Stambaugh * * * who at the time and place last aforesaid did wilfully and unlawfully offer for sale and delivery, and did sell * * * one half (½) gallon of gasoline and did then and there falsely represent such gasoline to be the gasoline of a manufacturer or producer other than the true manufacturer or producer thereof. * * *

It appears from the record herein that petitioner took an appeal from the judgment of the recorder's court to the superior court

of Orange county, and that the judgment of said recorder's court was affirmed.

It is urged that the complaint is fatally defective in that it fails to include two essential elements necessary to charge petitioner with the commission of a crime in that, first, it fails to allege that petitioner sold gasoline for internal combustion engines, and, second, it fails to allege that petitioner willfully and falsely represented that the gasoline sold by him was gasoline of a manufacturer or producer other than the true manufacturer or producer.

[1-3] In considering the petition herein, it may not be amiss to make certain observations pertinent to the problem which is here presented. It is clear that the writ of habeas corpus is not to be made to subvert the office of a demurrer (In re Von Perhacs, 190 Cal. 364, 212 P. 689; Ex parte Williams, 121 Cal. 328, 53 P. 706; In re Avdalas, 10 Cal. App. 507, 102 P. 674; In re McDonald, 86 Cal. App. 362, 260 P. 842); nor is it to be made a vehicle of determining mere errors where a conviction has been had and the commitment thereon is in due form (In re Kowalsky, 73 Cal. 120, 14 P. 399; In re Hayward, 62 Cal. App. 177, 216 P. 414); nor of a motion in arrest of judgment. In re Simmons, 199 Cal. 590, 250 P. 684; In re Von Perhacs, supra. In determining the sufficiency of the complaint which is here attacked the greatest liberality of construction must be indulged (In re Simmons, supra), and if the facts alleged squint at a substantive statement of the offense the writ will not lie. In re Hayward, supra; In re Kaster, 52 Cal. App. 454, 198 P. 1029. A complaint will fall more easily before an attack upon an appeal than in a habeas corpus proceeding. In re Maldonado, 97 Cal. App. 288, 275 P. 495.

[4-6] Bearing in mind the well-settled principles hereinabove stated, it is not difficult to arrive at the determination that the attack made by petitioner upon the complaint must fail. It may be conceded that the complaint is defective in that it fails to contain the allegation that the gasoline, which it is charged petitioner misrepresented, was gasoline for internal combustion engines, but this defect was one that could have been reached by demurrer for uncertainty, or by motion in arrest of judgment. In re Simmons, supra. But though the complaint be defective in the respect stated, it is obvious that it attempts to charge an offense; it at least squints at an offense of which the court wherein petitioner was tried had jurisdiction, and it is not therefore subject to successful attack in this proceeding. In re Cordish, 94 Cal. App. 680, 271 P. 784; In re Hayward, supra. It can hardly be maintained that petitioner was not plainly informed of the nature of the of-

fense, the gist of which consists in the misrepresentation as to the manufacturer or producer of the gasoline. The contention that the complaint is fatally defective in that it fails to allege that petitioner willfully and falsely represented that the gasoline was gasoline of a manufacturer or producer other than the true manufacturer or producer thereof is likewise without merit. The complaint alleges that petitioner did willfully and unlawfully sell to a named individual a specified quantity of gasoline, and did then and there falsely represent it to be the product of a named producer, when in truth and in fact it was not the product of such producer. It is not necessary that the word "willfully" be repeated in connection with each averment of the acts detailed and enumerated as making up the charge contained in the complaint. People v. McDougal, 74 Cal. App. 666, 673, 241 P. 598.

The writ is discharged, and the petitioner remanded.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 636
PICKERING v. CALIFORNIA AIRWAYS CO.
et al.
Civ. 6793.

District Court of Appeal, Second District, Division 1, California.
Oct. 23, 1931.

Master and servant §330(3).

In action for injuries from airplane accident, plaintiff's plane being operated by defendant's servant as flying instructor, judgment for defendants was affirmed.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by R. B. Pickering against the California Airways Company and others. From the judgment, plaintiff appeals.

Affirmed.

Victor R. Hansen, of Los Angeles, for appellant.

Macfarlane, Schaefer, Haun & Mulford, of Los Angeles, for respondents.

YORK, J.

This is an action for the recovery of damages for personal injuries and property damage resulting from an accident in plaintiff's own airplane, in which the plaintiff was a student of the respondent company, and, at the time of the accident, was taking a course

of instruction in flying under the tutelage of respondent company's instructor, who was then and there employed by respondent company as a pilot for the instruction of students in the art of practical flying of aircraft. The plane itself was the property of the student—the plaintiff and appellant. At the beginning of the flight for instruction in which the accident occurred, the plaintiff operated the airplane at the time of the take-off, under signals given by the said instructor, and the plaintiff operated it up to five minutes prior to the accident, but at the exact time of the accident the plane was being operated and was under the control of the instructor. The plane dropped when at an elevation of about three or four hundred feet, and dove to the ground. After using all the means possible to right the plane, the instructor failed in his attempt to right it before the crash occurred.

Appellant contends that the judgment should be reversed because the findings are not supported by the evidence. There is evidence, however, to support each finding; although it is true that the evidence on some points is somewhat conflicting.

Appellant contends that there is evidence that the contract of January 20, 1928, was not the only agreement between the parties. The brief of appellant attempts to point out that this contract could not refer to any cross-country flying, which, according to appellant's contention, was the mission upon which plaintiff and the pilot were engaged at the time of the accident; appellant contending that the contract is limited to "practical flying at the airport or flying field of the company." This is not borne out by the evidence, as there was always, in each of the lessons given, flying beyond the actual airport or flying field of the company. Some point is made that the airplane in which the flight was made was an unlicensed aircraft. However, it was the property of the appellant, and it does not lie in his mouth to raise that question on appeal.

There is evidence from which the court could have found that the accident was caused wholly by a condition of the air that could not be anticipated. That may well have been the basis of several of the findings made by the trial court.

If the servant, that is, the instructor in this case, was acting without and beyond the authority vested in him by his employer in going beyond the distance that he was ordered to go by the employer, but within the distance which he was ordered to go by the owner of the plane, to whom the instructor was giving the lesson, then the respondent would not be liable for the injuries sustained by the appellant.

The judgment is affirmed.

CONREY, P. J.

I concur in the judgment. It is enough that there is evidence sufficient to sustain the court's decision that defendants' representative, Anderson, was not guilty of negligence in his operation of the plane at the time of the accident.

HOUSER, J.

I concur in the judgment.

117 Cal.App. 520

PEOPLE v. CUPPS.

Cr. 2102.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1931.

Rehearing Denied Oct. 30, 1931. Hearing Denied by Supreme Court Nov. 16, 1931.

Criminal law ⇨ 1170(1).

Defendant's guilt of robbery being overwhelmingly established, notwithstanding direct testimony of alibi, excluding conversation merely supporting alibi held not reversible error, since not affecting result (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Irsle Howard Cupps was convicted of robbery, and he appeals.

Affirmed.

Thomas P. Walker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

BISHOP, Justice pro tem.

Appellant was found guilty of robbery in the first degree. The evidence amply supports the finding. Close to 11 o'clock one evening, the evidence reveals, the home of the Blundons was entered by two men, unmasked, who, under the menace of revolvers, robbed the Blundons of \$40 in cash, a radio, and a bunch of keys. Both Mr. and Mrs. Blundon identified appellant, with positiveness, as the robber who held the guns while his companion collected. Immediately after the intruders left, Mr. Blundon hurried into the street and discharged his revolver twice. A police officer in a patrol car, operating in the neighborhood of the Blundons, hearing what he thought were shots, immediately thereafter saw a coupé, with a radio on the running board. As the officer gave chase, the coupé sped away; the radio bouncing off the car in-

to the street. This radio was identified as the one taken from the Blundons, and appellant was identified by the officer as the man who was holding it on the running board of the coupé. About two hours later, appellant and one Keith were arrested and the stolen bunch of keys, containing a tag with the Blundons' name and address, was found in appellant's possession. This review of the evidence has been given to show the basis of our conclusion that the matters complained of, even if admitted to be errors, are inconsequential.

By way of defense, appellant produced testimony that he was at an East Vernon street address, a few miles from the vicinity of the Blundons, all the evening on which they were robbed. A part of his story was that one Butler had borrowed his car about nine o'clock that evening. The appellant himself was a witness, and testified that he told Butler to return his car in half an hour, but that so far as he knew it was not returned until he got ready to leave, about 11:30. At that hour the car, with Butler's overcoat in it, was in front of the house where appellant had been. Before appellant appeared as a witness, Keith was on the stand, and testified that the defendant was at the East Vernon street address at all times between the hours of 7:30 and 11:30 p. m. on the evening of the robbery. Keith further stated that he had heard a conversation between Bob Butler and the defendant, but he was not allowed to relate its contents. The burden of the conversation, it appears, had to do with Butler's borrowing the defendant's car; and it was offered, not as proof of any fact related by the conversation, but as a fact in itself, from which the jury might infer that Butler had taken the car, and that it was he, therefore, and not the defendant, who was seen driving it immediately after the robbery. Even if we concede that the conversation should have been placed before the jury by Keith, the ruling keeping it out does not justify a reversal. The fact that defendant and Butler discussed the borrowing of the former's car by the latter would, at best, give rise to but an inference that that event had taken place. That the event had taken place, if Keith was to be believed, was clear from statements which he made in his testimony. The relating of the conversation would in no way have added to his credibility as a witness, although it might have added somewhat to the weight of his statements. As the evidence of defendant's guilt was quite overwhelming, and the story both he and the defendant told was found a fabrication by the jury, the action of the trial court in refusing to permit Keith to add a detail, in itself but a line in the picture painted, cannot be said to have affected the

result. We must disregard such errors. Cal. Const. art. 6, § 4½.

No useful purpose would be served in listing the few questions and comments by the prosecuting attorney of which appellant complains. We have examined them all and find neither error nor substance in any way affecting the outcome of the case.

The judgment appealed from should be, therefore is, affirmed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 627

HAND et al. v. CITY OF WHITTIER.

Civ. 6863.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1931.

Municipal corporations ☞609.

Passage of ordinance declaring that burial of dead within city was dangerous to life being in exercise of governmental function, owners of cemetery could not maintain action against city for damages, in absence of statute.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by E. V. Hand and others against the City of Whittier. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Haas & Dunnigan and W. E. McClintock, all of Los Angeles, for appellants.

Arthur G. Wray, of Whittier, for respondent.

HOUSER, J.

As far as is pertinent to a decision of the instant appeal, it may be stated that the facts on which the judgment depends are that plaintiffs are the owners of a small cemetery located within a thinly populated portion of the city of Whittier; that the people of the city by direct vote adopted an ordinance by which it was declared that the burial of the dead within the city was dangerous to life and detrimental to the public health, and forbade the interment of the dead body of any person in any cemetery within the corporate limits of said city; that thereupon the plaintiffs brought an action against said city for damages caused by "said ordinance and the unreasonable arbitrary caprice and unrestrained will of the municipality and the refusal of the officers thereof to issue per-

mits for burials." The defendant's demurrer to plaintiffs' complaint was sustained by the trial court without leave to amend; and it is from the ensuing judgment that this appeal is prosecuted.

It is undisputed by appellants that the passage of the ordinance in question was an act by the city of Whittier in the exercise of a governmental function. In such circumstances, in the absence of any statute to the contrary, the principle of law is well established that an action for damages against the city will not lie. 18 Cal. Jur. 1091; 19 R. C. L. 1083.

In the case of *Bertiz v. City of Los Angeles*, 74 Cal. App. 792, 796, 241 P. 921, 923, the following excerpt from the case of *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667, is quoted with approval, to wit: "When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for non-user or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation."

See, also, *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106; *Miller v. City of Palo Alto*, 208 Cal. 74, 280 P. 108.

In the case of *Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1, it is held that a municipality is not civilly liable in damages which may result from the passage by its council of an illegal ordinance.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

117 Cal.App. 578

CHAPMAN v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 730.

District Court of Appeal, Fourth District,
California.

Oct. 20, 1931.

1. Justices of the peace § 155(1).

Delay caused by erroneous order of superior court dismissing appeal from justice's

court held not to suspend operation of statute so as to give superior court jurisdiction to vacate order dismissing appeal after year had elapsed (Code Civ. Proc. § 981a).

Code Civ. Proc. § 981a, provides that no action appealed from justice's court shall be further prosecuted, and that no further proceedings shall be had therein, and that appeal must be dismissed where appealing party fails to bring appeal within one year from date of filing the same in superior court, unless time be extended by written stipulation filed with the clerk of court to which appeal is taken.

2. Mandamus § 57(1).

Writ of mandate will issue compelling dismissal of appeal from justice's court, where superior court over two years after appeal was perfected made order vacating dismissal, there being no written stipulation for extension, as provided under statute (Code Civ. Proc. § 981a).

Petition by C. S. Chapman for a writ of mandate to compel the Superior Court of Fresno County, and Honorable C. E. Beaumont, Judge of Department Two thereof, to dismiss an appeal from a justice's court.

Petition granted, and writ issued requiring respondent court to enter an order dismissing the appeal.

David E. Peckinpah and Bert M. Green, both of Fresno, for petitioner.

Henry A. Hunter, of Fresno, for respondents.

BARNARD, P. J.

This is an application for a writ of mandate to compel the superior court of Fresno county to dismiss an appeal from a justice's court.

It appears from the stipulated facts that on February 6, 1928, an action was brought in the justice's court of the city of Fresno by the Fresno Investment Company, a corporation, against C. S. Chapman, the petitioner herein, to recover \$173.85; that a trial was had resulting in a judgment for the defendant; that within the time allowed by law and during the month of December, 1928, the plaintiff in that action duly perfected an appeal to the superior court of Fresno county; that on March 1, 1929, on motion of the plaintiff, the appealed cause was set for trial in the superior court on April 18, 1929; and that on March 22, 1929, the court granted a motion made by the defendant to dismiss the appeal, the motion having been made upon the ground that the appeal was from the judgment of a purported court which had no legal existence, and that at the time the judgment was rendered the said court had no jurisdiction to

render any judgment whatsoever. In this connection, it is stipulated that on February 23, 1929, one Earl J. Church, who had been presiding over the justice's court of the city of Fresno, and who had rendered the judgment appealed from, voluntarily vacated the office of justice of the peace of the said justice's court, for the reason that the auditor of Fresno county had refused to pay his salary; this refusal being based upon the advice of the district attorney of Fresno county to the effect that said justice's court had no legal existence. It is further stipulated that the office of justice of the peace of the city justice's court of Fresno remained vacant from February 23, 1929, to and including March 16, 1931, when it was "reestablished" pursuant to an order of the board of supervisors of Fresno county. It is further stipulated that such re-establishment followed a writ of mandate issued by the Supreme Court of California. *Church v. Board of Supervisors* (Cal. Sup.) 295 P. 516. On April 1, 1931, the Fresno Investment Company filed a notice of motion to vacate the order dismissing the appeal from the justice's court upon the grounds that the judgment appealed from was a legal judgment, and that the superior court had jurisdiction of the appeal, and that the previous order of said superior court dismissing said appeal was a nullity. After a hearing, this motion was granted, and an order made on April 3, 1931, vacating and setting aside the previous order dismissing the appeal. On April 16, 1931, this petitioner filed notice of motion to dismiss the appeal, upon the ground that the same had not been brought to trial within the period of one year. On May 26, 1931, an order was made by the superior court denying this motion. It further appears that this petitioner has not signed or filed any written stipulation extending the time for hearing said appeal.

[1-2] The only question here presented is whether, under the terms of section 981a of the Code of Civil Procedure, this petitioner is entitled to have the appeal from the justice's court dismissed; the same not having been brought to trial within one year. That section provides that no action thus appealed shall be further prosecuted, that no further proceedings shall be had therein, and that the appeal must be dismissed where the appealing party fails to bring such appeal to trial within one year from the date of filing the same in the superior court, unless such time be extended by written stipulation filed with the clerk of the court to which the appeal is taken. The provisions of this section have frequently been held to be mandatory. *Swim v. Superior Court*, 193 Cal. 539, 226 P. 2; *Eckard v. Superior Court*, 195 Cal. 473, 234 P. 80; *Hoopes v. Superior Court*, 71 Cal. App. 564, 235 P. 739; *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670. The question now presented is

whether the facts here shown constitute an exception to the general rule. In behalf of respondents, it is urged that the appealing party in the action referred to has not failed to comply with the section in question, since the time limitation of that section was suspended during the time intervening between the date when the appeal was ordered dismissed and the date when that order was set aside.

It must be conceded that the order made on March 22, 1929, dismissing the appeal was erroneously entered. If made in time, the order of April 3, 1931, vacating the previous order dismissing the appeal would have been proper. *Edwards v. Superior Court*, 159 Cal. 710, 115 P. 649. In the case just cited, it was held that a superior court has jurisdiction to vacate an order dismissing an appeal from a justice's court in a case where the appeal has been erroneously dismissed. This case, however, is not authority for the proposition that such a proceeding is proper after the period of one year, referred to in said section 981a, has elapsed. It would seem that the application for and the order vacating the previous order was a "further proceeding" in the action. But any "further proceeding" is prohibited by the statute, after the expiration of one year. It has been held that this prohibition against further action deprives the court of authority to take any action in the case, other than to dismiss the appeal. *Napolitano v. Superior Court*, 81 Cal. App. 639, 254 P. 647. We are of the opinion that, under the terms of the statute, the respondent court had no power to make the order of April 3, 1931, vacating its previous order dismissing the appeal. Having made this order, however, and having subsequently entered an order refusing to dismiss the appeal, and more than two years having elapsed since the appeal was perfected and no written stipulation, in accordance with section 981a of the Code of Civil Procedure, having been filed with the clerk of the superior court, a writ of mandate will issue to compel the dismissal of the appeal in question. *Eckard v. Superior Court*, supra.

While the order of March 22, 1929, was erroneous, it did not have the effect of suspending the operation of the statute. Nor was the appealing party without remedy. At the time this order was made, only about three months of the year had elapsed. The superior court could have been compelled by writ of mandate to hear the appeal. *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 P. 978. However, the party aggrieved by the order did not avail himself of this remedy, and in fact took no steps to protect himself for more than two years. The statute in question makes no provision for an exception to the rule, in case the delay occurs without fault on the part of the appellant, and in spite of the fact that he has done all within his pow-

er. Even if it should be assumed that it is within the power of a court to make such an exception, no such a situation here appears. In our opinion, the facts before us do not constitute an exception to the general rule.

The order made by the respondent court on May 26, 1931, denying a motion to dismiss the appeal in question should therefore be annulled, and a writ should issue requiring the respondent court to make and enter an order dismissing the appeal.

Let the peremptory writ issue.

We concur: JENNINGS, J.; ALLISON, Justice pro tem.

117 Cal.App. 523

S. H. WEST & CO. et al. v. WAGNER et al.
Civ. 6689.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1931.

1. Brokers §63(1).

Owners held bound to pay commission to brokers for securing acceptance of offer to exchange real estate, where failure of consummation of exchange was due to owners' fault.

Facts disclosed that by the terms of a written contract owners agreed to pay brokers \$500 if they secured an acceptance of owners' offer to exchange real estate and the exchange was consummated, and \$500 plus the commission to be promised by the acceptors of the offer, if the exchange failed, due to the fault of either party; that brokers secured the acceptance; that the exchange was never consummated due to owners' fault; and there were no facts in evidence showing fraud or waiver creating an estoppel.

2. Appeal and error §169.

Judgment cannot be reversed on grounds pressed for first time on appeal.

Appeal from Superior Court, Los Angeles County; Leonard F. Wilson, Judge.

Action by S. H. West & Co. and another against Harry F. Wagner and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Praeger & Biddle, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondents.

BISHOP, Justice pro tem.

Plaintiffs successfully sought a judgment for brokers' commissions earned by securing an acceptance of an offer to exchange real estate. We are of the opinion that the judgment must be affirmed.

Defendants placed in the hands of plaintiffs, the record shows, a writing signed by themselves containing an offer to exchange their property, subject to a mortgage for \$15,500 and other incumbrances, for certain other property described in the writing, subject to its listed incumbrances. The writing also contained a statement that S. H. West & Co. was irrevocably appointed defendants' agent to negotiate an acceptance, and that they agreed to pay "said agent S. H. West & Co. and A. Stanley White a commission for his services \$500.00, immediately upon the procuring by him * * * of said written acceptance of this offer." It was further provided that the agent for either party to the exchange might act for the other party and receive a commission of not to exceed \$1,500. The writing continued: "It is further agreed and understood, that if for any reason whatsoever either or all of the principals to this agreement, shall fail to comply with same, and in consequence this exchange shall fail of consummation, then the party or parties at fault for such failure agree to pay S. H. West and Company the full commission for both sides together with attorney and escrow charges."

The same day plaintiffs presented this offer to the Wilsons, who signed an acceptance unconditionally. They further agreed to pay plaintiffs a commission of \$1,500. Within five days thereafter, the parties entered escrow, conditioned upon each complying with the escrow instructions within thirty days. This the defendants failed to do, and the Wilsons terminated the escrow and called the deal off.

With these facts as a background, the parties entered upon the trial with a statement, made by the plaintiffs and echoed by the defendants, that there were only two issues involved: (a) "Whether the defendants in the case were the parties at fault in failing to consummate the transaction," or whether they were excused by their special defense; and (b) whether or not the contract is such that plaintiffs were entitled to attorney's fees. As the trial court found on the second issue in favor of appellants, the first is the only question presented both to the trial court and to us. The theory of the case, thus framed by the statement to the trial court, is in harmony with the pleadings, where the only issue raised (in addition to the denial of an interpretation of the contract which would allow plaintiffs attorney fees) was a denial of defendants' inability

to complete the terms of the exchange, a denial that it failed of consummation through their fault, and the affirmative defense that it was all plaintiffs' fault. By way of explaining how plaintiffs were at fault, defendants alleged that shortly after the escrow was opened plaintiffs came to them, requesting that instead of a loan of \$15,500, against the property they were to convey to the Wilsons, that \$17,500 be secured; that repeated attempts to obtain this sum from sources suggested by plaintiffs were fruitless but time consuming, with the result that they had secured no loan of any amount within the thirty days prescribed in the escrow instructions, failed to comply with its provisions, and the Wilsons withdrew. The findings do not touch specifically upon this special defense, but, in substance, find against it in declaring "the exchange failed of consummation by reason of the fault of the defendants."

[1] Assuming, however, that this is insufficient as a finding, and that there is no finding on this special issue, appellants are not harmed, for if true it would constitute no defense. When they left the presence of the defendants with the signed writing in their hands, plaintiffs plainly had a written contract, promising them (a) \$500 if they secured an acceptance and the exchange was consummated; (b) \$500 plus the commission to be promised by the acceptors of the offer, if the exchange failed, due to the fault of either party. They secured the acceptance, which earned them their commission. *Jau-man v. McCusick* (1913) 166 Cal. 517, 137 P. 254. As between the parties to the exchange, the fault for the failure is not the Wilsons, but the defendants. Under what principle of law are the defendants to be relieved from the obligation thus imposed by their contract, because of what plaintiffs are alleged to have done? There are no facts alleged, or appearing in the evidence, showing fraud or waiver, creating an estoppel, or giving rise to any known or suggested theory or fiction of law, which forfeits the rights plaintiffs acquired under the contract. Of course, plaintiffs denied that the added sum was sought at their request, but, if it was, it was not under conditions which made them responsible for the defendants' failure, or which worked as a surrender of plaintiffs' right to an earned commission.

[2] It would not be proper for us to reverse this judgment on grounds which, if they had been before the trial court, might have resulted in the admission of evidence and the making of findings which would obviate a reversal, but which are pressed for the first time on appeal. 2 Cal. Jur. 234; *American Exchange National Bank v. Soffel* (Cal. App. 1931) 3 P.(2d) 338; *Isen-*

berg v. Sherman, (Cal. Sup.) 299 P. 528. For this reason, we shall not discuss appellants' contention that there was a mutual rescission of the exchange agreement by all concerned, nor their argument that by some subsequent promise of the Wilsons plaintiffs were to receive more than \$1,500, nor the claim that there was no proof that the Wilsons could perform, nor the effect of the defendants' belated offer to perform. No other matter merits comment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 510
MERCANTILE BANKING CO., S. A., v.
HERNANDEZ.
Civ. 873.

District Court of Appeal, Fourth District,
California.

Oct. 16, 1931.

Appeal and error ⇨70(1).

Order made before entry of judgment setting aside default of defendant entered by clerk is not appealable, it not being order made after judgment nor interlocutory order (Code Civ. Proc. § 963).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Mercantile Banking Company, S. A., against Jose M. Hernandez. From an order vacating and setting aside default of defendant, plaintiff appeals.

Appeal dismissed.

MacKinnon & Kirk, of Calexico, for appellant.

M. C. Atchison, of Calexico, for respondent.

JENNINGS, J.

The appeal herein is from an order vacating and setting aside the default of the defendant entered by the clerk—an order made before the entry of any judgment in the action. Such an order, where it appears that no judgment has been entered upon the default, is not the subject of a separate appeal. It is in no sense an order made after judgment and is not one of the interlocutory orders enumerated in section 963 of the Code of Civil Procedure. *Savage v. Smith*, 154 Cal. 325, 97 P. 821; *Rauer's Law, etc., Co. v. Standley*, 3 Cal. App. 44, 84 P. 214; *Rose v. Leland*, 17 Cal. App. 308, 119 P. 532; *Lapique v. Plummer*, 24 Cal. App. 685, 142 P. 107.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 614

O'NASH v. BOOTH.

Civ. 4359.

District Court of Appeal, Third District, California.

Oct. 21, 1931.

1. New trial $\S$ 108(1).

Question of efficacy of newly discovered evidence is peculiarly one addressed to judge's discretion.

2. Appeal and error $\S$ 981.

Unless manifestly abused, exercise of judge's discretion in denying new trial for newly discovered evidence will not be disturbed.

3. New trial $\S$ 108(4).

Where automobile guest recovered damages for permanently injured arm, judge under evidence did not abuse discretion in denying new trial for newly discovered evidence that arm had been injured over eight years previously.

Appeal from Superior Court, Sacramento County; Malcolm O. Glenn, Judge.

Action by Charles A. O'Nash against William N. Booth. Judgment for plaintiff, and defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Downey & Chester, of Sacramento, for respondent.

PRESTON, P. J.

Action for damages for personal injuries. The cause was tried before a jury and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$10,000.

A motion for a new trial was made principally upon the ground of newly discovered evidence. The motion was denied. From the judgment entered upon the verdict defendant Booth prosecutes this appeal.

Plaintiff was severely and permanently injured in the right arm and shoulder on October 1, 1928, at the intersection of Nineteenth and Q streets, in the city of Sacramento, when the automobile in which he was riding, as a guest of defendant and appellant, collided with another automobile driven by a man by the name of Mulligan.

The sole contention made for a reversal of the judgment is that the trial court abused its discretion in denying appellant's motion for a new trial. The motion was heard upon the affidavit of one of the defendant's attorneys and upon the counteraffidavits of plain-

tiff and Dr. June B. Harris, which affidavits reveal substantially these facts:

This accident occurred on October 1, 1928, and the injuries received by plaintiff, according to his testimony and that of his physician, consisted of a severe injury to his right arm and shoulder, which totally and permanently incapacitated him from performing any manual labor of any kind. On July 12, 1930, about 17 days after the trial, defendant's attorney discovered that plaintiff had received an injury to this same arm in Fresno on the 3d day of March, 1920, and that the subjective symptoms related by plaintiff to the various and several doctors who examined and treated him following this first injury in 1920, are very similar to the subjective symptoms related by plaintiff upon the trial of this action, and that he believes that the injuries now complained of by plaintiff were traceable back to the injury received by plaintiff in 1920, and that if a new trial could be granted he would produce witnesses to substantiate said contentions. The affidavit of Mr. Desmond, one of defendant's attorneys, also avers: "That the deposition of said plaintiff was taken * * * on the 9th day of November, 1929, * * * and at said time and * * * plaintiff testified that he had lost a portion of his left arm in a railroad accident many years ago, and that his right arm had not been injured in said railroad accident, but plaintiff failed to state at said time and * * * that his right arm had ever before been injured."

There was also offered in evidence, in support of the motion for a new trial, the record of the industrial accident commission, which showed that plaintiff had received in 1922, \$600 for the injury suffered on March 3, 1920.

In plaintiff's counter affidavit he denied that defendant's attorney had ever asked him anything concerning the prior accident. This counter affidavit also avers that the prior accident occurred more than eight years before the injury involved in this action and that within a few months after the settlement for that accident in 1922, his right arm had returned to its normal power and all vestige of every symptom of the injury had passed away, and since that time (July, 1922), and up to the time of the present injury, was able to perform the usual and customary duties of a hoistman, which requires the most rigorous use of said arm and the muscles therein, and that for several years immediately preceding the accident here involved, he had suffered no pain and no disability of any kind or character in said arm, etc.

There was also presented to said court in opposition to the motion for a new trial the affidavit of Dr. June B. Harris, which reads in part as follows:

"He (Dr. June B. Harris) is a physician and surgeon, and the identical J. B. Harris who testified on behalf of the plaintiff herein upon the trial of this action heretofore held. That he has read the affidavit of Gerald M. Desmond herein filed, and considered the matters and things therein set forth.

"Even assuming that there had been introduced upon the trial of said action testimony concerning the injury to said plaintiff upon the 3d of March 1920 as set forth in the affidavit of said Gerald M. Desmond his testimony concerning the injury and its effects, sustained by the said plaintiff in the automobile accident in 1928, would not have been changed.

"Even assuming as true the matters and things set forth in the affidavit of the said Gerald M. Desmond, he is now of the present opinion that all of the symptoms and disability now affecting the arm of the said plaintiff came from the effects of the injury received in the automobile collision and in no way relates to the prior accident in 1920.

"That when he examined the said plaintiff, as testified to upon said trial, he observed a scar upon the injured arm of said plaintiff, who then and there stated to him that the same had resulted from a scald received by him several years prior to said automobile accident."

[1,2] The question as to the efficacy of newly discovered evidence is peculiarly one which is addressed to the discretion of the trial court, and the exercise of this discretion will not be disturbed except in a case of manifest abuse. The authorities supporting this well-settled rule are legion and we shall only cite *Waer v. Waer*, 189 Cal. 178, 207 P. 891.

[3] We are not convinced that such an abuse of discretion has been shown in this instance. In fact, taking the entire situation as it was presented to the trial court on the motion for a new trial, we are fully satisfied that the learned trial court exercised its discretion wisely in denying the motion.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

117 Cal.App. 559

BROWNE v. LOS ANGELES RY. CORPORATION.

Civ. 6797.

District Court of Appeal, Second District,
Division 1, California.

Oct. 20, 1931.

Appeal and error ⇨ 1052(8), 1056(6).

Errors, if any, in admitting and excluding testimony on question of injuries, *held*

harmless where evidence did not establish negligence.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Anna Browne against the Los Angeles Railway Corporation. From a judgment for defendant, and from an order denying motion for new trial, plaintiff appeals.

Judgment affirmed, and the appeal from the order denying new trial dismissed.

Walter W. Osterman, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Malcolm Davis, of Los Angeles, of counsel), for respondent.

BISHOP, Justice pro tem.

The plaintiff is the appellant in this case, having failed to convince the trial judge that the defendant caused her injuries by a sudden starting of one of its cars as she was alighting. This was specified in her complaint as defendant's negligent act, and the trial court specifically found that the car was standing still when she fell. The evidence in support of this finding preponderates.

With this finding, error, if existent, in not permitting the appellant to testify that she had had (or had not had) arthritis, becomes of no consequence. Likewise, if it was error not to permit a witness to testify to the condition of the street where appellant fell (it was alleged in the complaint that she was thrown onto a pile of rocks), the error is harmless, for the testimony was directed entirely to the question of injuries, and as there is no negligence, the question of injuries is moot. We find no error prejudicial to appellant.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 548

ZAGOREN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 4501.

District Court of Appeal, Third District, California.

Oct. 19, 1931.

Rehearing Denied Nov. 18, 1931. Hearing Denied by Supreme Court Dec. 18, 1931.

Executors and administrators ⇨ 111(1).

Executors and administrators are not personally liable for payment of attorney's fees in probate matters, but such fees are payable like other expenses of administration (Code Civ. Proc. §§ 1616, 1619).

Application by H. W. Zagoren for a writ of mandamus to be directed to the Superior Court in and for Sacramento County, Hon. Malcolm C. Glenn, Judge, and Harry W. Hall, Clerk of Sacramento County.

Application denied.

H. W. Zagoren, in pro. per. and James F. Gaffney, both of Sacramento, for petitioner.

Devlin, Devlin & Diepenbrock, of Sacramento, for respondents.

PRESTON, P. J.

This is an original proceeding in mandamus. The facts are briefly these: On the 2d day of May, 1922, Henrietta de Bach Myers was, by an order of the Superior Court in and for the county of Sacramento, appointed administratrix of the estate of her deceased husband, L. W. Myers. Mrs. Myers duly qualified and continued to act as administratrix of her husband's estate until June 19, 1925, when she was permitted by the court to resign. The California Trust & Savings Bank, a corporation, was appointed by the court administrator of said estate in her place and stead.

The California Trust & Savings Bank immediately qualified and took over the administration of said estate, and continued to act as administrator until on or about January 20, 1931, when it resigned. Louis J. Myers was thereafter appointed administrator of said estate, and is now the duly appointed, qualified, and acting administrator of said estate.

From the 4th day of November, 1923, to June 4, 1929, George L. Popert and petitioner, H. W. Zagoren, were the regularly employed attorneys for Mrs. Myers and the California Trust & Savings Bank in all matters connected with the administration of said estate. Said estate consisted largely of real property valued at more than \$1,000,000, but heavily incumbered. Petitioner and Mr. Popert performed the ordinary legal services connected with the administration of said estate, and also performed extraordinary services in connection therewith during the time that they were attorneys for the above-named two administrators. They were paid on account of their commissions during this time the sum of \$5,250.

On or about the said 4th day of June, 1929, said Superior Court, upon the petition of the California Trust & Savings Bank, discharged said petitioner and Popert as attorneys of record for California Trust & Savings Bank as such administrator, and substituted the firm of Devlin, Devlin & Diepenbrock as attorneys of record for said administrator. Thereafter, and on the 20th day of January, 1931, your petitioner, H. W. Zagoren, petitioned said Superior Court for a further allowance of attorney's fees for services ren-

dered, under the provisions of section 1616 of the Code of Civil Procedure. This petition, the application of California Trust & Savings Bank for permission to resign as administrator of said estate, and the petition of Louis J. Myers to be appointed administrator of said estate in the place and stead of California Trust & Savings Bank all came on for hearing before the court at the same time.

The application of petitioner for further attorney's fees was contested by the California Trust & Savings Bank, but during the hearing of these three petitions it was stipulated by all the parties concerned in open court that the application for attorney's fees should be deemed to have been made prior to the acceptance of the resignation of the California Trust & Savings Bank as administrator and the appointment of Louis J. Myers as administrator to continue the administration of said estate. The court allowed petitioner herein the sum of \$4,000 as additional attorney's fees, \$2,000 for ordinary services, and \$2,000 for extraordinary services, a portion of said order reading as follows: "Let an order be entered allowing petitioner, against and out of said estate and in payment of legal services rendered therein, the sum of \$2,000.00 for ordinary services, and the sum of \$2,000.00 for extraordinary services."

No appeal was taken from this order, and it has become final.

The California Trust & Savings Bank was permitted to resign, its accounts were settled and approved by the court, and Louis J. Myers was appointed administrator and qualified in its place and stead, and all property belonging to said estate was turned over to Louis J. Myers, the last administrator.

Petitioner's attorney's fees so allowed were not paid. He applied to the county clerk of the county of Sacramento for a writ of execution to be issued against the California Trust & Savings Bank, which was denied, and thereupon this proceeding was instituted to compel the county clerk and ex officio clerk of the Superior Court of Sacramento county to issue a writ of execution in favor of petitioner, Zagoren, and against the California Trust & Savings Bank, a corporation, to enforce payment of said sum of \$4,000, together with interest, under the provisions of section 1649 of the Code of Civil Procedure.

The personal liability of the California Trust & Savings Bank for the payments of this \$4,000 due petitioner is the only question that need be determined in this proceeding.

We are satisfied that, since the amendment of sections 1616 and 1619, Code of Civil Procedure, in 1905 and 1909 (Stats. 1905, pp. 727 and 776; Stats. 1909, p. 987), an executor or administrator is not personally liable for the payment of attorney's fees in probate

matters, but such fees are now proper expenses of administration, payable like other expenses of administration. This conclusion is not only irresistible from a reading of the statutes as amended, but also by the following authorities: *In re Estate of Kelleher*, 205 Cal. 757, 272 P. 1060, 1063; *Chapman v. Pitcher*, 207 Cal. 63, 276 P. 1008, 1010. In the last-mentioned case the court said:

"The many earlier cases of this court cited by appellant, to the effect that an administrator or executor of an estate is personally liable for the payment of attorneys' fees in probate matters, were decided before the change was brought about by the adoption of the amendment and the enactment of statutes which revised the whole system of claims against estates and more particularly placed attorneys in their relation to estates on a basis similar to that of executor or administrator."

In *Re Estate of Kelleher*, supra, the court said: "The fees for attorney's services, being a proper expense of administration, are payable like the other expenses of administration, and are not a personal charge against the executor."

Petitioner argues that the court's order allowing him \$4,000 additional compensation made him a creditor of said estate and also constituted an order on the administrator for its payment, and, payment having been refused by California Trust & Savings Bank, the then administrator, said bank, became personally liable under section 1649, Code of Civil Procedure, and he was entitled to have execution issued against the bank to enforce payment.

This argument is ingenious, but we believe unsound, in view of the provisions of the court's order and the undisputed facts as to the condition of said estate of L. J. Myers, deceased. In the first place, section 1616 of the Code of Civil Procedure, under which the court made the order, provides that the administrator "pay such attorney out of the estate," etc. In the second place, the order of the court specifically provides that payment and allowance to petitioner of said \$4,000 be paid "out of said estate."

Furthermore, the California Trust & Savings Bank did not have in its possession any money belonging to said estate with which payment to petitioner could have been made. In fact, the estate being administered consisted almost entirely of real estate heavily incumbered, and there was no money belong-

ing to said estate to pay any of the creditors, and the same condition apparently prevails at the present time.

We think section 1649 of the Code of Civil Procedure (now section 954 of the Probate Code) must be considered with the other sections of the same Code with reference to the payment of creditors of an estate, and, when so considered, it (section 1649, Code Civ. Proc.) presupposes that there are funds available for the payment of the creditors. Where the funds are available and the court orders the administrator to pay them, and he either deliberately refuses to pay the creditors or dissipates the estate's money, then and under such circumstances he is personally liable to the creditors, and execution may issue. But we think said section has no application under the unusual circumstances here presented.

Certainly an administrator of an estate cannot be held personally liable for the payment of a creditor's claim against the estate simply because such creditor has an order for its payment from the court, when said administrator or executor has no funds belonging to the estate with which to pay the creditors. The administrator or executor must refuse to make payment to the creditor after he has funds, or should have funds available for such purpose and after the court has directed him to pay such creditor, before he and his bondsmen are personally liable. Otherwise, an administrator or executor could be compelled, without fault on his part, to advance his own personal funds to pay creditors of the estate he was administering, and sometimes, perhaps, when such estate was insolvent. This was certainly not the construction intended by the Legislature to be placed on said section 1649, Code of Civil Procedure. Petitioner herein will have to look to the assets of the estate for the payment of his claim, and he is not without remedy to enforce payment if the estate is not insolvent. This conclusion on our part makes it unnecessary to give consideration to the other points raised by respective counsel in this proceeding.

We think the petition should be denied and the alternative writ discharged, and it is so ordered.

I concur: R. L. THOMPSON, J.

PLUMMER, J., deeming himself disqualified, did not participate in this decision.

117 Cal.App. 526

McCABE v. CHESELDINE.

Civ. 6720.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1931.

1. Damages ⇨ 132(2).

\$3,500 for injuries to woman confining her to bed for five weeks, permanent injury being probable, *held* not excessive.

Facts disclosed that injured woman was knocked on her back as she stepped from a street car, confined to bed for five weeks, unable to work for three more weeks, suffered for five months with severe headaches, was unable to do her housework, and had a fracture of the twelfth rib near the spine, which very likely will result in a permanent injury.

2. New trial ⇨ 32.

Plaintiff's attorney's argument to jury that defendant driving automobile striking plaintiff was "potential murderer," not resulting in miscarriage of justice, *held* no grounds for new trial.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Marie McCabe against George H. Cheseeldine. From a judgment for plaintiff, defendant appeals.

Affirmed. Appeal from order denying new trial dismissed.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Lorrin Andrews, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1] Knocked on her back in the street as she stepped from a street car, confined by her injuries to bed for five weeks, unable to return to work for three more weeks suffering, to the time of trial, a period of five months, with severe headaches, coming home from work with her back aching so all the time that she could not do her share of the housework, a fracture of the twelfth rib near its union with the spine which may take months or years to get over, and is, very probably a permanent injury—with this evidence before it of what plaintiff had suffered, due to defendant's admitted negligence, we cannot say the jury's allowance of \$3,500 was actuated by passion or prejudice or predicated on any consideration but the evidence. We may not, therefore, disturb it on the ground that it is excessive. *Ware v. McPherson* (Cal. Sup., 1931) 1 P.(2d) 433.

[2] Nor do we believe that the trial court erred in denying defendant a new trial when the only other matter complained of was plaintiff's attorney's statement in his argument to the jury that defendant was a "potential murderer." Granting that such an expression had no place in the case, its unfortunate presence, in the opinion of the trial court as shown by the ruling on the motion for a new trial, did not result in a miscarriage of justice, and we are not more impressed than he with its seriousness.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 565

THOMPSON et ux. v. PURDY et al. (two cases).

Civ. 6829, 6852.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1931.

Brokers ⇨ 4.

Complaint against licensed real estate broker and his surety *held* not to sufficiently allege false representation by defendant while acting as broker under Real Estate Brokers' Act (St. 1917, p. 1579).

Complaint failed to allege any facts which would show a violation of the law by broker, or facts which would show liability on the part of broker's surety under its bond, which bond was conditioned on the faithful performance by broker of his undertaking as a licensed real estate broker; allegation "That in making the representations and statements, defendant was guilty of failure to perform his duties and to comply with the provisions of the act and that by reason thereof, plaintiffs suffered damage in the sum, * * *" being insufficient in that regard. There was, in fact, nothing in the complaint that alleged directly that broker's alleged representations were made by him in a deal wherein he was acting as a broker under the Real Estate Brokers' Act (St. 1917, p. 1579).

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Actions by William Thompson and another against H. E. Purdy and the American Surety Co. of New York. From a judgment for plaintiffs, defendant H. E. Purdy appeals in the first case, and defendant American Surety Co. of New York appeals in the second case.

Judgment reversed.

Kenneth W. Kearney, of Los Angeles, for appellant Purdy.

Vernon Day, of Los Angeles, for appellant Surety Co.

John V. Morris and Earl Curtis Peck, both of Los Angeles, for respondents.

YORK, J.

These two appeals, which have been consolidated for hearing and decision, are appeals from the judgment in an action for the recovery of damages, brought against H. E. Purdy, a licensed real estate broker, and the surety on his bond, for alleged false representations made to the plaintiffs in a transaction between them and the said Purdy, it being alleged that the plaintiffs signed an agreement for the sale of real estate in the office of the said Purdy, without any allegation as to whether the said Purdy was acting as a broker or as a principal.

Both appeals are taken on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the findings of fact do not support the conclusions of law or the judgment.

There is a failure in the complaint to allege any facts which would show a violation of law on the part of Purdy, or facts which would show liability on the part of the surety company under its statutory bond, which bond was conditioned for the faithful performance by defendant Purdy of his undertaking as a licensed real estate broker; this may have been attempted by the allegation in the complaint, "That in making the representations and statements, as aforesaid, the defendant H. E. Purdy was guilty of failure to perform his duties and to comply with the provisions of said act #3841 hereinabove referred to, and that by reason thereof, plaintiffs suffered damage in the sum of Seventeen Hundred Fifty Dollars (\$1750.00), together with interest thereon at the rate of seven percent (7%) per annum from the 21st day of September, 1928." But if this is an attempt to allege that Purdy was acting as a real estate broker at the time such statements and representations were made, it fails to make such allegation.

There is no allegation in the complaint as to whether or not the plaintiffs rescinded their said contract, which they would have to do, if the said Purdy was the principal thereof, and there is no allegation as to whether or not the contract was completed by the said plaintiffs. There is no allegation as to the amount paid by the plaintiffs, excepting that they paid to the defendant Purdy the sum of \$1,750, which they would not have paid had not certain representations been made, as set forth in the complaint. But no statement that it was paid to him in his capacity as a broker.

There is, in fact, nothing in the complaint that alleges directly that the said representations alleged to have been made by the said Purdy were made by him in a deal wherein he was acting as a broker under the Real Estate Brokers' Act (St. 1917, p. 1579), unless it be the conclusion contained in the hereinbefore quoted portion of the complaint, or in the allegation in the complaint that on the day of the transaction, and for a long time prior thereto, defendant Purdy had been a licensed real estate broker.

Although every intendment is in favor of the judgment, we cannot find in the complaint or in the findings any statement of fact which would show that the said Purdy, in the transaction complained of, was acting as a real estate broker.

The judgment is therefore reversed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

117 Cal.App. 560
CHAPMAN v. PICKWICK STAGES SYSTEM
(STATE COMPENSATION INSURANCE
FUND, Intervener).

Civ. 6827.

District Court of Appeal, Second District,
Division 1, California.

Oct. 20, 1931.

1. Appeal and error ⇨1011(1).

Mere conflict in evidence is insufficient to justify reversal of judgment.

2. Appeal and error ⇨1010(1).

If evidence for party obtaining judgment is insufficient to support it, appellate court must vacate judgment.

3. Automobiles ⇨242(3).

Generally, where proximate cause of injury arises from violation of statute requiring driver of overtaking vehicle to give warning before passing, negligence is presumed (St. 1923, p. 557, § 125, subd. b).

4. Automobiles ⇨244(12).

Finding that collision between overtaking stage and truck attempting to make left-hand turn into private driveway was caused by negligence of stage driver *held* supported (St. 1923, p. 557, § 125, subd. b).

5. Automobiles ⇨244(56).

Evidence *held* insufficient to establish that truck occupant was contributorily negligent in failing to inform stage driver of truck

driver's intent to make left-hand turn into private driveway (St. 1923, p. 558, § 130, subd. a).

6. Automobiles ☞226(1).

That truck occupant was seated on tool box in rear of driver's seat held not to constitute contributory negligence which would preclude recovery for injuries sustained in collision.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Crisonogo R. Chapman, sometimes called C. Chapman, against the Pickwick Stages System, in which the State Compensation Insurance Fund intervened. From an adverse judgment, the defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, for appellant.

Blackstock & Rogers, of Ventura, for respondent.

A. G. Ritter, of Los Angeles, for intervenor-respondent.

HOUSER, J.

The defendant appeals from a judgment rendered against it in an action for damages which arose from personal injuries which were sustained by plaintiff and which were occasioned by reason of a collision that occurred between a stage operated by the defendant and a truck on which plaintiff was a passenger.

The first point presented by appellant is to the effect that the evidence introduced by plaintiff which tended to show that the accident was the result of the negligence of the defendant not only was in conflict with the evidence adduced by the defendant in that regard, but as well that plaintiff's evidence was insufficient as a matter of law to sustain the judgment.

[1, 2] It is so universally established that a mere conflict in the substantial evidence presented by the respective parties to an action is an insufficient reason for a reversal of the ensuing judgment that it is deemed wholly unnecessary to cite any authority in support of such doctrine. As to the latter proposition advanced by appellant, it is equally well-settled law that, notwithstanding an apparent conflict between the aggregate of the evidence introduced by the plaintiff and that presented by the defendant, if it appear that the evidence in favor of the party in whose favor the judgment was rendered is legally insufficient to support it, the duty rests upon the appellate tribunal to set the judgment aside. In considering the question thus suggested, the evidence material to the inquiry is limited to that which may tend to

sustain the judgment; from which in the instant appeal it follows that, except as far as it may aid plaintiff's cause, the evidence presented by the defendant may not be taken into consideration.

Disregarding any conflicting facts which might be inferred or deduced from the testimony of the several witnesses introduced by the defendant on the trial of the action, it would appear that the pertinent facts upon which the judgment herein must rest are substantially as follows: The plaintiff, who was an employee of the city of Ventura, was riding on the highway in a small truck which was owned by the said city, which truck at that time was being operated by another city employee; that following said truck on the same highway was a stage owned and operated by the defendant; that the accident in question resulted from the fact that as the truck, so traveling on the highway, made a left-hand turn for the purpose of entering a private driveway, the stage collided with the truck and caused the injuries of which plaintiff complains; that shortly preceding the happening of the accident each of the vehicles was traveling to the right of the center of the highway at a rate of speed of from 20 to 25 miles per hour, at which time the stage was from 100 to 150 feet to the rear of the truck, and the latter was within approximately 100 feet of the intersection of the private driveway with the highway; that in such situation the driver of the truck gave the signal for a left-hand turn, which was continuously maintained until the turn of his truck was made, and at the same time slowed the rate of speed of said truck to 8 miles per hour; that neither preceding the time, nor at the instant, when the driver of the stage attempted to pass the truck, did he, or any one else on said stage, sound a horn or give any alarm or other notice which might indicate his intention to pass the truck; that it was not until the stage was within 15 or 20 feet of the point of its impact with the truck that any attempt was made by the driver of the stage to stop it, with the result that it did not stop until it had driven the truck sidewise a distance of 30 or 40 feet into a hedge on the side of the highway, where it broke down three trees varying in diameter from 5 to 8 inches.

[3, 4] By many authorities the general rule is announced that, where the direct or proximate cause of an injury arises from the violation of a statute which (for example) requires that "the driver of an overtaking motor vehicle * * * shall give audible warning with his bell, gong, or other warning device before passing or attempting to pass a vehicle proceeding in the same direction" (subdivision b, § 125, Cal. Vehicle Act, Stats. 1923, pp. 517, 557), negligence is pre-

sumed as a matter of law (19 Cal. Jur. 632, and cases there cited. But aside from such rule of law, and without reference to any possible concurring negligence on the part of the driver of the truck, it is clear that the cause of the accident was the negligence of the driver of the stage, or his lack of ordinary care in the premises to prevent the happening of the accident, and consequently that the point urged by the appellant in that behalf cannot be sustained.

[5, 6] Appellant also contends that, since it appears that in riding in the truck on a "built-in" (?) tool box, which was located immediately in the rear of the seat occupied by the driver of the truck, although plaintiff was "watching, thinking they were just going to pass us," he heard no horn sounded because "they never blowed no horn"; that according to the contention of the appellant plaintiff "knew the distance between it (the stage) and the truck, knew that it was the intention of the driver of the truck to enter the private driveway, knew that it must have been the intention of the stage driver to pass the truck, and, having this knowledge, he still failed to make certain that the stage driver was informed of the intent of the truck driver to enter into the driveway in question"—it would follow that plaintiff was guilty of contributory negligence, and hence precluded from a recovery of damages for the injuries sustained by him.

But it is manifest that, although plaintiff was "watching, thinking they were just going to pass us," he could have had no actual, positive knowledge of what was in the mind of the stage driver, or what was his intention with reference to driving the stage past the truck. Plaintiff had a right to assume that, if such was the intention of the driver of the stage, he would comply with the precedent requirements of the statute in that regard before attempting to drive the stage past the truck; also, that said driver would see the signal which by law the driver of the truck was bound to give preceding his turn into the private driveway (subdivision a of section 130, Cal. Vehicle Act, Stats. 1923, pp. 517, 558), and thereafter that the stage driver would use ordinary care to prevent the happening of an accident. At least until plaintiff was put on notice that in either regard such was not the intention of the stage driver, he was under no obligation either to inform the driver of the truck that he was "thinking they were just going to pass," or that after the truck driver had given the signal, regardless of such fact, the stage driver was about to attempt to drive the stage past the truck. It is clear that in riding on the truck, because the plaintiff was seated on a tool box instead of upon an ordinary seat, cannot in itself constitute a want of ordinary care.

Considering the entire situation, it may not be stated that plaintiff omitted to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would have done, or that he did something which a prudent and reasonable man would not have done. 19 Cal. Jur. p. 548.

It thus becomes plain that as a matter of law contributory negligence on the part of plaintiff may not be attributed to him.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

117 Cal.App. 125
PEOPLE v. MONTEZUMA.
Cr. 1162.

District Court of Appeal, Third District, California.

Oct. 10, 1931.

Criminal law ⇨1086(14).

Error in refusal to give instructions is not available to defendant on appeal, unless record affirmatively shows they were offered by him.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 3 P.(2d) 370.

Carl Barnard, of Santa Rosa, and Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

Upon petition for rehearing the court's attention is called to an inaccurate statement to the effect, that a controversy between the defendant and Cruz "was conceded." It appears that defendant did deny this dispute. It was, however, satisfactorily established. Alfred Gilder, the owner of the ranch upon which the homicide occurred, referred to the matter. This controversy was important only as tending to show enmity on the part of the defendant toward Cruz, which the jury was entitled to assume may have been transferred to the deceased when he interfered with defendant's attack upon Cruz. One further circumstance appears in the evidence which might furnish a motive for defendant's ill will toward the deceased. It appears the mother of the deceased had brought suit in the justice's court of Sebastopol against the defendant. He admitted this fact, but insist-

ed that this suit caused no enmity against the deceased. The evidence of malice is sufficient upon which to support the verdict.

The original opinion should be and is modified by striking out lines 36 to 38 from top, col. 2, 3 P.(2d) 371, and adding in lieu thereof the following sentence: "A controversy existed between the defendant and Cruz regarding the cooking."

The appellant also complains of the disposition of his charge of prejudicial error on the part of the trial court in refusing to give certain instructions to the jury. Several instructions on the subject of manslaughter appear in the record which are indorsed by the judge, "Refused, covered by other instructions." There is nothing in the transcript indicating which party offered these instructions. Our opinion therefore correctly states that, "No such instruction appears from the record to have been offered by the defendant." The appellant complains of this statement and now claims to have offered these rejected instructions. In the language of our opinion, this court was careful not to say the defendant did not offer the instructions. All that we said is that it does not appear from the record that the defendant offered them. The rule is firmly established that error in the refusal to give instructions is not available to a defendant on appeal unless the record affirmatively shows they were offered by him. 8 Cal. Jur. 539, § 544; *People v. Baker*, 64 Cal. App. 336, 343, 221 P. 654; *People v. Hettick*, 126 Cal. 425, 429, 58 P. 918; *People v. Vukojevich*, 25 Cal. App. 459, 464, 143 P. 1058; *People v. Olds*, 86 Cal. App. 130, 260 P. 321.

With the modification of the opinion above suggested, the petition for a rehearing is denied.

117 Cal.App. 484

CLEMENT et al. v. REYNOLDS et al.

Civ. 4400.

District Court of Appeal, Third District, California.

Oct. 15, 1931.

1. Forcible entry and detainer §6(2).

In action between tenants in common for forcible entry and detainer, contention that judgment should restrict possession of plaintiffs to their moiety could not be considered, because based on legal title.

2. Forcible entry and detainer §6(2).

In forcible entry actions, questions of title and right to possession cannot arise.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action by Jesse E. Clement and another against W. J. Reynolds and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Barcroft & Barcroft, of Madera, and F. W. Taft, of Willits, for appellants.

Conley, Conley & Conley, of Fresno, for respondents.

TUTTLE, Justice pro tem.

This is an action for forcible entry and unlawful detainer. The judgment restored possession to plaintiffs and awarded them \$100 actual damages. Defendants appeal from the judgment.

The evidence shows that the house was constructed upon real property which appellants, respondents, and other parties owned as tenants in common. This house was built by respondents in 1923, and they lived there until 1930. In December, 1930, appellants, in the temporary absence of respondents, forcibly broke open a door of the house and took possession thereof. When respondents returned, they were not permitted to enter their home.

[1, 2] It is contended by appellants that the judgment should restrict the possession of respondents to their moiety, instead of giving them exclusive possession. This view is untenable. In an action for forcible entry, questions of title and right to possession cannot arise. *California Products, Inc., v. Mitchell*, 52 Cal. App. 312, 198 P. 646; *Kerr v. O'Keefe*, 138 Cal. 415, 71 P. 447; *White v. Pfeiffer*, 165 Cal. 740, 134 P. 321. The point urged by appellants, being based upon legal title, cannot be considered here. "The peace and good order of society demand that an actual and peaceable occupation of real estate, however it may have been originally acquired, shall not be disturbed by violence. The aim of the statute of forcible entry and detainer is to conserve the public peace, and not only to prevent and punish the forcible entry of those having no right of entry, but also of those who have a right of entry given by law. The action provided for is possessory in character; it is not intended as a substitute for the action of ejectment." 12 Cal. Juris., p. 597.

The case of *Noble v. Manatt*, 42 Cal. App. 497, 183 P. 823, is of no assistance to appellants. The parties there were all jointly in possession, and the court very properly refused to give any one of them the exclusive possession.

There is nothing in the contention that the possession of respondents was a "scrambling" one. The court found otherwise upon abundant testimony.

Objections are made to rulings upon evidence, but we find no injury or prejudice resulting therefrom.

The appeal is devoid of merit, and, accordingly, the judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

117 Cal.App. 629

PEOPLE v. MALONE et al.

Cr. 107.

District Court of Appeal, Fourth District,
California.

Oct. 22, 1931.

1. Criminal law ☞739(1).

Whether defendants were induced by police employee to commit burglary, *held* for jury.

2. Criminal law ☞37.

Law will not punish one induced by officer to commit crime which would not otherwise have been committed.

3. Criminal law ☞37.

Officer's loaning of motortruck to defendants, even if officer knew what defendants intended to do, *held* not such inducement to commit burglary as to relieve defendants from responsibility.

4. Criminal law ☞569.

Verdict finding that defendants committing burglary were not entrapped, *held* supported.

5. Witnesses ☞282½.

Questions on cross-examination having been asked and answered, refusing to permit practically identical questions *held* not prejudicial error.

6. Criminal law ☞369(7).

Refusing to permit officer to testify as to what he or his superior officer had done after knowing defendants had committed another burglary, *held* not error.

There was no error, since it was immaterial whether or not defendants were being prosecuted or would be prosecuted for a separate and distinct burglary.

7. Criminal law ☞1186(4).

Error, if any, in not permitting cross-examination of officer as to whether he endeavored to prevail on defendants charged with burglary to plead guilty, *held* not sufficient to justify reversal (Const. art. 6, § 4½).

The error, if any, was not sufficient to justify reversal as against contention that evidence was admissible to show degree

of hostility on part of officer as a witness and the extent of the interest of the witness, since, if answer to cross-examination question had been allowed, it did not appear that interest or hostility on part of witness would have been shown. And even if the evidence was admissible to show that the officer had instigated the crime, and sought to shield himself by inducing defendants to plead guilty, defendants had not sought to directly establish such fact, and the evidence was overwhelmingly against defendants on question of whether officer or defendants conceived idea of crime.

8. Criminal law ☞1186(4).

Denying new trial for newly discovered evidence that witness identifying defendants as those who visited place prior to burglary was not certain as to one defendant, *held* not error (Const. art. 6, § 4½).

There was no error, since it appeared that at least one of defendants was at place at time stated by witness, and it was admitted that both of defendants made examination of rear of premises afternoon before crime was committed, and both defendants actually burglarized place.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Odell Malone and another were convicted of burglary, and they appeal.

Affirmed.

See, also (Cal. App.) 297 P. 964; (Cal. Sup.) 2 P.(2d) 332.

Rowen Irwin and W. C. Dorris, both of Bakersfield, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Dep. Atty. Gen., for the People.

BARNARD, P. J.

The defendants were charged with the crime of burglary, and tried by a jury. This appeal is from the judgment following a verdict of guilty, and from an order denying a motion for a new trial.

It is admitted that the appellants entered the store of R. J. Wooten in the city of Bakersfield between 11 and 12 o'clock on the night of April 13, 1930, and took therefrom a safe, a number of tires, and various other articles of merchandise. The only defense offered at the trial or raised on appeal is that appellants were entrapped into committing the offense by an officer of the law. It appears that for about a month prior to April 13, 1930, one H. C. Stone had been in the employ of the police department of the city of Bakersfield as a special investigator, and that it was his duty to frequent pool halls and

similar places and pick up information about crimes that were contemplated or that had been committed. It also appears that Stone had conversations with the appellants on the afternoon of April 13, and that the three went to the rear of the Wooten Tire Shop and looked at the premises. Stone reported to his superior officer that the Wooten place would probably be entered about 11 o'clock that night. Stone owned a Ford truck and it appears that on April 12, the appellants had asked permission to borrow this truck for use during evenings and nights, which permission was given. During the evening of April 13, the appellants came and got the truck. A number of police officers secreted themselves near the rear of the Wooten store and around 11 o'clock that night the appellants came in the Ford truck, and backed the same up to the rear door of the store. They cut the screen from a window, broke the glass, entered through the window, opened the rear door, and removed and loaded on the truck an iron safe, some tires, and various other articles. During all this time, Brown had with him a .44 caliber revolver, which was kept cocked. As the appellants started to drive away, the officers appeared and called to them to stop. Instead of stopping, they drove away as rapidly as possible, and the officers opened fire. Both of the appellants were injured, and the truck stopped a short distance away, due to a flat tire. Both of the appellants got out and ran, and shortly thereafter Brown was arrested on the street, and Malone was arrested at the home of Stone, where Stone was engaged in dressing his wounds.

[1] The first point raised is that the evidence clearly establishes that the appellants were entrapped and that the appellants were induced to commit the crime in question by the police employee Stone. This claim is based entirely on the testimony of the two appellants, to the effect that on the afternoon of the 13th, Stone met them on the street and asked them if they wanted a job; that he told them he wanted them to haul a small safe, some tires, and some other things from the Wooten store to another place a few blocks away; that he told them he would pay them \$20 apiece for the service; and that he took them down and showed them the place and furnished the truck. This was flatly denied by Stone, who testified that he saw the appellants on the afternoon before the robbery and they told him that they had several places in mind, but that the Wooten place looked easy, and that they took him down and showed him the rear of the premises. He also admitted that when the appellants, on the previous day, asked permission to use his truck evenings, he thought they might use the truck for the purpose of stealing something. John S. Lamberson, a police officer, testified that he had a conversation with

Malone at the hospital later on the night of the burglary, and that Malone admitted having robbed the place and said he was going to plead guilty. Nothing was then said about Stone having had anything to do with the burglary. On April 14th, the day after the crime, Malone made a statement which was taken down by a court reporter, in which he stated that no one was with him but Brown, and that no one else was mixed up in the crime. He also answered as follows:

"Q. When did you first plan it? A. Yesterday.

"Q. After you got the car? A. No, before we got the car."

It will be observed that the testimony of the appellants is not the ordinary claim of entrapment, that is, that they were induced to undertake to commit a crime. Their claim is that they thought they were being hired to do some legitimate work, that is, to haul some merchandise. And yet their own story contains some surprising things. They claim they were to receive \$20 apiece for this small service. They went to do the work at 11 o'clock at night, and when they found the door locked, they broke in. They testified that Stone had not told them just what property they were to take, that "he didn't mention very many things at all. He told us there was material in there, that he could use it all." So, as they testified, they just "grabbed everything." They admitted that they knew the goods didn't belong to their supposed employer. They took a six-shooter with them, which they kept cocked all the time. While this gun was fired when they were attempting to get away, one of them testified that it went off accidentally as they were closing the truck door. They also testified that they did not hear the policemen call to them to stop, and that they had no chance to surrender.

[2-4] It cannot be held that the evidence clearly established entrapment. No more appears than a conflict in the evidence and at that, the entire story as related by appellants is of such a nature that it is impossible to see how a jury could have believed them. Aside from their testimony that they were hired by Stone to haul some goods, there is no evidence that Stone planned the burglary or had any part in inducing the appellants to take part in it, except the admitted fact that Stone loaned to the appellants the truck which they used. It may be conceded that when an officer induces a person to commit a crime which he would not have done without such inducement, the law will not punish the person so lured into the crime. *People v. Tomasovich*, 56 Cal. App. 520, 206 P. 119. But this is true only where the intent originates with the officer, and where the defendant is induced to commit a crime which was not contemplated by him. *People v. Norcross*,

71 Cal. App. 2, 234 P. 438. Even the furnishing of money with which to purchase liquor has been held not to constitute entrapment. *People v. Rodriguez*, 61 Cal. App. 69, 214 P. 452; *People v. Caiazza*, 61 Cal. App. 505, 215 P. 80. The loaning of this truck to these appellants, even if the officer knew from his conversation with appellants what they intended to do with it, was not such an inducement to commit the crime as will relieve the appellants from responsibility. *People v. Lanzit*, 70 Cal. App. 498, 233 P. 816. The question whether the intent to commit this crime originated with the officer or with the appellants was a question of fact for the jury, and their verdict finds ample support in the evidence.

[5-7] Appellants assign as error the refusal of the trial court to permit them, during their cross-examination of the witness Stone, to ask him several questions along the line of whether the witness had, on the Tuesday night preceding the burglary here in question, taken the defendant Brown over to the rear of "Abe Reigler's Place" and shown him how it could be entered, and whether he had told Brown he wanted him to go into the Reigler place for the purpose of removing certain merchandise. While objections to these questions were sustained, the record shows that upon cross-examination and just before these questions were asked, in response to other questions, the witness testified that he had had no conversation with Brown on that Tuesday about the Abe Reigler place and that he had not told him that he could with safety enter the Reigler place through the rear door. These questions having been answered, no prejudicial error appears in refusing to permit practically identical questions to be repeated. Error is also claimed in the refusal of the court to permit the witness Stone to answer a question as to what he or his superior officer had done after he told his superior officer that he knew "this defendant" had committed a burglary the night before. We see no error in this. It would hardly have been in accordance with the usual practice to have informed this jury whether or not these defendants were being prosecuted or would be prosecuted for a separate and distinct burglary. It is also claimed that the court erred in sustaining objections to certain questions asked of the witness Stone on cross-examination, to the general effect of whether he had not endeavored to prevail upon the appellants to enter a plea of guilty. The appellants did not plead guilty, and no question of misleading them is involved. Appellants cite several cases to the effect that evidence is admissible to show the degree of hostility on the part of a witness and the extent of the interest of the witness. If an answer to this question had been allowed, it does not appear how it would have shown any interest or hostility on the part of the wit-

ness, nor would it have impeached him in any respect. The appellants took the stand and did not themselves testify or offer to testify as to any such fact. The question seems to have been asked on the theory that Stone had instigated the crime, and thereafter sought to shield himself by inducing them to plead guilty. Assuming this evidence to have been admissible for this purpose, since the appellants did not seek to directly establish such facts, and since the other evidence in the case is so overwhelming against the appellants on the question of whether it was Stone or the appellants who first conceived the idea of this crime and who carried it into execution, we cannot hold that the error, if any, is sufficient to justify a reversal.

[8] The last point raised is that the court erred in refusing a new trial on the ground of newly discovered evidence. Mr. Wooten, owner of the store that was robbed, had testified at the trial that these appellants had been in his place of business about a week before the burglary; testifying that they had been in the front store, which was separated by a partition from the workshop in the rear. On motion for a new trial, the affidavit of Mr. Wooten was presented, in which he stated that it was possible that he might have been mistaken about appellant Malone being in the store a week prior to the burglary, that it might have been Malone's brother who was there at that time. It is insisted that the main question before the jury was whether the idea of the robbery originated with Stone or with the appellants; that Wooten's testimony that both of the defendants were in his store the previous week is of the utmost importance; and that this very testimony could well have caused the jury to hold that the idea of the robbery originated at that time and did not originate in the mind of Stone. In the first place, it may be observed that Wooten, while admitting it is possible he was mistaken as to the presence of Malone, does not change his testimony as to the presence of Brown. Since Malone and Brown actually robbed the place together, any observation supposed to have been made at that time would be just as effective if made by Brown alone. While it still appears that at least one of them was there a week before, that fact, together with the fact that whoever was there was only in the front store, is of small importance compared with the admitted fact that both of the appellants made an examination of the rear of the premises in question the afternoon before the crime was committed. And Malone, in his statement, said they planned it the day before. The important question is whether the appellants conceived the plan to commit this robbery, and not whether it was conceived on a particular day. In any event, it fully appears that Brown was there the week before, and both of the appellants were there the day before.

In our opinion, the court did not abuse its discretion in refusing to grant a new trial, and this is especially true in view of the whole record.

We have read the entire transcript and we can hardly see how the jury could have found otherwise than they did. The case is not one of those close ones where small details might seriously affect the conclusion reached by the jury. In our opinion, any errors shown by the record are well within the provisions of section 4½, article 6 of the Constitution.

The judgment and order appealed from are affirmed.

We concur: JENNINGS, J.; MARKS, J.

117 Cal.App. 639

GALWAY v. GUGGOLZ.

Civ. 4333.

District Court of Appeal, Third District, California.

Oct. 23, 1931.

1. Automobiles ⇨246(9).

Trial ⇨194(16), 240.

Instruction respecting duty of motorist approaching intersection *held* erroneous as argumentative, misleading, and invading jury's province.

The court instructed that, when driver of automobile had stopped at intersection with through highway and observed another automobile approaching at distance of one hundred or more feet, he could assume approaching automobile was traveling at lawful rate, unless he observed speed exceeded lawful speed, and, if he believed speed lawful, had right to enter intersection without waiting till approaching car had passed.

2. Automobiles ⇨246(9).

Instruction motorist might stop anywhere from stop sign to property line of through highway, provided he has clear view, *held* improper when considered with another instruction.

The other instruction related to motorist's right to enter intersection when seeing another car approaching. Under these instructions jury might have assumed that driver might stop at stop sign 78 feet from intersection, and if he saw car approaching on highway not less than 100 feet away, being driven at lawful speed, he could assume that he might cross in front of car on protected highway. The evidence in the present case showed the stop sign was 78 feet from intersection.

3. Automobiles ⇨245(80).

Distance of approaching car from intersection which would justify plaintiff in crossing through highway is jury question (St. 1923, p. 560, § 131 (e), as amended by St. 1929, p. 541, § 55).

4. New trial ⇨39.

New trial is proper where it is impossible to tell which of contradictory instructions were adopted by jury.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by John W. Galway against John C. Guggolz for damages for personal injuries and property damages resulting from an automobile collision. From an order granting a new trial, defendant appeals.

Affirmed.

Foltz, Rendon & Wallace, of Stockton, for appellant.

Case, & Forslund, of Stockton, for respondent.

PRESTON, P. J.

Action for damages for personal injuries and property damage. This action is the result of a collision between the automobile driven by plaintiff and the one driven by the defendant. The collision occurred at the intersection of the Sacramento highway and Kettleman lane in San Joaquin county. Plaintiff and defendant were both injured and both cars damaged. Each claims that the other was negligent and both seek damages. The case was tried before a jury and the following verdict returned: "We, the jury in the above-entitled action, find for defendant John C. Guggolz upon the complaint herein and for cross-defendant John W. Galway, upon the cross-complaint herein. No damages assessed to either party."

Judgment was regularly entered upon the verdict, and plaintiff, in due time, made a motion for a new trial based upon all the statutory grounds. The court granted a new trial, and in doing so, used this language: "It is hereby ordered that the motion of the plaintiff for a new trial in the above-entitled action be and the same is hereby granted on the grounds of error in law occurring at the trial and excepted to by the plaintiff." From this order the defendant Guggolz prosecutes this appeal.

The learned trial judge, in granting a new trial, was undoubtedly of the opinion that certain erroneous instructions had been given to the jury, which were prejudicial to the rights of the plaintiff.

Before taking up a discussion of certain instructions claimed to be erroneous, we deem it proper to make a further brief statement as to

the facts; about 12 o'clock noon on the 19th day of January, 1930, the plaintiff was driving his Hupmobile automobile north on the protected highway between Stockton and Sacramento; defendant was driving an Oldsmobile westerly on a crossroad, called "Kettleman Lane." Defendant intended to cross the Sacramento highway and continue westerly; there were no obstructions to the vision; each driver could see the other approaching for 1,000 feet or more; the weather was fair and the roads dry; there was a stop sign on "Kettleman Lane" requiring defendant to stop before entering the Sacramento highway upon which plaintiff was traveling. Defendant claims he stopped at the stop sign; plaintiff claims defendant slowed down at the stop sign, and led him to believe that defendant was going to stop, but did not stop. The cars collided near the center of the intersection of the two roads.

The testimony of the plaintiff and that of the defendant is in hopeless conflict, and it will not be necessary to set forth their respective versions of the collision.

[1] The court gave, at the request of the defendant, the following instruction (defendant's instruction No. 2): "When the driver of an automobile upon a public highway intersecting a through highway has stopped before entering such intersection, and the driver observes another automobile approaching at a distance of one hundred or more feet from such intersection, he had a right to assume that said approaching automobile was traveling at a lawful rate of speed, unless he observed the speed was in excess of the lawful speed, and if he did believe the speed was lawful, as a reasonable man from appearances at said time, such driver had a right to enter said intersection without waiting till said approaching automobile had passed."

This instruction is erroneous: First, it is argumentative; second, it is an instruction on the facts and therefore invades the province of the jury; third, it is misleading.

The instruction states that when the driver approaching the through highway observes an automobile approaching at a distance of 100 feet or more, he has a right to assume that such approaching automobile is traveling at a lawful rate of speed, unless he observes otherwise. Forty miles an hour was the lawful speed at the time of this accident on said highway, and at that rate the distance of 100 feet would be covered in two seconds. No careful and prudent person would attempt to start from a stop sign and cross an intersection in front of an on-coming automobile with only a margin of two seconds.

An instruction suggesting to the jury that such an act be without negligence is clearly erroneous. The evidence shows that the stop sign on Kettleman lane is 78 feet from the intersection.

[2] The court also gave the jury defendant's instruction No. 4, which states that the driver may lawfully stop "at any point from the stop sign to the property line nearest him of the through highway, provided he has a clear view of the traffic on said through highway in each direction for at least two hundred feet from the intersection."

Under these instructions the jury might well have assumed that it is the law that a driver may stop at a stop sign 78 feet away from the intersection, and if he sees a car approaching on the highway not less than 100 feet away, being driven at a lawful rate of speed, he has a right to assume that he may cross in front of the car on the protected highway.

Suppose the stop sign were 100 feet away, could it be said that the driver stopping at the stop sign would still have the right to enter the intersection if the driver on the through highway were traveling at a lawful rate of speed and only 100 feet away? Certainly not.

[3] Section 131(c) of the California Vehicle Act (as amended by St. 1929, p. 541, § 55) provides that the driver of any vehicle who has come to a stop as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely from the left as to constitute an immediate hazard. There is nothing in this section which will justify the court in prescribing in an instruction to the jury the number of feet upon which the driver may rely. That would be a question for the jury under all the facts and circumstances of the particular case.

[4] Defendant's instruction No. 1 and plaintiff's instruction No. 1 are irreconcilably conflicting. The rule is well settled in this state that where instructions are contradictory in essential particulars, and it is impossible to tell which of the instructions were adopted by the jury in reaching their verdict, a new trial is rightfully granted. *Buttrick v. Pac. Elec. Ry.*, 86 Cal. App. 136, 260 P. 588. Defendant's instruction No. 8 is inapplicable and misleading. Defendant's instruction No. 3 also invades the province of the jury.

All instructions proposed and given have been examined with care, but we deem a further discussion unnecessary. We might add that from a reading of all the instructions we are inclined to the belief that the distinction between the rights and duties of a driver of an automobile upon a *protected* highway and the rights and duties of an automobile driver on an *unprotected* highway was not clearly stated to the jury.

The order granting a new trial is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

117 Cal.App. 622

FIEDLER v. ALLEN et al.
Civ. 6707.

District Court of Appeal, Second District, Division 1, California.
Oct. 22, 1931.

1. Brokers ⇨23.

Where broker's customer pledged bonds, broker, under statute, could repledge bonds to extent of broker's interest therein (Civ. Code, § 2990).

2. Brokers ⇨4.

Where broker's customer pledged bonds to secure price of stock, broker's repledging bonds for indefinite sum, including indebtedness unconnected with original pledge, *held* "conversion" justifying recovery against broker's surety (Civ. Code, § 2990; St. 1917, p. 677, § 5, as amended by St. 1925, p. 967, § 3).

[Ed. Note.—For other definitions of "Conversion," see Words and Phrases.]

3. Trover and conversion ⇨9(4).

Since bonds, when demand, if any, was made, had passed out of converter's possession and control, demand was unnecessary, as regards conversion.

4. Evidence ⇨543(4).

Where witness showed familiarity with converted bonds and their market value, his testimony regarding value thereof *held* competent.

5. Appeal and error ⇨880(3).

Surety sued jointly with principal could not complain that judgment was entered against surety alone, omitting mention of principal; liability being joint and several (St. 1917, p. 677, § 5, as amended by St. 1925, p. 967, § 3).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by C. K. Fiedler against R. E. Allen, as receiver of the J. E. K. Financial Service, Inc., and the American Surety Company of New York. Judgment for plaintiff against the last-named defendant, and such defendant appeals.

Affirmed.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for respondents.

CONREY, P. J.

On December 27, 1926, the J. E. K. Financial Service, Inc. (hereinafter called Finan-

cial Service), as principal, and the American Surety Company of New York, as surety, executed on behalf of said Financial Service a broker's bond as required by section 5 of the Corporate Securities Act (St. 1917, p. 677), as amended in the year 1925 (St. 1925, p. 967, § 3). The bond was executed for the calendar year 1927. During the period of the transactions referred to herein, said Financial Service was engaged in business as a licensed broker in this state, and said undertaking was in force. This action was brought to recover judgment under and within the terms of said undertaking.

On September 30, 1927, the defendant Allen qualified under appointment as receiver of said Financial Service, and, under permission duly given, he was made defendant in this action. Judgment was entered against the surety company alone in the sum of \$3,090, plus \$30.21 costs. The judgment is silent concerning any right of action of plaintiff against the receiver. From that judgment, the surety company prosecutes this appeal.

The conditions of the undertaking were such that if the principal, and any and all agents and employees representing such principal, should comply with the provisions of said Corporate Securities Act, "and shall honestly and faithfully apply all funds received, and faithfully and honestly perform all obligations and undertakings, in the purchase or sale of securities by said broker, his agent and employees, * * * then this obligation shall be void; otherwise to remain in full force and effect."

The liability sought to be enforced herein arises out of the alleged conversion by Financial Service of three \$1,000 bonds of the Meriondale Electric Company. On August 22, 1927, respondent entered into a contract in writing with Financial Service, whereby Financial Service was employed as respondent's agent for the purchase of certain shares of stock of sundry corporations. As a deposit on the purchase of said securities, respondent delivered to the broker said three electric company bonds, which were thereupon given a "loan value" of \$2,256. The contract was upon a printed form, and, on the face thereof, it was stated that the employment "shall be governed by the conditions printed on the reverse side hereof." Those conditions were printed in a series of numbered paragraphs, one of which reads as follows: "(6) It is further agreed that in case any securities are deposited with the agent by the principal as security for the performance of this agreement, the agent may pledge such collateral or securities to the extent of its interest therein, or to the amount advanced by it for the account of the principal on such collateral or securities."

Pursuant to said contract of employment, Financial Service purchased the securities specified in the agreement, which was in the nature of a marginal contract under which the aggregate purchase price of said securities would be approximately two and a half times the amount of the agreed loan value of said electric company bonds. Said purchases, however, were made through another broker, Henry H. Nelson & Co., in accordance with an existing contract between the two brokers, which contract authorized Nelson & Co. to hold in pledge any securities purchased by it for account of the first broker, as well as any other securities deposited in pledge by the first broker with Nelson & Co. in the course of transaction of the business provided for by the agreement. In the general contract existing between the two brokers, and under which their business was transacted, Nelson & Co. were authorized, whenever they should deem it necessary for their protection, to sell any or all of the securities held by them in connection with the Financial Service account. When Financial Service placed its order with Nelson & Co. to purchase said stocks for respondent, said three electric company bonds of respondent were delivered in pledge by Financial Service to Nelson & Co. in accordance with said agreement between the brokers. The purchases of stocks for respondent were promptly reported by Nelson & Co. to Financial Service, and entered on the books of Financial Service as charges against respondent. The result of these transactions, as shown on the books of Financial Service, was that on the 16th of September respondent was indebted to Financial Service in the sum of \$3,654.46 in addition to the sum of \$2,256 loaned to respondent on the bonds. The securities, that is to say, the shares of stock purchased through Nelson & Co. remained in the possession of Nelson & Co. and were never delivered to Financial Service or to the plaintiff. The evidence is that they were all sold out by Nelson & Co. before the end of that month. It further appears that on October 3, 1927, Nelson & Co. sold said electric company bonds which had been pledged by respondent to Financial Service, and repledged as above stated.

From the foregoing and other facts in evidence, the court was justified in finding, as by implication it did find, that on or before September 30, 1927, the purchase and sale of stocks, under the employment of Financial Service by respondent, had been so concluded that respondent was no longer in debt to Financial Service, and so was entitled to the return of his electric company bonds. But the return of those bonds became impossible on October 3d, because they had been sold by Nelson & Co., and Financial Service, having become insolvent, was in the hands of a receiver. It was by virtue of the facts thus shown that the trial court held that said

electric company bonds had been converted by Financial Service, and that respondent was entitled to indemnity from appellant as surety on the undertaking sued on in this action.

[1] It is contended by appellant that the evidence is insufficient to support and is contrary to any finding, actual or implied, that Financial Service converted the bonds. It must be conceded that both under the contract and under the provisions of section 2990 of the Civil Code, Financial Service was entitled to repledge the bonds, but only to the extent of its interest therein. *People v. Tambara*, 192 Cal. 236, 219 P. 745. If we assume, for the purposes of the argument, that the pledging of the electric company bonds by Financial Service to Nelson & Co., at the time and in the manner in which they were so pledged, did not constitute a conversion of the bonds, this fact would not prove that there was no conversion at all. According to the testimony of the witness Warfield, vice president of Financial Service, all of the Fiedler stocks were sold on or before September 30th. But, through the method of the business transactions, as conducted between Nelson & Co. and Financial Service, those stocks were mingled with stocks of other customers or clients of Financial Service in such manner that the actual shares purchased for account of any one customer would not be identified except by a system of apportionment and accounting, which in this case appears never to have been completed. It does appear, however, that on or about October 22, 1927, the defendant Allen, as receiver, received a check in the sum of \$4,715.12 as the balance of account between Nelson & Co. and Financial Service, which sum was deposited in the receiver's account. How much of this balance was the result of transactions concerning the Fiedler stocks, the record does not show.

[2] We are of the opinion, however, that when Financial Service pledged the Meriondale bonds to Nelson & Co. for an indefinite sum, including indebtedness unconnected with the purposes of the pledge made by Fiedler, such rep pledging was a wrongful conversion of said bonds, and was sufficient to constitute a basis for an action on the broker's bond.

[3] With reference to appellant's discussion of certain questions relating to demand and refusal, as evidence of the conversion of the bonds, we think it sufficient to say that since, at the time of the demand (if any demand at all was made), the bonds were not in possession of the broker Financial Service and had passed beyond its control, it follows that no demand was necessary.

[4] We think that the court did not err in refusing to strike the testimony of the witness Levi as to the value of the bonds. His

testimony showed a familiarity with said bonds and their market value sufficient to authorize him to testify on the subject.

[5] As the liability of the principal and surety on the bond was joint and several, appellant has no cause of complaint based on the fact that judgment was entered against appellant alone, and is silent concerning the disposition to be made of the action as against the receiver.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

117 Cal.App. 528

**PRUDENTIAL INS. CO. OF AMERICA v.
SUPERIOR COURT IN AND FOR CITY
AND COUNTY OF SAN FRANCISCO et al.**
Civ. 8103.

District Court of Appeal, First District, Division 1, California.

Oct. 19, 1931.

Rehearing Denied Nov. 18, 1931.

1. Dismissal and nonsuit ⇨45.

Statute concerning dismissal of actions not brought to trial within five years after filing of answer is mandatory, in absence of written stipulation extending time (Code Civ. Proc. § 583).

2. Mandamus ⇨43.

Mandamus lies to compel judge's compliance with mandatory statute concerning dismissal of actions not brought to trial within five years after answer (Code Civ. Proc. § 583).

Where express mandatory conditions for dismissal are clearly established without contradiction, court has no discretion in the matter.

3. Dismissal and nonsuit ⇨60(3).

As respects dismissal, stipulation that case be dropped from calendar, to be reset on notice, does not extend statutory time for bringing action to trial (Code Civ. Proc. § 583).

4. Dismissal and nonsuit ⇨60(3).

As respects dismissal, after stipulation dropping case from calendar, plaintiff was still required to see that action was timely brought to trial (Code Civ. Proc. § 583).

Petition by the Prudential Insurance Company of America for a writ of mandate against the Superior Court in and for the City

and County of San Francisco, and Louis H. Ward, as Judge thereof, to compel respondents to grant petitioner's motion to dismiss an action brought against petitioner more than five years previously.

Writ granted.

Knight, Boland & Christin, of San Francisco, for petitioner.

Charles N. Douglas, of San Francisco, for respondents.

TYLER, P. J.

It is claimed in the petition that the trial court erroneously made an order denying a motion of petitioner to dismiss a certain action, in which it was defendant, on the ground that plaintiff in such action had not brought the same to trial within five years after issue joined.

The action was commenced on January 6, 1926. On June 17, 1926, defendant, petitioner herein, filed its verified answer. On February 15, 1927, plaintiff filed notice of motion to set cause for trial. The case was subsequently set for trial on October 27, 1927. On October 14, 1927, plaintiff served on defendant notice of time and place of trial. On the date set for trial the cause was continued to November 16, 1927; thence to November 28, 1927; thence to December 14, 1927. All such continuances were had at the request of the plaintiff. On December 20, 1927, a stipulation was entered into between the parties to the effect that the case might be dropped from the calendar, to be restored upon five days' notice by either party. No other stipulation was ever entered into. After the making of this stipulation, plaintiff on May 15, 1930, filed a memorandum of notice to set the cause for trial, which she abandoned. Thereafter, on August 20, 1930, she again filed a memorandum to set cause for trial. On August 25, 1931, defendant made a motion to dismiss the action on the ground that the same had not been brought to trial within five years after issue joined. Said motion was heard and denied, and this proceeding followed.

[1-4] The provision of section 583 of the Code of Civil Procedure, as to dismissal of actions not brought to trial within five years after the filing of the answer, is mandatory, where no stipulation in writing to extend the time has been made, and mandamus is a proper proceeding to compel a dismissal. *Andersen v. Superior Court*, 187 Cal. 95, 200 P. 963. There is nothing contained in the stipulation above referred to which takes the case out of the operation of the statute. A stipulation that a case be dropped from the calendar to be reset upon notice is not within the statute. *Central Pacific Railroad Co. v. Riley*, 31 Cal. App. 394, 160 P. 844. After the case was dropped from the calendar according to the

stipulation, it was still the duty of the plaintiff to see that the case was brought to trial. *Kubli v. Hawckett*, 89 Cal. 638, 27 P. 57; *Mowry v. Weisenborn*, 137 Cal. 110, 69 P. 971. Where the express mandatory conditions for a dismissal are clearly established and, as here, without contradiction, the court is without discretion in the matter. *Andersen v. Superior Court*, 187 Cal. 95, 103, 200 P. 963; *Miller & Lux, Inc., v. Superior Court*, 192 Cal. 333, 219 P. 1006.

Let the writ issue as prayed for.

We concur: KNIGHT, J.; CASHIN, J.

117 Cal.App. 534

CORYELL v. CLIFFORD F. REID, Inc., et al.
Civ. 6718.

District Court of Appeal, Second District,
Division 1, California.

Oct. 19, 1931.

Rehearing Denied Nov. 16, 1931. Hearing
Denied by Supreme Court Dec. 18, 1931.

Automobiles — 181(1).

Automobile owner held liable for injuries to passenger which it requested to accompany driver on trip.

Appeal from Superior Court, Los Angeles County; Charles R. Barnard, Judge.

Action by Mary Dell Coryell against Clifford F. Reid, Inc., and others for damages for personal injuries sustained in an automobile accident. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Joe Crider, Jr., McAdoo, Neblett, O'Connor & Claggett, and E. H. Mitchell, all of Los Angeles, for appellant.

Earl Wakeman, of Los Angeles, for respondents.

YORK, J.

This is an appeal by Clifford F. Reid, Inc., from a judgment entered after verdict of the jury against defendants Clifford F. Reid, Inc., a corporation, and E. D. Rosher, in an action to recover damages for injuries received by the plaintiff as the result of negligence of the defendants in the operation of an automobile. Defendant Rosher was the driver of the automobile at the time the plaintiff was injured. It was alleged in the complaint and there was evidence introduced to show that the plaintiff was requested by the defendant Clifford F. Reid, Inc., a corporation, to accompany the said driver, E. D. Rosher, on a trip in the automobile at the time of her in-

jury. The question as to why and where she was injured and all the other questions raised as to the sufficiency of the evidence were decided by the jury upon evidence properly introduced in the trial of the case. The accident occurred on June 25, 1927. The judgment was rendered on the 7th day of February, 1929, and the law which appellant claims should be considered in weighing the liability, according to its brief, was not in effect until midnight of August 14, 1929. There is no merit in appellant's contention that the provisions of section 141¾ of the California Vehicle Act (St. 1929, p. 1580), effective at midnight August 14, 1929, relating to the duty owing by a host to a guest is retroactive. *Krause v. Rarity*, 210 Cal. 644, at page 653 et seq., 293 P. 62; *Dermer v. Pistoresi* (Cal. App.) 293 P. 78.

There was sufficient evidence to justify the verdict, and therefore the only question left for this court to discuss is the question as to the trial court's alleged error in instructing the jury "as to appellant's liability, ignoring the question of plaintiff's contributory negligence." An examination of the record hardly discloses any evidence from which the jury could find that the plaintiff suffered any injury by reason of negligence on her part. However, the trial court instructed the jury properly on the question of the law as to contributory negligence of the plaintiff.

Point three in appellant's opening brief is that "The court erred in admitting testimony that after the accident defendant Rosher said, 'It is my fault. I should not have been looking around.'" The evidence shows that this statement was made by defendant Rosher immediately after the accident occurred. This court said, in *Lloyd v. Boulevard Express*, 79 Cal. App. 406, at page 411, 249 P. 837, 839: "His statements, if true, indicate that they were made before the excitement attending the accident had subsided. Questions as to the admissibility of such statements as part of the *res gestæ* depend upon whether such statements are the emanations of the acts done, before the excitement usually incident to an accident causing great injury has subsided, or are the statements made after the excitement has subsided, and the witness has time to calculate a policy to be pursued. Here the statements were made at the scene of the accident, and in the presence of those suffering from its results, and in the presence of the wreckage the accident created. Again we hold that the trial judge before whom the witness appeared is better prepared to pass upon the evidence upon which the admissibility of such statements depends than is an appellate court, and his ruling should not be disturbed, unless he has abused his discretion. We cannot say, from the evidence appearing in the record, that the declarations of Mitchell were inadmissible. If the statement of

the employee is spontaneous, that is, made at the time of the accident and during the excitement attending it, before the employee has time to reflect upon the consequences of his statement, or to fabricate evidence against his employer, it is admissible against the employer." Also, see 10 R. C. L. 978, and 4 R. C. L., Perm. Suppl., p. 2801.

The judgment is therefore affirmed.

CONREY, P. J. (concurring).

I concur in the judgment. In addition to the matters discussed in the foregoing opinion there are some other points raised by appellant which perhaps should be mentioned. I think that the evidence is sufficient to establish the fact that Rosher was both the ostensible agent and the actual agent of appellant, and not an independent contractor.

Appellant contends that the court erred in refusing appellant's offered instructions No. 7, No. 4, and No. 16. If appellant had attempted to comply with rule VIII, by printing in its brief the other instructions given which bear upon the subject covered by the refused instructions, possibly these assignments of error would not have been urged upon the court, and some time would have been saved. Upon the point urged, with respect to refused instruction No. 16, I think that the law concerning ostensible agency as applied to this case was properly stated in plaintiff's instruction No. 1. *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 421, 49 P. 559. See, also, *Barton v. Studebaker Corp.*, 46 Cal. App. 707, at pages 721 et seq., 189 P. 1025. Applying these decisions to the case at bar, I think that the court in said instruction properly instructed the jury as follows: "If you find from the evidence that prior to the accident the defendant Clifford F. Reid, Inc., held out or represented to the plaintiff Mary Dell Coryell that defendant Rosher was the agent or representative of such corporation for the purpose of transporting her to the tract of such corporation, and that she was induced by such representation to accompany the said Rosher to said place and that she had acted upon such representation on the day of the accident, then the defendant Clifford F. Reid, Inc., is liable for any damage inflicted upon or suffered by the plaintiff as a direct result of any negligence that may have been proved against the defendant Rosher while she was being transported by him to the tract of the company of Clifford F. Reid, Inc., if the plaintiff herself was free of negligence upon her own part."

HOUSER, J. (concurring).

I concur in the judgment. Although in accord with the conclusion reached by my associates, I cannot agree with that part of the main opinion herein to the effect that, as part of the *res gestæ*, evidence was admissible as to what was said by defendant Rosher after

the accident occurred, to wit: "It is my fault. I should not have been looking around."

Definitions are of little assistance. According to my recollection, in the published opinion of one of our comparatively early justices of the Supreme Court of this state, in substance it was declared that "definitions of the term *res gestæ* are as numerous as the various cures for rheumatism, and about as useful." But what, to my mind, is of greater importance is the undeniable fact that by the greater weight of authority in this state evidence of declarations made, however soon after the completion of any act or transaction, are inadmissible as a part of the *res gestæ*.

The opinion in the case of *People v. Ah Lee*, 60 Cal. 85, contains a most comprehensive explanation and illustration of the principles of law upon which the admissibility of evidence under the doctrine of *res gestæ* depends. The precise point there at issue was whether statements made by a person immediately after he was stabbed were admissible in evidence. In ruling upon the question thus presented, the court quoted with approval from a pamphlet written by Cockburn, C. J., in connection with an opinion theretofore rendered in the English case of *Rex v. Bedingfield*, 14 Cox C. C., 341, wherein it appeared that the prosecution offered to prove that some ten or fifteen minutes before her death a woman who had been attacked, on "coming from her house, at a distance of fifteen or twenty yards from her door, holding her apron to her throat, exclaimed: 'Oh, dear aunt, see what Bedingfield has done,' Bedingfield not being present at the time." A part of the pertinent language appearing in such pamphlet is as follows: "Whatever act or series of acts constitute, or in point of time immediately accompany and terminate in the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused during the continuance of the action of the latter, actual or constructive, e. g., in the case of fight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestæ* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention, or its abandonment by the wrong-doer, such as, e. g., statements made with a view to the ap-

prehension of the offender, do not form part of the *res gestæ*, and should be excluded. * * * It is perfectly obvious that there is a limit to the time within which such statements must be made in order to be admissible in evidence as a part of the *res gestæ*. But if made after the termination of the act to which they refer, they are merely narrative of a past transaction, whether made within a minute or an hour afterward. And 'where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence.' (1 Greenl. Ev. 110.) 'An act can not be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of the past occurrence, or by an isolated conversation held, or an isolated act done, at a later period.' (1 Taylor's Ev. 53.)"

After quoting extensively from such pamphlet, our Supreme Court, in effect, declared that statements made "immediately after" an occurrence did not constitute a part of the *res gestæ*, and were not admissible in evidence.

In the case of *Heckle v. Southern Pacific Co.*, 123 Cal. 441, 56 P. 56, 57, the question presented to the court was whether the trial court had erred in granting a motion for a new trial on the ground that on the trial of the action error had been committed in sustaining an objection to the introduction of evidence as to what was said by a person who had been caught under a wheel of a car and was still under the wheel, held there firmly by the weight of the car, at the time he made the declarations sought to be introduced in evidence. Preceding a statement of the facts, the court made the following observation: " * * * A declaration, to be admissible on that ground, must be an undesigned part or incident of the occurrence in question. It must be, in a general sense, contemporaneous with the main occurrence; although, in case of a sudden accident or attack, the declaration would not be inadmissible merely because the blow or collision immediately preceded it. It must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation or calculation, or the design to manufacture evidence for future purposes; and, if it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded. * * * "

In *Williams v. Southern Pacific Co.*, 133 Cal. 550, 65 P. 1100, 1102, it appears that a witness was permitted to testify regarding statements made "soon after the accident." With reference to the application of the *res gestæ* rule, the court said: "The ruling admitting these declarations was clearly erroneous. It is contended that they were part of the *res gestæ*. * * * Statements are like other circumstances when they are part of it, and, if the whole affair cannot be rightly under-

stood without them, they are competent. Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as *res gestæ*. A narrative, even if given during the occurrence, is inadmissible. *Heckle v. Southern Pac. Co.*, 123 Cal. 441, 56 P. 56. * * * "

In *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 P. 688, the plaintiff recovered a judgment against the defendant for personal injuries sustained by the falling of an elevator in which plaintiff at the time was a passenger. At the trial of the action, a witness testified that after the elevator had stopped and the plaintiff had been taken "out of the cage," the elevator operator stated that "he lost all control, and the connection cord got broke." In ruling that such statement "formed no part of the *res gestæ*, and should have been excluded by the [trial] court," the Supreme Court cited the case of *Lane v. Bryant*, 9 Gray (Mass.) 245, 69 Am. Dec. 282, in which the facts were similar to those in the instant case, in that it appeared that the plaintiff was injured in a collision between his carriage and that of the defendant, and a witness was asked what the defendant's servant said to the plaintiff at the time of the accident, and while the plaintiff was being taken from the carriage, to which he replied that the servant said that the plaintiff was not to blame. In ruling upon the admissibility of such testimony, the Supreme Court of Massachusetts said that "The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, on which the whole case turned, or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month afterwards." (Citing authorities.)

In the murder case of *People v. Wong Ark*, 96 Cal. 125, 30 P. 1115, a police officer testified that "after the shooting" he ran a distance of about 140 yards (which certainly should have required not more than 30 seconds) to a place where the woman who had been shot was lying on a porch, and that then and there, not within the presence of the defendant, he "had a conversation with her for possibly half a minute, or a little longer," in which conversation the woman declared that defendant was the man who shot her. In ruling that such declaration was not admissible in evidence as a part of the *res gestæ*, the fol-

lowing was quoted from Wharton on Evidence: "The distinguishing feature of declarations of this class is that they should be necessary incidents of the litigated act; necessary in this sense: that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. * * * The rule before us, however, does not permit the introduction under the guise of *res gestæ* of a narrative of past events, made after the events are closed, by either the party injured or by the bystander." Thereafter the opinion in the cited case continues: "At the time the declaration referred to was made, the shooting had been done, and the assailant had escaped from the scene of the shooting. The declaration was not the fact talking through the party, but the party's talk about the facts. * * *"

In a separate concurring opinion, Mr. Justice Garoutte elaborated upon the question as to whether the declaration made by the woman was a part of the *res gestæ*. Therein he took occasion to criticize certain authorities, and to distinguish others. Among other authorities cited, Justice Garoutte referred to the case of *Commonwealth v. McPike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727, in which it appeared that "the attorney for the commonwealth called Benjamin D. Shaw as a witness, who testified that, about the time mentioned by the preceding witness, he heard the voice of a woman crying 'Murder!' as she was going upstairs. He got up, and, going towards the room, met the last witness coming out, who told him not to go up, for the defendant would kill her, and he then saw the defendant coming out of the room. The witness then went for a watchman, and, coming back, went immediately up to the room where the deceased was, and there found her on the floor bleeding profusely. She asked the witness for some water, and to go for a physician. She said that John (meaning the defendant) had stabbed her, and told the witness what she wanted done if she died." The following comment is then made by Justice Garoutte: "Upon appeal the court held the statement of the deceased admissible upon the ground that the period of time at which these acts and statements took place was so recent after receiving of the injury as to justify its admission as part of the *res gestæ*, and upon the further ground that in the admission of testimony of this character much must be left to the exercise of the sound discretion of the presiding judge. These grounds are untenable. Neither upon principle nor authority does the fact (of itself) that the statement was made within a very few moments after the injury was received, stamp such statement as *res gestæ*. As to the second ground relied upon to support the admission of the evidence, the same court said, in *Lund v. Inhabitants of Tyngsborough*, 9

Cush. [Mass.] 41, referring to the admission of evidence as *res gestæ*: 'Its admission is not left to the discretion of the presiding judge, as has been sometimes supposed, but is governed by principles of law, which must be applied to particular cases as other principles are applied in the exercise of a judicial judgment.'" Mr. Justice Garoutte then restated the facts and continued: "It is entirely apparent that her statement as to the stabbing was the narrative of a past event, and should not have been admitted as *res gestæ*. It was no more a part of the *res gestæ* than if the statement had been made to the witness upon his return after calling the physician."

After further comment on the English case of *Rex v. Beddingfield*, 14 Cox C. C. 341, in part Justice Garoutte said:

"No rule can be laid down for all cases. Each case must be tested to a great extent by its own facts, but the fact that the statements may have been made immediately subsequent to the wounding or killing is in no sense true indicium that they are *res gestæ*. When the statements are the spontaneous outgrowth of the main fact, when, as Mr. Wharton says, 'they are the act talking for itself, and not what people say when talking about the act,' then they become *res gestæ*; otherwise they are merely narrative of a past event, and, in the interest of truth and justice, should be rejected. * * *

"In this case the 'thing done' was the shooting. The officer was not present at the time, but was 140 yards distant. He traveled that distance, and found the deceased lying upon the sidewalk, and several Chinese in her immediate presence; an opportunity for reflection and recollection had presented itself, and corrupt influences may have suggested her statement. It was a statement that defendant did the shooting. It was a narrative of a past event; in no respect an automatic or spontaneous incident of the shooting; no part of the thing done; and should not have been placed before the jury."

In the case of *Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 P. 243, 244, it appears that, over the objection of the defendant, a witness was allowed to testify that when the car stopped after the accident, and after the conductor had gone from the place where it stopped to the place where the defendant lay, and again returned to the car, the witness had a conversation with the conductor, in which the latter said: "These ladies seem to blame me—seem to think it is my fault." With reference thereto, in part, the Supreme Court said: "This was not a part of the *res gestæ*. It happened after the accident, and after a sufficient time had elapsed for the conductor to walk almost half a block and back again. It was not even a relation of the facts which caused the accident, but was a mere statement

of the opinion of third persons as to who was at fault. Its admission was against all the rules with relation to *res gestæ*." (Citing authorities.)

To like effect, see, also, *Luman v. Golden A. C. M. Co.*, 140 Cal. 700, 709, 74 P. 307; *Kimlic v. San Jose, etc., Ry. Co.*, 156 Cal. 379, 391, 104 P. 986; *Willard v. Valley Gas & F. Co.*, 171 Cal. 9, 16, 151 P. 236, and authorities respectively there cited.

It thus becomes apparent that the application of the *res gestæ* doctrine should be limited to acts or declarations which are necessary incidents of the completed act or transaction, and which act transpires, or which declarations are made, preceding in time the completion or consummation of the main act or transaction; and that in the operation of such principle, in arriving at a proper conclusion as to whether any given act or declaration constitutes a part of the *res gestæ* of the main act or transaction, the element of time within which such incidental act has been performed, or such incidental declaration has been made, following the completion or consummation of the main act or transaction, should not be given consideration. In other words, the element of time is a false quantity in the problem which is presented for solution by the trial court. Nor should the legal determination of the question be left to the sound discretion of the trial court. The decision of such question should be founded upon principles of law, and based solely upon the ultimate fact of whether the given act or the declaration is a necessary incident to the main act or transaction which in point of time preceded the completion of such main act or transaction.

Reasoning from the judicial declarations contained in the cited authorities of this state, I am led to the conclusion, in the instant case, that the alleged statement made by Mr. Rosher, after the accident in question had occurred, in substance, that it was his fault and that "he should not have been looking around," was no part of the *res gestæ*, and, consequently, was erroneously admitted in evidence. But, in view of the further fact that Rosher was a party defendant to the action, it would seem clear that, at least as far as he was concerned, his statement was properly receivable in evidence as a declaration or admission against interest. Nor does it appear that any motion was made by the other defendant that the effect or the substance of the questioned evidence be limited in its application to the one defendant. Furthermore, unquestioned evidence was received from other witnesses which, if not in express terms, at least, in substance, was to the same effect as the conclusion contained in the statement that the accident occurred because of the fault of the defendant Rosher, and that "he should not have been looking around." It

therefore becomes obvious that no prejudice to the defense of either of the defendants arose from the reception of the evidence of which appellants here complain.

117 Cal.App. 568

YUBA CITY v. CHERNIAVSKY et ux.

Civ. 4191.

District Court of Appeal, Third District California.

Oct. 20, 1931.

1. Municipal corporations ⇨601.

Zoning ordinance *held* to prohibit, by necessary implication, construction of an entirely new nonconforming building at place on lot remote from original one which was used for nonconforming purpose, unless council approves.

Zoning ordinance provided that a nonconforming use existing in any district at time ordinance takes effect may be continued subject to certain provisions, amongst which were provision that "no nonconforming use shall be extended beyond the confines of the lot" upon which it previously existed, followed by provision that "no building devoted to a nonconforming use, at the time of the effective date of this ordinance, shall be reconstructed without a permit therefor."

2. Municipal corporations ⇨120.

Ordinance should be construed so as to uphold all essential provisions if reasonably possible.

3. Municipal corporations ⇨601.

City has authority under police powers to adopt reasonable zoning ordinance prescribing confines of residence, business, and industrial districts.

4. Municipal corporations ⇨621.

Necessity of first requiring consent of council to change location of grocery business to different building at different location on same lot *held* not an unreasonable exercise of city's police power.

5. Municipal corporations ⇨621.

City may lawfully require that individual shall obtain permit for construction, alteration, or use of building.

6. Municipal corporations ⇨122(2).

When ordinance is passed relating to matter within legislative power of municipality, all presumptions are in favor of its validity.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Petition by the City of Yuba City against A. Cherniavsky and wife. From a decree denying an injunction sought to prohibit operation of mercantile business in residence district, plaintiff appeals.

Reversed, with directions.

Arthur Coats, of Marysville, for appellant.

Lloyd E. Hewitt, of Yuba City, for respondents.

R. L. THOMPSON, J.

This is an appeal from a decree denying an injunction which was sought to prohibit the respondents from operating a mercantile business in the residence district of the city of Yuba City.

The respondents own lot 17 of Shasta tract in the city of Yuba City. This lot fronts 127 feet on Teegarden avenue, and is 266 feet in depth. Prior to February 6, 1928, the respondents owned and operated a small grocery store which was located at the extreme rear end of this lot. There was no open street at this end of the lot. The store was patronized chiefly by customers from an auto park which was located near by. A pathway led from the auto park to the store, and also communicated with the eastern extremity of Ailer street. On the last-mentioned date the city of Yuba City adopted a zoning ordinance which included this lot 17 in the residence district. Section 4 of this ordinance prohibits the establishment of any business enterprise within the residence district. That section provides, in part: "In the residence district no building shall be used or maintained for purposes or uses other than those in this section hereinafter set forth; and no building shall be constructed, erected, altered or enlarged, which is arranged, intended or designed for any use or purpose other than as for * * * (Here follows a designation of the character of buildings which may be constructed in the residence district. It does not include mercantile establishments or grocery stores.)"

Section 9 of this ordinance contains the following provisions:

"A nonconforming use existing in any district at the time this ordinance takes effect may be continued subject to the following provisions:

"(a) No nonconforming use shall be extended beyond the confines of the lot which it occupies or upon which it is located;

"(b) No building arranged, designed, devoted to or intended to be used for a nonconforming use, at the time of the effective date of this ordinance, shall be reconstructed or structurally altered to an extent exceeding in aggregate cost twenty-five per cent. of

its assessed value, without a permit therefor first being granted by the unanimous vote of the city council, unless the use of said building be changed to a conforming use;

"(c) No nonconforming use shall be changed, unless changed to a conforming use, and shall not thereafter be changed back to any nonconforming use."

The city council is then authorized to hear and determine applications for "changing, restricting, enlarging or modifying any of the uses permitted in any district."

After the adoption of this ordinance the respondents obtained a permit to construct a dwelling house at the extreme northerly end of lot 17, at a distance of 160 feet from the location of the grocery store. No permit was requested or granted to construct or use the structure as a store building. No permit was procured to remove the store from its original location at the rear end of the lot. The respondents, however, abandoned their former location and removed their merchandise to the new dwelling house, where they are now maintaining a grocery business in violation of the zoning ordinance.

This petition for an injunction to restrain the maintenance of the grocery business in the new locality, contrary to the zoning ordinance, was heard upon stipulated facts, which are in substantial accordance with the foregoing recitation thereof. At the trial, findings of facts, favorable to the respondents, were adopted by the court. There was, however, no finding that the ordinance is unreasonable in its application. A decree was accordingly rendered denying the injunction. From this judgment the city of Yuba City has appealed.

[1, 2] The trial court apparently assumed subdivision (a) of section 9 of the zoning ordinance, by necessary implication, authorizes the change of location of an existing business to any portion of the lot where it was formerly conducted. We are of the opinion this is contrary to the spirit and terms of the ordinance. This change of location may not be allowed except upon specified conditions and with the approval of the council. It is true the ordinance provides that "no nonconforming use shall be extended beyond the confines of the lot" upon which it previously existed. This clause should be construed with subdivision (b), which follows immediately thereafter. It provides that "no building * * * devoted to * * * a nonconforming use, at the time of the effective date of this ordinance, shall be reconstructed * * * without a permit therefor." Indeed, the ordinance specifically prohibits the granting of a permit to alter any building which was previously used for a nonconforming purpose, at an expense in excess of one-fourth of its assessed value. This ordinance, therefore, precludes the city council

from granting permission to "reconstruct or structurally alter" any nonconforming building, at a cost exceeding 25 per cent. of its assessed value. Clearly this clause prohibits, by necessary implication, the construction of an entirely new building at a place on the lot remote from the original one which was used for a nonconforming purpose. An ordinance should be construed so as to uphold all of its essential provisions if reasonably possible. The construction of zoning regulations is ordinarily governed by the general rules applicable to the construction of statutes and ordinances. 43 C. J. 344, § 370. Paragraph (a) may be reasonably reconciled with the above-quoted portions of paragraph (b), by holding that the ordinance means "no building * * * devoted to * * * a nonconforming use, at the time of the effective date of this ordinance, shall be reconstructed * * * without a permit therefor," and under no circumstances where the cost of such alteration exceeds 25 per cent. of its assessed value, or when such improvement extends beyond the confines of the lot. In other words, paragraph (a) is a limitation with respect to the location of a building formerly used for a nonconforming purpose, beyond which the council is powerless to authorize any improvement. Any other construction of the application of this clause destroys the spirit and purpose of the zoning ordinance.

[3-5] It is conceded the city has the authority under its police powers to adopt a reasonable zoning ordinance prescribing the confines of residence, business and industrial districts. 43 C. J. 336, §§ 365-369; *People v. Hawley*, 207 Cal. 395, 410, 279 P. 136; *Feraut v. City of Sacramento*, 204 Cal. 687, 269 P. 537; *Pacific P. Assoc. v. Huntington Beach*, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782. The reasonableness of the present ordinance is not challenged. It is also conceded this ordinance may not interfere with the maintenance of the business which was previously established under substantially the same circumstances in which it was formerly operated. It is unnecessary for this court to determine whether the limitation of the right of the council to authorize the alteration or improvement of a building previously used for a nonconforming business, at an expense in excess of 25 per cent. of the assessed valuation, is a reasonable exercise of the police power of the city. That question is not involved in this action. The only question here involved is whether one may construct an entirely new and different building from the one formerly used for a nonconforming business, at a different location on the same lot, without first procuring the consent of the council. The necessity of first requiring the consent of the council to thus

change the location of a grocery business, or permit a substantial enlargement thereof, does not appear to be an unreasonable exercise of the police power of the city. A city may lawfully require that an individual shall obtain a permit for the construction, alteration, or use of a building. 43 C. J. 345, § 373; *Ex parte Fiske*, 72 Cal. 125, 13 P. 310; *City of Stockton v. Frisbie & Latta*, 93 Cal. App. 277, 294, 270 P. 270.

[6] In 19 Ruling Case Law 808, § 113, it is said: "It is well settled that when an ordinance is passed relating to a matter which is within the legislative power of the municipality, all presumptions are in favor of its validity, and when it is attacked the burden is on the party alleging its invalidity to establish that fact."

There was no attempt in the present case to show that the zoning ordinance in question is unreasonable in any particular.

In the present case the respondents were operating a modest little grocery store at the rear end of a 266-foot lot, remote from other dwelling houses. The rear end of this lot does not border on an open street. The store depended chiefly upon an auto camp, near by, for patronage. Located and operated as the store existed, it was of slight annoyance to the residents on Teegarden avenue at the opposite end of the lot. Without application or permission of the council, the respondents surreptitiously constructed a new building 160 feet away on Teegarden avenue, on the pretense of using it exclusively as a dwelling house, and then removed their merchandise to the new building, where they are now maintaining their grocery business in violation of the ordinance. If there is no limitation upon the character or location of a nonconforming business, so long as it is located on the same lot where it formerly existed, then one may abandon an inexpensive notions counter which was maintained prior to the adoption of a zoning ordinance, and construct in lieu thereof an elaborate mercantile establishment at the opposite end of the same lot, at an unlimited expense, and thus circumvent and destroy the very purpose of the ordinance. We are satisfied this may not be done under the provisions of the present ordinance.

The judgment is reversed, and the trial court is directed to enter a decree restraining the respondents from maintaining or operating a mercantile establishment in their dwelling house which is situated on the northerly extremity of lot 17 of Shasta tract in the city of Yuba City.

We concur: PRESTON, P. J.; PLUMMER, J.

117 Cal.App. 652

COGER v. WILTSEY et al.

Civ. 4407.

District Court of Appeal, Third District, California.

Oct. 23, 1931.

1. Vendor and purchaser ⇨351(5).

Measure of damages for vendor's failure to make escrow *held* difference between agreed price and value of property at time of breach (Civ. Code, § 3306).

It was therefore error to instruct that measure of damages was amount which would compensate purchaser for all detriment proximately caused by such failure, in suit brought by purchaser to recover amount he claimed to have lost by not being able to make resale at advantageous price.

2. Vendor and purchaser ⇨349.

Purchaser, to recover for vendor's failure to make escrow difference between agreed price and value of property, must allege and prove bad faith.

3. Vendor and purchaser ⇨350.

In purchaser's action, based on loss of resale through vendor's failure to make escrow evidence, *held* insufficient to show prospective purchaser's ability to pay.

4. Vendor and purchaser ⇨350.

As regards damages for loss of resale, proposed purchaser was not shown to be able to purchase when dependent on third parties for funds.

5. Appeal and error ⇨117(2).

Where cause was pleaded and tried, and jury instructed on unauthorized theory of damages, there must be retrial.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by P. W. Cogger against Mary J. Wiltsey and another for damages for breach of agreement to sell real property. From an adverse judgment, named defendant appeals.

Reversed.

J. Oscar Goldstein, of Chico, for appellant.

McCoy & Wetter, of Red Bluff, for respondent.

TUTTLE, Justice pro tem.

This action was brought to recover damages arising out of a breach of an agreement to sell real property. The trial was had before a jury, and a verdict was rendered against

appellant in the sum of \$9,000. The verdict also contained a finding in favor of defendant J. H. Wiltsey. This appeal is taken from the judgment entered upon the verdict, and is prosecuted by defendant and appellant, Mary J. Wiltsey. Counsel for appellant did not represent her at the trial.

On June 25, 1928, appellant was the owner of certain real property near Red Bluff, Cal., consisting of some ten acres of land, with a dwelling house thereon. Upon the date mentioned she and her husband, J. H. Wiltsey, entered into a written agreement with respondent, by the terms of which the Wiltseys leased to respondent the real property mentioned for a period of five years, at an annual rental of \$360 per year. The following portions of said agreement are pertinent to the issues in this case:

"It is further agreed that the party of the second part shall have the right or option to purchase the said above described real and personal property at any time during the term hereof, for the sum of \$7,000.00, payable in lawful money of the United States, and in the event that second party shall exercise said option, it is hereby agreed that all moneys theretofore paid first parties as rent for said above described premises and property shall be applied on the purchase price of said property. * * *

"It is further agreed that the parties of the first part will forthwith execute a good and sufficient deed conveying all of the said above described real and personal property to the party of the second part, said deed to be placed in escrow at the Bank of Tehama County in Red Bluff, California, to be delivered to the said party of the second part on payment to first parties, their heirs or assigns, of the amount of the purchase price aforesaid."

Respondent took immediate possession of said property, and has been in possession thereof ever since.

The deed mentioned in the agreement was not deposited in escrow until March 20, 1930, although respondent had several times requested appellant to complete the escrow.

On March 11, 1930, respondent and one L. M. Coates entered into the following agreement:

"Red Bluff, California, March 11, 1930.
"Bank of Tehama County, Red Bluff, California.

"Gentlemen: We herewith deposit \$400 with you upon the following conditions:

"P. W. Cogger is to deliver to you a deed for the Gas Station property at the corner of the East Side and Susanville Highways signed by the proper parties in favor of L. M. Coates by three o'clock this afternoon at which time the balance of the purchase price of \$17,500

is to be paid and time for examination of title is arranged for.

"Should Cogor fail to produce said deed by said time then said deposit is to be returned to the said Coates.

"Should Coates fail to make the balance of the payments provided above then the \$400 is to be paid to said Cogor.

"P. W. Cogor
"L. M. Coates"

Coates was a total stranger to respondent, and had arrived in Red Bluff on the day before the above writing was signed.

Upon signing the foregoing agreement, Coates and respondent requested Bank of Tehama County to produce the deed mentioned in the agreement of June 25th. The bank replied that the deed had never been deposited with them. Thereupon respondent attempted to locate appellant. He could not find her in Red Bluff, nor could he find her address. Coates left for San Francisco, and the next day wrote respondent: "If you are able to close the deal within seven days from this date [March 13th] my offer will still hold good." On March 18th respondent learned the address of appellant in San Jose, and wrote her that he had a deal on for the ten acres; that he had found she had not deposited the deed, and stating that it was imperative that this be done without delay. On March 20th the attorney for appellant wrote respondent that the deed had been deposited that day. This letter was not received by respondent until March 21st. On March 23d Coates wrote respondent from San Francisco, stating that he was no longer interested in the deal.

The complaint alleges the execution of the agreement between the parties hereto, and the failure, refusal, and neglect of appellant to deposit the deed in the Bank of Tehama County. It also recites the transaction between Coates and respondent. Damages are claimed and predicated upon the following allegation: "That solely by reason of said neglect, failure, and refusal of said defendants to execute the deed and place the same in escrow as provided by said contract and as a direct and proximate result thereof, plaintiff was unable to convey a good title to said land to said L. M. Coates, and thereby lost the opportunity to sell said property to said Coates or any one else at said sum of \$17,500.00, or any other profitable sum, and thereby plaintiff was damaged in the sum of \$11,220.00."

The court, upon its own motion, gave the following instruction:

"You are instructed that if you believe from a preponderance of the evidence that the defendants, Mary J. Wiltsey and J. H. Wiltsey, agreed to execute a good and sufficient deed conveying all of the real property described

in that certain contract dated June 25, 1928, made between said Mary J. Wiltsey and J. H. Wiltsey, as parties of the first part and P. W. Cogor, the plaintiff, as party of the second part, and to place such a deed in escrow at the Bank of Tehama County, in Red Bluff, California, and that the defendants failed to do so within a reasonable time after the signing of the contract and that such failure to place such deed in escrow at said bank resulted in a detriment to the plaintiff, then the plaintiff is entitled to recover from the defendants such an amount of money as will compensate the plaintiff for all the detriment proximately caused by such failure.

"Provided that you also find and believe that the attention of Mary J. Wiltsey and J. H. Wiltsey had been called to the intention and purpose of P. W. Cogor to make resale of the property as is in others of these instructions mentioned."

In his opening statement to the jury, counsel for respondent said: "Mr. Cogor lost the sale of that property, which was to him, as we will show, at an advantageous figure, and that he consequently lost the profit from the sale. We will try to show that that profit amounted to the sum of eleven thousand dollars."

A motion for nonsuit was made at the conclusion of plaintiff's case, and denied.

After an examination of the entire record, we are convinced that the case was tried under a total misapprehension and misconception of the measure of damages applicable to an action of this character, and that the trial court erred in denying the motion for nonsuit and also in giving the foregoing instruction.

[1] Under the agreement between these parties, appellant agreed to convey her real property to respondent. She also agreed to deposit the deed to her property, forthwith, in the bank. It is an admitted fact that she failed to thus deposit her deed, and thereby breached her agreement. This state of facts brings the case directly within the purview of section 3306 of the Civil Code, which reads as follows: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

There is no claim made in the case for the price paid or the expenses incurred in examining the title and preparing the necessary papers. From the complaint, statement of counsel for respondent at the trial, and the

instructions given, it conclusively appears that the only damage sought is that arising out of the alleged loss of profit upon a resale to Coates. There is no authority in this state for such a recovery. By the plain and express provisions of the Code section cited, the measure of damages is the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. This view is upheld in *Haight v. Marin Municipal Water District*, 208 Cal. 753, 284 P. 926; *Kaufman v. Bell*, 89 Cal. App. 610, 265 P. 317; *Wilson v. White*, 161 Cal. 453, 119 P. 895, and numerous other California cases.

The position of respondent is that "section 3306 of the Civil Code, referred to by counsel, refers only to breach of agreement to convey estate in real property. This is an agreement to make an escrow." We must confess that we are unable to follow counsel in his view. The provision for an escrow was one of the terms of the agreement to convey, and a breach thereof was a breach of the agreement, and the sole and exclusive remedy therefor is found in the Code section referred to.

From the record before us, it plainly appears that the court adopted the view of the law upon this question, as expounded by counsel for respondent at the trial. The jury was instructed, as we have shown, in the language of section 3300 of the Civil Code. Such an instruction was not justified by the pleadings or the evidence in the case. If this rule were adopted, it would open the door to fraud and collusion. One would merely have to plead and prove a contract with a third party, and he thereupon would be entitled to judgment for the difference between the original contract price and the contract price with the third party. This would be done, as attempted here, under the guise of special damages. This would open up a realm of speculation for the jury. It was probably for this reason that the Legislature confined the damages to the difference between the price agreed upon in the contract and the value of the land at the time of the breach. We are not holding here that market value may not be proved by evidence of another contract with a subsequent vendee. That question is not before us. We do hold, however, that, where a vendor has breached his contract to convey real property, the vendee cannot recover damages predicated (in the pleadings, proof and instructions), solely upon profits which he might have made on a resale of said property to a third party.

[2] In order for the respondent to prevail, it was incumbent upon him to allege and prove facts showing bad faith upon the part of appellant. See cases cited, *supra*. An examination of the record discloses that the

question of bad faith was never presented to the jury.

[3,4] If we accept the theory of respondent, the judgment must nevertheless fall, for the reason that there is no evidence in the record that appellant had any knowledge of the intent of respondent to ever make a resale of the property. In the instruction quoted, *supra*, the jury were told that respondent could not recover unless such knowledge was brought home to appellant. The implied finding of the jury in favor of respondent, upon this issue, is without support in the record. The jury were also instructed that, if they found that Coates was not able or willing to buy the property, they must find for defendants. The testimony of Coates as to his ability to pay \$17,500 is not sufficient to sustain an implied finding that he had the ability to pay that sum. He did not have the money with him at the time of performance. In one breath he said he could write a check, while in another he stated he had some of the money, \$8,000, in a safe deposit box. He said he did not think his check would be paid at once. He said it would be paid "in good time." Witness Bottaro for respondent testified that Coates told him he was going to buy some property, and that he (Bottaro) agreed to loan Coates \$10,000 on a first mortgage to complete the deal. This is clearly an insufficient showing upon the ability of Coates to pay \$17,500 cash upon production of the deed. Upon the question as to the showing of ability upon the part of a customer in an action concerning the commission of a real estate broker, the rule is laid down in 4 California Jurisprudence, 592, as follows: "If the money for the purchase or sale is to be produced by some third person other than the customer, the broker has not produced a customer able to buy, and is not entitled to commissions."

Unenforceable promises do not constitute ability, as the latter term is applied to a prospective purchaser. *Merzozian v. Kludjian*, 183 Cal. 422, 191 P. 673. A proposed purchaser cannot be said to be able to purchase when he is dependent upon third parties, who are in no way bound to furnish the funds with which to make the purchase. *Pellaton v. Brunski*, 69 Cal. App. 301, 231 P. 583.

[5] Under such circumstances, where a cause was pleaded and tried, and the jury instructed upon a theory (relative to damages) not authorized by law, it is the plain duty of this court to prevent a miscarriage of justice by sending the case back for retrial.

It is therefore ordered that the judgment be reversed.

We concur: PRESTON, P. J.; PLUMMER, J.

117 Cal.App. 427

SMITH v. McKNIGHT et al.

Civ. 6684.

District Court of Appeal, Second District, Division 1, California.

Oct. 10, 1931.

Municipal corporations ⇨348.

Without allegation, proof, or finding that plaintiff had filed claim within statutory period, he could not recover on street improvement contractor's bond (St. 1911, p. 738, § 19, as amended by St. 1919, p. 480).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by H. G. Smith against J. R. McKnight, F. H. Dolan, and Josephine H. Dolan. From the judgment, F. H. and Josephine H. Dolan appeal.

Judgment reversed in part.

Benno M. Brink, of Los Angeles, for appellants.

Fred W. Heatherly and Alfred W. Allen, both of Los Angeles, for respondent Smith.

Horace P. Babson, of Los Angeles, for respondent McKnight.

BISHOP, Justice pro tem.

So far as pertinent to our problem, the provisions of section 19 of the Improvement Act of 1911 (as amended by St. 1919, p. 480) are the following (effective in the year 1925): "Every contractor * * * to whom is awarded any contract for street work under this act, shall * * * file * * * a good and sufficient bond * * * to inure to the benefit of any and all persons * * * who perform labor on, or furnish materials to be used in the said work of improvement. * * * Any laborer, materialman * * * whose claim has not been paid * * * may, at any time prior to thirty days after the recording of the assessment for said work, file with the superintendent of streets, a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the persons * * * filing the same * * * may commence an action * * * on said bond. * * *" Because there is neither allegation, nor proof, nor finding of fact, that plaintiff had filed his claim within the time prescribed, his judgment, recovered on a bond given under this section by the appealing sureties, must be reversed. This was the conclusion reached in Republic Iron & Steel Co. v. Patillo (1912) 19 Cal. App. 316, 125 P. 923, where provisions of the Vrooman Act, in all essentials identical with the provisions quoted above, were applied. It is a conclusion further supported by Miles v. Baley

(1915) 170 Cal. 151, 149 P. 45; San Dimas Quarry Co. v. American Surety Co. (1916) 30 Cal. App. 3, 157 P. 548; Evans v. Shackelford (1923) 64 Cal. App. 750, 222 P. 846. See, also, the discussion in Hub Hardware Co. v. Aetna Accident & Liability Co. (1918) 178 Cal. 264, 173 P. 81, and in California Portland Cement Co. v. Boone (1919) 181 Cal. 35, 183 P. 447.

The judgment is reversed in so far as it affects appellants F. H. Dolan and Josephine H. Dolan.

We concur: CONREY, P. J.; YORK, J.

214 Cal. 168

RAND et al. v. COLLINS, Registrar of Voters.
S. F. 14445.

Supreme Court of California.

Oct. 26, 1931.*

1. Municipal corporations ⇨39.

Consolidated cities and counties *held* authorized to provide in their charters for appointment of officers (St. 1931, pp. 2973, 2980, 3013-3017, §§ 5, 59-62, 64; Pol. Code, §§ 4013, 4021; Const. art. 11, §§ 5, 7½, 8, 8½).

Const. art. 11, § 8½, under which a consolidated city and county may adopt a charter, grants plenary power to provide in charter manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers shall be elected or appointed, and amounts to a grant of power to consolidated cities and counties to determine in their charters how their officers shall be chosen.

2. Municipal corporations ⇨39.

Constitution under which consolidated city and county may adopt charter, *held* to permit making certain officers in office, when charter is approved, successors of themselves, subject to charter provisions (St. 1931, p. 3016, § 62; Const. art. 11, § 8½).

3. Municipal corporations ⇨39.

Constitution under which consolidated city and county may adopt charter authorized designation of county officer generally known as "auditor" by name "controller" (St. 1931, p. 3017, § 64; Const. art. 11, § 8½).

4. Officers ⇨1.

Duties and powers to be exercised by incumbent determine the office.

5. Coroners ⇨6.

Counties ⇨65.

Continuance in office, under terms of new charter, of coroner, county clerk, and auditor, *held* not to constitute unconstitutional extension of their respective terms of office beyond period for which they were elected (St. 1931, pp. 3013-3017, §§ 59-62, 64; St. 1931, p. 3108, Schedule; Const. art. 11, § 9).

San Francisco Charter (St. 1931, pp. 3013-3017) §§ 59-62, 64, did not amount to extension of respective terms of coroner, county clerk, and auditor, in violation of Const. art. 11, § 9, since the term of office to be held under the new charter was a new and distinct term of office, the old terms having been terminated on the

effective dates of the charter provisions. Furthermore, the San Francisco Charter, Schedule (St. 1931, p. 3108) worked complete destruction of old terms of office.

6. Municipal corporations ⇨39.

General law establishing uniform system of county and township government *held* inapplicable to city and county of San Francisco adopting new consolidated charter (St. 1907, p. 354, as amended; St. 1931, p. 2973; Const. art. 11, § 8½).

In Bank.

Mandamus proceedings by Lewis H. Rand and others against C. J. Collins, registrar of voters for the city and county of San Francisco.

Alternative writ discharged, and peremptory writ denied.

Elmer Collett and James M. Hanley, both of San Francisco, for petitioners.

John J. O'Toole, City Atty., and Walter A. Dold, Asst. City Atty., both of San Francisco, for respondent.

Frank L. Fenton, of San Francisco, amicus curiæ for Benning Wentworth, auditor.

Morris, Jaffa & Thompson, of San Francisco, amici curiæ on behalf of coroner.

Maurice E. Harrison, Lewis F. Byington, Robert M. Searls, and Allen G. Wright, all of San Francisco, amici curiæ for San Francisco Bar Association.

WASTE, C. J.

The respondent, as registrar of voters, has refused to accept and file declarations of candidacy tendered by the petitioners for the offices of auditor, coroner, and county clerk, respectively, to be voted on at the election to be held in the city and county of San Francisco on November 3, 1931. Respondent's refusal was based on his contention that, under the provisions of a new freeholders' charter adopted by the people of San Francisco on March 26, 1931, ratified by the Legislature, and, except in certain particulars, in effect January 8, 1932 (assembly concurrent resolution No. 26, Stats. 1931, chap. 56, p. 2973), the offices of coroner and county clerk are appointive, and not elective; that the office of auditor has been consolidated with another office which has been made appointive; and therefore the offices are not to be voted for at the November election. As respondent persists in his refusal to accept the declarations of candidacy and other documents, the petitioners have come here seeking a writ of mandate to compel him to file them, and to place the names of petitioners on the official ballot as candidates for office at the coming November election. They allege that, under

*Note: Because of the limitation of time, the order denying a writ of mandate in the case was made on October 5, 1931, but the opinion was not filed until October 26, 1931.

the provisions of the State Constitution, the people of the city and county of San Francisco have no power, by charter provision or otherwise, to make the offices appointive; that the provisions of the new city charter, in so far as they attempt to make the offices appointive, are unconstitutional. Respondent has generally demurred to the petition.

San Francisco's new charter was framed under the provisions of sections 8 and 8½ of article 11 of the Constitution of California. Section 8½ provides: "It shall be competent in any charter framed in accordance with the provisions of this section, * * * and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees." Availing themselves of the privilege given by this provision of the Constitution, the people of San Francisco, in adopting the new charter, have provided (section 5) that only the mayor, the members of the board of supervisors, an assessor, a district attorney, a city attorney, a sheriff, a treasurer, a public defender, and municipal court judges shall be elected by the voters of the city and county. The tax collector, registrar of voters, recorder, county clerk, and public administrator, comprising the department of finance and records, shall be appointed, and come within the civil service provisions of the charter. The incumbent in any of these offices and in the office of coroner at the time the charter was ratified by the state Legislature, if he has held such office for one year continuously prior thereto shall be deemed appointed thereto, and thereafter hold office under the provisions of the charter. Sections 59, 60, 61, 62. The office and duties of the auditor are combined with and united in the office and duties of a controller to be appointed by the mayor, subject to confirmation and approval by the board of supervisors. The controller shall be the successor of the auditor, and, the charter provides, "shall have the powers and duties of a county auditor. * * * He shall be the auditor and chief accounting officer of the city and county. * * *" Section 64.

Petitioners contend that the provisions of section 8½ of the Constitution above quoted cannot be given the construction contended for by the respondent; that plenary power is not

thereby given a consolidated city and county government to provide in its charter "for the election or appointment" of county officers, but only to provide for the manner in which, the method by which, the times at which, and the terms for which the several county officers shall be appointed or elected. This contention presents the vital question to be determined by the court in this proceeding. By section 5 of article 11 of the Constitution, it is provided that "the Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require." The Legislature, in section 4013 of the Political Code, has provided that the officers of a county are (among others): (3) A county clerk; (4) an auditor; (12) a coroner; and in section 4021 it is provided that all elective county officers shall be elected at the general election at which the Governor is elected, and, when seated, shall hold office until their successors are elected or appointed; provided, that whenever any county has framed and adopted a charter of its own government, under the provisions of section 7½ of article 11 of the Constitution of this state, and such charter provides for the appointment of county officers, then the officers first appointed under the provisions of such charter shall be deemed the successors of the like elective officers in office at the time of the approval of the charter.

[1-4] It is provided by section 7½ of article 11 of the Constitution referred to by the Legislature in the Code section (Pol. Code, § 4021, supra), and which grants power to "any county" to frame a charter for its own government, that in all such county charters it shall be competent to provide, and the charter shall provide for county officers, naming them, "for the election or appointment of said officers, or any of them, for the times at which and the terms for which, said officers shall be elected or appointed, and for their compensation. * * *" By its express terms, the provisions of section 7½ "shall not be applicable to any county that is consolidated with any city." While the language of section 7½ may be cited as being more direct in expressly providing that county charters "shall" provide for the election or appointment of county officers than the language used in section 8½ under which a consolidated city and county may adopt a charter, we are of the view that the language of section 8½, which grants plenary power to provide in a charter "the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers * * * shall be elected or appointed," amounts to a grant of power to consolidated cities and counties

to determine in their charters, as San Francisco has done, how their officers shall be chosen. We are also of the view that the language in section 8½ is sufficiently broad and inclusive to permit the making of certain officers, in office when the charter was approved by the state Legislature, or who may be in office at the effective date of the charter, successors of themselves, subject to the provisions of the charter. It is broad and inclusive enough, also, to authorize the designation of the county officer generally known as "auditor" by a new name, "controller," with the duties imposed by the charter, and which are, in large part, the same as the duties imposed by law on county auditors. The name of an officer is unimportant. The duties and powers to be exercised by the incumbent determine the office. *Sloane v. Hammond*, 81 Cal. App. 590, 613, 254 P. 648; *Coulter v. Pool*, 187 Cal. 181, 185, 186, 201 P. 120; *Kennedy v. Gustine*, 199 Cal. 251, 255, 248 P. 910.

In view of the present tendency toward city government freed from general legislative control, and with larger powers of selection of local officials being constantly lodged in some responsible appointing power, we feel that harmonizing the language of the two sections of the Constitution to convey essentially the same meaning does not do violence to any rule of constitutional construction. If there is a distinction in the language used in the sections, it appeals to us as a distinction without any great or material difference. The intent of the framers of the two sections was the same, except that consolidated cities and counties, which are not subject to general laws in the conduct of municipal affairs, are given larger powers in choosing their officers and fixing their terms of office.

[5] Petitioners contend that the continuance in office of the coroner, county clerk, and auditor, by the provisions of the charter, amounts to an extension of their respective terms of office beyond the period for which they were elected, and therefore violates section 9 of article 11 of the Constitution, which provides that the term of a city, county, town, or municipal officer shall not be extended beyond the period for which he is elected or appointed. There is no merit in the point. By the adoption of the new charter, and under the express grant of power contained in section 8½ of article 11 of the Constitution, *supra*, the electors of the city and county have provided new "terms for which the several county and municipal officers * * * shall be elected or appointed." These terms of office are not extended beyond the period for which the incumbents were elected, but are new and distinct terms of office, the old terms having been terminated on the effective dates of the charter provisions. The new charter provides, in the concluding paragraph or "schedule" following section 226, that "of-

ficers which, under the charter superseded by this [new] charter, shall have been filled by vote of the electors of the city and county, and which, by this charter, are made appointive officers shall not be filled by vote of the electors at the general municipal election of 1931." This provision seems to work a complete destruction of the old terms of office. Offices heretofore elective which are, by the provisions of the new charter, made appointive, now come within the civil service provisions of the new charter, and the incumbents, if they have held the offices for the times fixed by the charter, are deemed to be appointed to the respective positions so held by them. Charter, § 62.

[6] Another contention of petitioners is that the provisions of the new charter conflict with the general law of the state establishing a uniform system of county and township government (St. 1907, p. 354, as amended). The same contention was made against the freeholders' charter adopted by the city and county of San Francisco and approved by the Legislature January 26, 1899 (St. 1899, p. 241). In passing on the contention, this court held that it was too obvious for question or argument that the general law did not apply to the city and county of San Francisco, and, in its decision, the court used this language: "It is contended * * * that the law (and a freeholders' charter adopted as provided for in the constitution is a law of the highest grade) cannot be passed, although in pursuance of express power granted by the constitution, because it may perhaps infringe upon some other law. The rule of construction invoked by appellants seems to be that a provision in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases." *Martin v. Election Commissioners*, 126 Cal. 404, 411, 58 P. 932, 934. See, also, *Fragley v. Phelan*, 126 Cal. 383, 58 P. 923.

Other contentions advanced and arguments made by petitioners are so intimately connected with the principal issue involved and heretofore discussed that we deem it unnecessary to consider them. Petitioners have cited and relied strongly upon two cases in this state which, on first examination, appear to give color to their contentions. In *Crowley v. Freud*, 132 Cal. 440, 64 P. 696, the Supreme Court merely decided that section 8½ of article 11 of the Constitution, as it then read, did not confer power on the city and county of San Francisco to prescribe, in its charter, the qualifications of deputies of county officers. Language used by the court in the majority opinion and in its reference to an earlier decision, *Kahn v. Sutro*, 114 Cal. 316, 46 P. 87, 33 L. R. A. 620, decided before section 8½ had become a part of the

Constitution, and which is in conflict with our holding in the present case, should be considered as overruled. In *People v. Elkus*, 59 Cal. App. 396, 211 P. 34, the District Court of Appeal decided that the provision of section 8½, which grants power to provide "the manner in which" and "the method by which" city officers are to be elected, does not authorize the city to adopt a proportional [the Hare] system of voting; that to permit such innovation would infringe upon and overthrow the fundamental right guaranteed by the Constitution in other provisions to every qualified voter to vote at all elections. There is nothing in the issue involved in the decision or what is said in the opinion of the court that is closely enough allied with the question involved in the present case to make the decision or opinion of the District Court of Appeal authoritative or even persuasively controlling here.

The demurrer is sustained, the alternative writ is discharged, and the petition for a peremptory writ is denied.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

214 Cal. 182

WEBB et al. v. FRANCIS J. LEWALD COAL CO. et al.
S. F. 14299.

Supreme Court of California.
Oct. 29, 1931.

1. Damages ⇐192.

Plaintiff's testimony, in action for injuries caused by fright, warranted inference she was frightened for own safety as well as truck driver's.

2. Witnesses ⇐209.

Physician examining plaintiff and making written report to plaintiff's attorney "acted" for plaintiff, without having "prescribed for" or "treated" plaintiff; hence testimony was privileged (Code Civ. Proc. § 1881, subd. 4).

Code Civ. Proc. § 1881, subd. 4, provides that physician cannot be examined respecting information acquired in attending patient without latter's consent, with proviso that action to recover for personal injuries shall be deemed consent by plaintiff that any physician who "prescribed for or treated" plaintiff shall testify. The words "prescribed for or treated" of this

proviso do not cover identical scope of words "to prescribe or act" found in portion of subdivision creating the privilege; "prescribe" meaning to direct, designate or order the use of a remedy; "treat" meaning to care for medicinally or surgically. Hence, a physician may properly "act" for patient without having thereby "prescribed for" or "treated" him.

[Ed. Note.—For other definitions of "Act," "Prescribe" and "Treat; Treatment," see Words and Phrases.]

3. Witnesses ⇐206.

Report to attorney for plaintiff by physician who examined her *held* privileged as "communication between attorney and agent of his client" (Code Civ. Proc. § 1881, subd. 2).

4. Appeal and error ⇐1048(2).

Refusal to compel physician to testify respecting examination of plaintiff in personal injury action, if erroneous, *held* not prejudicial to defendant (Code Civ. Proc. § 1881, subds. 2, 4).

The ruling was not prejudicial because two experts testified in plaintiff's behalf and she twice submitted herself to examination by experts for defendant, both of whom testified minimizing plaintiff's claims as to injuries, and plaintiff never at any time refused to submit to physical examination on behalf of defendant, so that all that physician, who refused to testify on ground of privilege, could have testified to, if favorable to defendant's side, would have been cumulative to testimony already produced. Furthermore, defendant's counsel did not propound any questions to physician refusing to answer, answers to which would have disclosed plaintiff's physical condition, but it was apparently counsel's purpose to secure physician's written report, which was not only privileged but hearsay as well, and to then decide whether to proceed with further questions, with purpose of not putting defendants in position where they would be bound by answers of witness.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Peggy Webb and husband against the Francis J. Lewald Coal Company and others. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Superseding opinion of the District Court of Appeal in 297 P. 958.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

Lewis Mitchell and Hartley F. Peart, both of San Francisco (Russel Shearer, of San Francisco, of counsel), amici curiæ.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for defendants City and County of San Francisco.

Walter McGovern, of San Francisco, for respondents.

PRESTON, J.

Appeal by defendant Lewald Coal Company, its codefendant having been granted a new trial, from a judgment for plaintiffs, husband and wife, in an action to recover damages for personal injuries suffered by the wife, hereinafter referred to as respondent.

On April 2, 1928, a truck of appellant and a street car of defendant city and county collided in such a manner as to propel the truck over onto the sidewalk and cause it to smash into the front of a building occupied by respondent as a millinery store. Respondent viewed the entire occurrence from the mezzanine floor of the building and claimed to have suffered, as a result of the impact and shock attendant thereon, an immediate nervous collapse resulting in continued extreme nervousness, headaches, sleeplessness, loss of weight, and other disturbances, still to some extent unhealed at the time of trial. As above indicated, the jury returned a verdict against both defendants; a new trial was denied defendant coal company, and it alone appealed from said judgment.

[1] We shall dismiss briefly appellant's first contention, to wit: That under the testimony of respondent, she was put in fear solely for the safety of the driver of the truck and not for her own safety and physical injury caused by fear for the safety of another will not support a recovery for tort. Although respondent did testify that she "felt sure he (the driver) would be killed" and was frightened and finally collapsed, a reading of all the testimony given by her warrants the inference that she was also fearful for her own safety and that her physical condition was the proximate result of the collision and not of fear for the driver's safety.

The only other question raised justifying discussion appertains to the ruling of the trial court upon the calling of one Dr. Jos. J. Catton, a neurologist, as a witness for defendant city and county and also for appellant. It appears that respondent, in order to aid her counsel in the preparation for presentation of her cause, submitted herself to a physical examination by the said witness, Dr. Catton. He reduced his conclusions to writing and delivered them to respondent's counsel, retaining a copy himself. Presumably, at least, counsel for respondent used this report upon the trial of the action. For some reason, however, possibly financial, respondent

did not cause Dr. Catton to take the witness stand but secured the evidence of another expert physician by the name of Dr. R. W. Harvey. Upon counsel's examination of respondent, it was discovered that she had submitted to said physical examination by Dr. Catton, whereupon they sought him and were told that he would claim privilege and refuse to testify in the case; nevertheless, they subpoenaed him and, without attempting to compensate him, placed him upon the witness stand. He was asked about making the examination, which he admitted, and about the making of the report, which he also admitted, whereupon counsel called upon him to produce his written report for their inspection. This the witness refused of his own accord to do.

At this point there followed a lengthy dissertation by the witness upon the ethics of the situation, the question of privilege, and the important item of compensation. Respondent's counsel, however, remained silent and expressly stated to the court that they would take no part in this phase of the proceeding. No further questions were propounded to the witness, except that it was ascertained from him that he had not prescribed for nor treated respondent but had made only a single physical examination of her on October 19, 1929, for the use of her attorneys. Counsel for appellant propounded no questions which, if answered, would have thrown any legitimate light upon the doctor's opinion as to the physical condition of respondent. The court sustained the objection made by the witness himself to testifying upon the broad ground that he was entitled to satisfactory compensation from defendants and excused him from the stand with the statement that defendants could negotiate with him if possible, for compensation for his expert opinion and return him to the stand, to which statement of the court counsel replied that the witness had already stated that it was not compensation alone, but the question of ethics as well, that prevented him from answering the question. To this the court responded that they should attempt to overcome the state of mind of the witness with respect to the ethics of the situation. But, as above stated, the witness was not returned to the stand. With this as a basis, appellant asserts serious prejudicial error resulted. We think this position cannot be successfully maintained for several reasons.

[2] First, it is our conclusion that the testimony was privileged under the broad language of subdivision 4 of section 1881 of the Code of Civil Procedure, which reads in part: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient. * * *" The word "act," used in

this connection, seems to cover the very service performed by the witness here. He acted for respondent by making the examination and by making and delivering to her counsel a written report of his findings. He was her physician and she his patient only for this limited purpose. This seems clearly also to be a case where such information would be of value to the attorney in the proper presentation of her case.

But counsel insists that a controlling exception to the above rule is found in the further provision of said subdivision 4 of said section, which reads as follows: "Provided, further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify. * * *" We do not believe that the words "prescribed for or treated" of this proviso cover the identical scope of the words "to prescribe or act" found in that portion of said subdivision 4 above quoted. Webster defines the word "prescribe" as—to direct, designate or order the use of a remedy as, "the doctor prescribed quinine"; he defines the word "treat" as—to care for medically or surgically. A physician may properly act for a patient without having thereby prescribed for or treated him and the case before us seems fairly to be an illustration of this fact.

[3] Moreover, if it be conceded that the witness neither prescribed for, treated nor acted for respondent as a patient, the testimony sought by the particular question at least was privileged nevertheless under subdivision 2 of said section 1881, in that it appears that respondent caused herself to be examined and a report made for the purpose of aiding her counsel in the presentation of her cause. In other words, "communications between an attorney and the agent of his client are also entitled to the same protection from disclosure as those passing directly between the attorney and his client." 28 R. C. L., § 161, p. 571.

[4] But even if technical error in the ruling of the court were to be conceded, we would nevertheless hold that no prejudice to the rights of appellant is shown by the record. The injury complained of was to the nervous system of respondent. Two experts testified in her behalf, and she twice submitted herself to examination by experts for defendants, both of whom testified minimizing her claims as to injuries. She never at any time refused to submit to physical examination on behalf of appellant. All that Dr. Catton could have testified to, if favorable to appellant's side, would have been cumulative to the testimony

already produced by it. If Dr. Catton or any other expert secured by defendants had desired to further examine respondent, the privilege doubtless would have been freely accorded. Under this situation it cannot be presumed that because the witness asserted a privilege, his testimony, if given, would have been favorable to the side of appellant. *Thomas v. Gates*, 126 Cal. 1, 6, 58 P. 315; *Cook v. Los Angeles Ry. Corp.*, 169 Cal. 113-115, 145 P. 1013.

Furthermore, it may also be noted that counsel did not propound any questions to this expert, answers to which would have disclosed the physical condition of respondent. Apparently it was the purpose of counsel to secure said written report, which was not only privileged but hearsay as well, and if the report disclosed favorable matter, to then decide whether to proceed with further questions. In other words, defendants did not put themselves in a position where they would be bound by the answers made by the witness. We think that they should have been required to do this in order to get in a position to receive the benefit of error, if any was in fact committed.

The troublesome question as to when it is proper in litigation between private parties to compel an expert witness to give his professional opinion, without consent or compensation, though discussed by counsel and by amici curiæ, does not fairly arise on this record; hence it will not be here considered.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

214 Cal. 150

Ex parte BOST.

Cr. 3466.

Supreme Court of California.

Oct. 24, 1931.

1. Prisons ☞6.

Order for temporary removal of prisoner from penitentiary to secure testimony held not to deprive prison directors of right to fix term of imprisonment (Pen. Code, §§ 1168, 1333).

2. Criminal law ☞1192.

Trial court held without power to hear probation application after remittitur where no stay of execution was ordered pending appeal (Pen. Code, §§ 670, 1213, 1216, 1243, 1265, 1333).

Facts disclosed that prisoner had been delivered to warden of prison in pursu-

ance of Pen. Code, §§ 1213, 1216, that sentence had commenced to run under section 670, that prisoner was returned to court under section 1333 to secure his testimony, and that while in county jail prisoner presented application for probation, that on affirmance and remittitur of prisoner's appeal trial court was reinvested under section 1265 with jurisdiction, but that pending appeal no stay of execution had been ordered as permitted by section 1243.

3. Criminal law ☞993.

That prisoner was detained in county jail longer than necessary after testimony was required at pending criminal trial did not modify judgment.

PRESTON, J., dissenting.

In Bank.

Habeas corpus proceeding by William J. Bost to secure release of petitioner from custody of warden of San Quentin Prison on ground of illegal detention.

Writ discharged, and petitioner remanded.
See, also, 298 P. 85.

W. T. Kendrick, Jr., and Caryl Warner, both of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

SHENK, J.

This is a petition for a writ of habeas corpus.

The petitioner, William J. Bost, was charged in the county of Los Angeles with the crime of murder. He was convicted of manslaughter and sentenced to San Quentin for the term provided by law. Pursuant to the judgment a commitment was issued on October 18, 1929, and on November 9, 1929, the petitioner was delivered into the custody of the warden at San Quentin. The petitioner took an appeal from the judgment and from an order denying his motion for a new trial. On August 4, 1930, the judgment and order were affirmed. *People v. Bost*, 107 Cal. App. 550, 290 P. 513.

On the trial of the petitioner one Fred A. Parman appeared and testified as a witness for the defendant. Thereafter Parman was indicted in said county for the crime of perjury, involving his testimony on the trial of the petitioner. Pending the trial of Parman and on November 23, 1929, counsel for Parman filed an affidavit with the trial court, pursuant to section 1333 of the Penal Code, setting forth that Bost was a material witness for the defendant, Parman, in the pending action; that Bost was confined in the state prison at San Quentin, and application was made, based on said affidavit, for the removal

of Bost from San Quentin to Los Angeles for the purpose of giving his testimony on behalf of Parman. The Superior Court made the order requested, and directed the warden "to permit the temporary removal of said William J. Bost from said penitentiary by the said sheriff for the said purposes." On November 26, 1929, the warden delivered Bost to the sheriff of Los Angeles county, and took the latter's receipt for the prisoner, who was in due time lodged in the county jail of Los Angeles county to await the giving of his testimony.

On August 4, 1930, when the judgment against the petitioner was affirmed, and on September 12, 1930, when the remittitur was filed in the Superior Court, the petitioner was still in the county jail. Before the remittitur was filed, but on the same day, the petitioner filed a petition for a writ of habeas corpus in said Superior Court. The writ was made returnable on September 18, 1930, and on the hearing thereon the writ was discharged and the petitioner remanded. In making the order last aforesaid, the court stated that an application for probation of the petitioner would be entertained. Such an application was filed. On November 18, 1930, the order committing the petitioner to the state prison was, by the court, vacated and set aside, further proceedings on the judgment of conviction were suspended, the petitioner was placed on probation for five years, and was thereupon released pursuant to the order of probation.

Believing the order of probation and release to be void for want of jurisdiction in the Superior Court to make the same, the respondent warden apprehended the petitioner in the city of Los Angeles and returned him to the state prison at San Quentin to complete the service of his term of imprisonment under the judgment of conviction. The state board of prison directors has not yet fixed the petitioner's definite term of imprisonment, and until that is done the respondent warden is holding the petitioner for the maximum period of imprisonment for the offense of which the petitioner was convicted.

[1, 2] The foregoing statement of facts presents the question of the jurisdiction of the Superior Court to entertain and act upon an application for probation after a judgment of conviction in a felony case has become executed so far as that court is concerned. It must be noted that no stay of execution was ordered by the trial court as provided by section 1243 of the Penal Code or otherwise. Upon the pronouncement of the judgment, a certified copy thereof without further order of the court was required to be issued to the sheriff for execution of the judgment. Section 1213, Penal Code. It thereupon became the duty of the sheriff to deliver the defendant to the

warden of the state prison. Section 1216, Penal Code. This was done. When so delivered, the term of imprisonment, pursuant to the judgment, commenced to run. Section 670, Penal Code. Thereafter it continued to be the duty of the warden to hold the petitioner until his release by order of the state board of prison directors under the indeterminate sentence law (section 1168, Penal Code), or until otherwise legally discharged from his custody. When the petitioner was delivered to the warden by the sheriff, he was permanently removed from the jurisdiction of the Superior Court except in certain contingencies, one of which is specified in section 1333 of the Penal Code, wherein it is provided that the prisoner in the custody of the warden shall, upon a proper showing and an order of court, be temporarily released to the sheriff of the county wherein the testimony of the prisoner is required in a criminal action. The custody of the prisoner by the sheriff under this section must necessarily be temporary, qualified by and limited to the purposes of said section. The jurisdiction of the Superior Court over the prisoner would likewise be so limited. The order for such temporary removal could not have the effect of depriving the state board of prison directors of the right and power to fix the term of imprisonment of the petitioner under section 1168 of the Penal Code. The policy of the law and its wise administration would prevent such confusion of powers as would otherwise obtain.

Upon the affirmance of the petitioner's appeal and the filing of the remittitur, the Superior Court was reinvested with jurisdiction to make all orders necessary to carry the judgment into effect. Section 1265, Penal Code. Here there was no order to make, for the judgment had theretofore become executed so far as the Superior Court was concerned. If the certificate staying execution as provided for in section 1243 of the Penal Code had been issued by the trial court, the petitioner would have remained in the custody of the sheriff, the judgment would not have become executed, and the custody and control of the warden and the state board of prison directors would not have attached. Upon the affirmance of the appeal in such case, the Superior Court would order the commitment to issue or could entertain an application for probation as provided in section 1203 of the Penal Code, as said section was construed in *Lloyd v. Superior Court*, 208 Cal. 622, 283 P. 931.

The petitioner places great reliance on the *Lloyd* Case, but it is not a parallel case, and does not afford a precedent for the relief which he seeks. In that case the judgment had not become executed either in whole or in part. The trial court had granted a writ of probable cause which had the effect of staying the execution of the judgment under section 1243 of the Penal Code, and the defendant remained in the county jail pending his ap-

peal. In the opinion in that case the court was particular in pointing out that the trial court had the power, under the amended section 1203 of the Penal Code, to hear and determine applications for probation made prior to the execution of judgment. Such is not this case. Here no stay of execution was granted and no application for probation was made before execution of the judgment.

Cases from other states relied upon by the petitioner are not helpful. In none of them do we find that the power of the trial court to recall the defendant from state's prison, there held under a valid judgment, for the purpose of granting probation, has been sustained. It has been held in this state that the trial court is without the power, after a valid judgment is in the process of execution, to set it aside and pronounce a new judgment. *People v. Conley*, 27 Cal. App. 362, 150 P. 412, 413.

[3] Assuming, as the petitioner points out, that he was detained in the Los Angeles county jail longer than was necessary after his testimony was required at the pending criminal trial, such delay did not have the effect of modifying or changing the judgment under which he was delivered to the warden. The petitioner had the right to a speedy return to the custody of the warden, when his presence in Los Angeles county was no longer required. If he conceived that his rights in that respect were being infringed, an appropriate remedy would undoubtedly have been open to him to effect his return to the state prison.

We conclude that the Superior Court was without jurisdiction to make the order on which the petitioner relies.

The writ is discharged, and the petitioner is remanded.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.

PRESTON, J.

I dissent from the above holding. I would not object to such a holding if, in order to make it, we had receded from the doctrine of *Lloyd v. Superior Court*, 208 Cal. 622, 283 P. 931, but, if this case stands, Bost is entitled to his liberty also. The only distinction between the cases is that in the *Lloyd* Case a certificate of probable cause under section 1243 of the Penal Code was issued to him and he remained in the county jail until his conviction was affirmed. In the present case the defendant accepted the time of appeal as a part of his sentence if the appeal were denied, and went into the custody of the warden instead of remaining with the sheriff. At any time prior to the coming down of the remittitur the Superior Court could have granted this certificate and withdrawn the prisoner from the custody of the warden. Section 1245, Penal Code. This was doubtless deemed un-

necessary, as prior to the time of affirmance the prisoner had already been returned to the custody of the sheriff. There is therefore but a technical difference between these cases, with the odds, I think, in favor of Bost, who accepted, and did not merely bemoan, his fate.

214 Cal. 188

WILSON v. J. E. FRENCH CO.
S. F. 13493.

Supreme Court of California.

Oct. 29, 1931.

Usury ⚡32.

Carrying charge of \$186.51 by seller of automobile for \$1,532.46 on conditional sales contract *held* not usury entitling buyer to rescission of contract.

Such charge was not usury in view that transaction was not a loan, that seller may sell at certain price for cash, and much higher price for credit, and fact that agreement for purchase price instead of specifying whole sum then to be paid, names particular sum as principal, and declares that it shall draw interest, at a rate which, were the transaction borrowing and lending, would be usurious, is immaterial.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by J. M. Wilson against the J. E. French Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Arthur H. Barendt, of San Francisco, for appellant.

G. J. Irwin, of San Francisco, for respondent.

PRESTON, J.

Plaintiff purchased from defendant on June 21, 1927, an automobile known as a Dodge cabriolet, under a conditional sales contract, paying thereon \$309 in cash and agreeing to pay the sum of \$67.97 on the 21st day of each and every month thereafter for a period of eighteen months. In arriving at the gross sum to be charged for said car, there was included the ordinary cash price of \$1,195; extra tire, \$25; insurance of various types, \$125.95; and a carrying charge, sometimes called interest charge, of \$186.51—making a total of \$1,532.46. Plaintiff paid the July,

August, and September installments and on or about September 21st took the car and left it at defendant's place of business, and thereafter she brought this suit, claiming the right to rescind the contract and praying for return to her of said cash items paid to defendant.

Plaintiff based her claims, first, upon the ground that she was induced to enter into the contract by fraudulent misrepresentations and, second, because of presence in the obligation of usury by reason of the fact that said item of \$186.51 above mentioned was alleged to be approximately 24 per cent. interest on the legitimate principal chargeable to plaintiff.

The answer put the allegations of the complaint at issue, and the cause came on for trial in the court below, resulting in findings by that court that all the allegations of the complaint essential to a recovery were untrue. Judgment accordingly went for defendant and plaintiff appealed.

We have examined the entire record. Ample evidence supports the finding that fraud was not practiced in any form upon appellant. This reduces her appeal to the sole question of whether or not said item of \$186.51 above referred to was in fact usury and for that reason entitles her to a rescission of the contract. That such an item, whatever it may be called, is not usury in a bona fide conditional sales contract is now well settled. As early as *Verbeck v. Clymer*, 202 Cal. 557, 563, 261 P. 1017, 1019, this court enforced the following doctrine announced in 27 R. C. L. pp. 213-215: "On principle and authority, the owner of property, whether real or personal, has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices, unless the buying and selling was a mere pretense; and it has been held that it is not material that the agreement for the purchase price in the future, instead of specifying the whole sum then to be paid, names a particular sum as principal, and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly be usurious. * * *" This holding has been followed in *Berger v. Lodge*, 90 Cal. App. 19, 265 P. 515, and *Pacific Finance Corp. v. Lauman*, 95 Cal. App. 541, 273 P. 48, and perhaps in other cases.

The essence of the situation is that the transaction is not a loan. *Liebelt v. Carney* (Cal. Sup.) 2 P.(2d) 144, is an illustration of where a conditional sales contract may be used to camouflage a loan, but we have no such situation here. The cash price and the term sale price may logically differ. In an

automobile transaction, where the article sold is depreciating, it is perfectly legitimate, if not necessary, that a rather wide margin exist between the cash price and the term price, especially where the down payment is small and the possession of the car is given to the purchaser. The action of this appellant in making a few small payments, using the car four months and then abandoning it to the seller, confirms the wisdom of this difference.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.

214 Cal. 142

PEOPLE v. FEWKES.

Cr. 3458.

Supreme Court of California.

Oct. 24, 1931.

1. Criminal law ☞573.

Where trial was ordered off calendar on accused's stipulation and waiver of delay, and accused requested subsequent delays, trial being further delayed by calendar congestion, accused could not complain of being denied speedy trial.

2. Criminal law ☞1166(1).

Failure to give accused notice of district attorney's motion to reset trial as required by stipulation *held* not prejudicial, where accused did not object to setting of cause for still later date.

3. Criminal law ☞742(1).

Credibility of witnesses is for jury.

4. Embezzlement ☞44(1).

Evidence sustained conviction for grand theft in embezzling money received as agent to purchase stock in corporation which was to take over accused's business, despite accused's contention that money was paid to purchase outright interest in accused's business (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

5. Embezzlement ☞44(2).

Although agent accused of embezzlement originally received principal's money without fraudulent design, subsequent appropriation justified inference of fraudulent intent (Pen. Code, § 21, and § 484, as amended by St. 1927, p. 1046, § 1).

6. Criminal law ☞568.

Intent is fact, provable by acts, conduct, and circumstances connected with offense (Pen. Code, § 21).

7. Embezzlement ☞11(1).

That accused received money allegedly embezzled from owner through intermediary *held* immaterial as regards guilt of embezzlement (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1).

8. Indictment and information ☞59.

Information charging offense as "grand theft," and reciting particulars thereof, *held* sufficient, although not specifying kind of grand theft (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1; § 490a, as added by St. 1927, p. 1047, § 7; § 950, subd. 2; § 952, as amended by St. 1927, p. 1043).

9. Indictment and information ☞132(2).

In grand theft prosecution, district attorney need not elect in advance of proof theory of specific kind of theft (Pen. Code, § 484, as amended by St. 1927, p. 1046, § 1; § 490a, as added by St. 1927, p. 1047, § 7; § 952, as amended by St. 1927, p. 1043).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John B. Fewkes was convicted of grand theft, and he appeals.

Affirmed.

Superseding opinion in 298 P. 840.

See, also, 3 P.(2d) 590.

William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., J. Charles Jones and Frank Richards, Deputy Attys. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

SHENK, J.

By information filed in Los Angeles county the defendant was charged in nine counts. The first count alleged a violation of the Corporate Securities Act (St. 1917, p. 673, as amended). Counts 2 to 9, inclusive, alleged grand theft in that the defendant, at various times alleged in these several counts, unlawfully took money belonging to the complaining witness, Mrs. Thomas E. Merrill. The total alleged in the several counts was \$6,500, and the times at which the same were taken were from April 26, 1927, to July 5, 1927. The defendant filed a general and special demurrer to each count. On April 25, 1929, the court sustained the demurrer to the first count without leave to amend and overruled the demurrers to the remaining

counts. The district attorney forthwith gave oral notice of appeal from the order sustaining the demurrer to the first count, and the case was set to be tried on May 10, 1929. On May 9, 1929, the district attorney and the defendant with his counsel appeared before the court and stipulated that the trial as to the counts charging grand theft should "go off calendar to be reset by a ten days' notice by either party after the determination of the appeal now pending on count 1. The defendant waives any delay of the trial that may thereby occur up to the determination of said appeal." Pursuant to said stipulation, counts 2 to 9, inclusive, were ordered off calendar. On April 21, 1930, the district attorney and counsel for the defendant signed a stipulation that the appeal taken to the District Court of Appeal involving count 1 might be dismissed with remittitur forthwith. By an order based on said stipulation said appeal was dismissed on April 22, 1930, and on the following day the order of dismissal of the appeal was filed in the Superior Court. On motion of the district attorney, made on May 1, 1930, the trial as to the remaining counts was set for May 8, and was continued to May 9 and 16 successively. No notice of the motion to reset the cause for trial appears to have been served on the defendant's counsel. However, on May 16, 1930, the district attorney and the defendant with his counsel appeared in court, and the trial was set without objection for July 1, 1930. At the request of counsel for the defendant, orders of continuance were made to July 11 and August 4. Because of the congestion of the court's calendar, a continuance was, without objection, made to September 23. On September 25, 1930, the trial was begun without any objection on the part of the defendant as to the delay in bringing him to trial. The jury returned a verdict of guilty on each count. Motion for new trial was made and denied. An application for probation was made and denied, and judgment was pronounced on December 8, 1930, the sentences on the several counts to run concurrently. The district attorney filed a supplemental information pursuant to section 969a of the Penal Code charging the defendant with the prior conviction in 1910 of the offense of embezzlement of national bank funds, a felony, in the District Court of the United States, District of New Mexico, and the service by the defendant of a term of imprisonment therefor. On arraignment the defendant denied the prior conviction, and entered also a plea of once in jeopardy. Trial by jury on this charge was waived, and the trial thereon was set for February 27, 1931. The record before us does not disclose whether such trial has been had, or other disposition of the charge. This appeal is from the judgment of conviction and from the order denying the motion for a new trial.

[1, 2] Numerous grounds for reversal are put forth. It is insisted that the constitutional rights of the defendant were grossly infringed at the outset in two particulars, first, that he was not accorded the speedy trial which the Constitution guarantees; and, secondly, that proceedings were taken in court in his absence to his prejudice. There is no merit in either point. In the first place, the trial as to the grand theft counts was ordered off calendar on the defendant's stipulation and waiver of delay incidental to the order. The appeal on the first count was dismissed on his stipulation on April 22. That dismissal was a determination of the appeal in the defendant's favor, and must be held to be such a determination as was contemplated by the stipulation of May 9, 1929. Eight days after the dismissal of the appeal, the district attorney moved the court to reset the cause for trial, and the trial was set for May 8, 1930. It may be assumed that, in compliance with the stipulation of May 9, 1929, the defendant should have had a ten-day notice of the district attorney's motion to reset, but this omission worked no possible prejudice to the defendant, for on May 16 he appeared with his counsel, and the cause was set for July 1 without any objection on his part. The subsequent delay of almost three months, with the exception of that occasioned by congestion in the court's calendar, was wholly at the instance and request of the defendant, and on account of which he is in no position to complain.

[3-6] The next contention is that the evidence is insufficient to support the verdict. The defendant was an accountant doing business under the name of J. B. Fewkes & Co. He was engaged in experting the books of Frank R. Strong, a real estate operator, whose books the complaining witness, Mrs. Merrill, had kept. The defendant made a proposal to Mrs. Merrill to become interested in his business, which consisted in that of an accountant for compensation and the good will incident thereto. He wanted \$6,500. It was agreed that a corporation should be formed and that Mrs. Merrill should receive for the \$6,500 sixty-five shares of preferred stock and twenty-five shares of common stock of the proposed corporation. Mrs. Merrill paid, and the defendant received, the \$6,500 in partial payments in the amounts and at the times set forth in the several eight counts of the information. Articles of incorporation of "Accounting Service Corporation" were filed on May 25, 1927, in which neither the defendant nor Mrs. Merrill were named as the original directors, but in connection with which the defendant was the dominating and controlling influence. Thereafter an application was made to the corporation commissioner for a permit to issue the entire capital stock of the corporation to the defendant, Mrs. Merrill, and one Davidson, "as they may agree among

themselves." The application recited that J. B. Fewkes was and had been for some time past engaged in a general accounting business, and stated that the purpose of the organization of the corporation was to take over the business of the defendant, and that the same should thereafter be conducted through the medium of said corporation; that the corporation desired to issue its preferred and common stock to the defendant, Mrs. Merrill, and Davidson; that the consideration to the corporation for the stock would "be the assignment to the corporation of the accounting business now owned by and being conducted as aforesaid by the said J. B. Fewkes"; that immediately upon the granting of the permit the defendant, Mrs. Merrill, and Davidson would be elected to the board of directors in the place and stead of two of the directors named in the articles of incorporation, with Davidson continuing as the third person named in the original board. The application for the permit was denied.

It was and is the theory of the prosecution that the money was paid and received by the defendant as the agent of Mrs. Merrill for the purposes of paying the same to the corporation upon the issue to her of the specified amount of its capital stock; that the stock has not been issued; that the money has not been returned to Mrs. Merrill; that the defendant appropriated the same to his own use; and that thereby the crime of grand theft was committed in the form of embezzlement of funds intrusted to the defendant's care. See section 484, Pen. Code.

There is and can be no dispute of the facts that the complaining witness paid the money, that the defendant received the same, and that he appropriated it to his own personal use. The only dispute on this branch of the case relates to the purpose for which the money was paid and received by the defendant. It is the contention of the defendant that Mrs. Merrill paid the money for the purpose of purchasing outright an interest in the defendant's general accounting business. The defendant so testified, but the evidence to the contrary, both oral and documentary, supports the verdict on the theory of the prosecution. The defendant makes a violent assault on the credibility of the complaining witness and of her corroborating witness, Dr. Gardner. But his efforts in that regard are unavailing, in view of the fact that the jury was the judge of the credibility of the witnesses, and in view of the substantial character of the evidence in support of the verdict. We find nothing inherently improbable in their testimony.

It is insisted that the defendant appropriated the money openly and avowedly and under a claim of title in good faith; that there was no evidence of fraudulent intent and no evidence that he received the money in a fid-

uciary capacity. The evidence is full and complete that the money was placed when received in his personal bank account, and checked out from time to time for his personal use soon after the same was received. The complaining witness had no access to or knowledge of the status of this bank account. There was evidence which the jury was entitled to believe that the defendant told the prosecuting witness that her money would be turned over to the corporation, and that she would receive the shares of stock therefor. It is a reasonable, if not necessary, deduction from the evidence that the defendant received the money as the agent and trustee of the complaining witness to be used for the particular purpose intended. Assuming that he originally received it for that purpose without fraudulent design, the fact that he appropriated it to his own use after he received it and without the knowledge and consent of the complaining witness would be a circumstance upon which the fraudulent intent could be inferred. Intent is a question of fact which may be proved, like any other fact, by acts, conduct, and circumstances connected with the offense. Section 21, Pen. Code; *People v. Richardson*, 161 Cal. 552, 559, 120 P. 20; 8 Cal. Jur. p. 168, and cases cited. It cannot be said on this record that the jury was not justified in drawing the inference of fraudulent intent.

[7] The point is made that the money was not delivered directly to the defendant, and the conclusion is urged that he was therefore not intrusted with the funds. It appears to be the fact that the checks drawn by the complaining witness were made payable to Davidson, an employee of the defendant. But the checks were so drawn at the instance of the defendant and with the intention that the defendant should receive the money without delay. Davidson deposited the checks in his own bank account, and made checks payable to the defendant for the amounts at the various times when the checks were received from Mrs. Merrill. Furthermore, the defendant admitted the receipt of the various sums mentioned in the information, that the money was received from Mrs. Merrill, and that he devoted the same to his own personal use. In the face of these admissions, the fact that the money was received through the channel of Davidson with the knowledge and consent of the principal parties affected became, we think, an immaterial circumstance. However, if the evidence shows that the defendant received the money from the owner, or from a third party for the owner, it is sufficient. *People v. Walker*, 144 Cal. 1, 77 P. 705. There is no denial that the defendant received the money from Mrs. Merrill. The only question left for the jury to determine was the purpose for which it was obtained and the capacity in which the defendant was acting when he received it. This question, as has

been stated, was resolved against the defendant on substantial, though conflicting evidence.

[8, 9] The information charged the offense as "Grand Theft, a felony, committed as follows" (reciting the particulars), under the authority of sections 484, 490a, and 952 of the Penal Code as amended and added in 1927 (St. 1927, pp. 1043, 1046, 1047). This was sufficient. See *People v. Myers*, 206 Cal. 480, 275 P. 219; *People v. Plum*, 88 Cal. App. 575, 263 P. 862, 265 P. 322; *People v. Giron*, 94 Cal. App. 53, 270 P. 462. It is not necessary that the information state the kind of grand theft with which the defendant is charged in order to comply with subdivision 2 of section 950 of the Penal Code. *People v. Manchell*, 91 Cal. App. 788, 267 P. 718.

Under the new procedure, it is obviously unnecessary and improper to compel the district attorney, in advance of the proof, to elect upon what theory the prosecution is to proceed, whether larceny, false pretense, trick, and device, embezzlement, etc. These distinctions in the charge and proof obtained under the old practice, but are done away with in the new. They were eliminated, not only for the purpose of simplifying procedure, but also to relieve the courts of the necessity of drawing fine distinctions as to whether the particular crime charged had been proved, and the prosecution of charging in advance, at its peril, an offense which the evidence, because of such fine distinctions, might show not to exist, although the guilt of the defendant be manifest. *People v. Myers*, supra.

The evidence in this case established grand theft in the form of embezzlement. The court instructed the jury fully and completely on all phases of the case. There was no confusion of the issues, and the charge was fair to the defendant.

Other points are made, but they are insubstantial, and it is not necessary to comment thereon.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

214 Cal. 175

PEOPLE v. GATES.

Cr. 3497.

Supreme Court of California.

Oct. 27, 1931.

1. Criminal law ☞1167(4).

Withdrawing amendment to information in forgery, alleging prior conviction of felony and enlarging charge, *held* not prejudicial er-

ror, where original information did not lose efficacy (Pen. Code § 470).

2. Criminal law ☞772(2).

Referring to uttering forged instrument in defining forgery *held* no error, evidence of guilt being overwhelming and showing defendant uttered forged check (Pen. Code § 470).

3. Criminal law ☞964.

Withdrawal of court's tentative statement granting new trial to defendant, to permit argument, and later entering order denying motion, *held* not error.

Proceeding was not error, since statement made by court never became a finished order in case, and was at most but a preliminary impression of court as to the merits of motion.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

L. L. Gates was convicted for the crime of forgery, and he appeals.

Affirmed.

Superseding opinion of District Court of Appeal, 3 P.(2d) 315.

Tom Okawara and Clyde E. Cate, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine and John D. Richer, Deputies Atty. Gen., and Glenn M. De Vore, Dist. Atty., and C. T. Walton, Asst. Dist. Atty., both of Fresno, for the People.

PRESTON, J.

[1] Appeal from judgment of conviction by jury, on undisputed evidence, of the crime of forgery, charged in the information as follows: That "he falsely altered and forged the name of Sam Snyder to a check * * * in the sum of \$25.00 with intent to defraud. * * *" The information was amended pursuant to section 969a of the Penal Code to allege prior conviction of a felony and to enlarge the charge to cover the uttering of a forged instrument. This amendment was later withdrawn and the original information remained. The defendant suffered no prejudicial error through such action and the original information did not lose its efficacy.

[2] The court in defining the offense of forgery referred to the crime of uttering as genuine a forged instrument. The two offenses are defined in correlative clauses of section 470 of the Penal Code. No prejudicial error to defendant resulted from the action of the court in this connection, for the evidence of guilt was overwhelming and it abundantly showed also that defendant did

in fact utter the forged check and obtained the proceeds thereof. *People v. Dole*, 122 Cal. 486, 495, 55 P. 581, 68 Am. St. Rep. 50.

[3] There was likewise no error in the action of the court respecting defendant's motion for new trial. The evidence clearly shows that upon the argument of this motion on May 5, 1931, the court merely, as a tentative conclusion, at that time stated that the motion of defendant for a new trial was granted, but as part of the same proceeding, upon interruption by the assistant district attorney, the court immediately withdrew his statement to allow the question to be argued and briefed and postponed the matter until May 11th, and again until May 12, on which latter day an order was regularly entered denying the motion. The statement made by the court never became a finished order in the case and was at most but a preliminary impression of the court as to the merits of the motion.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

214 Cal. 135

MEYER v. TOBIN et al.

S. F. 13487.

Supreme Court of California.

Oct. 24, 1931.

1. Negligence ⇨121(3).

Where repairman sent to repair concrete mixer was injured by "skip" which fell from mixer while mixer was being tested, under owner's employees' control, *res ipsa loquitur* doctrine applied.

"Skip" was a container in which the materials to be mixed were placed and raised to the body of the mixer and was usually secured by a brake, or a "dog" or pawl on a ratchet wheel, and its fall was an occurrence which would not ordinarily take place.

[Ed. Note.—For other definitions of "Skip," see Words and Phrases.]

2. Negligence ⇨121(3).

Evidence not negating negligence as to injury received by repairman when concrete mixer "skip" fell did not rebut *prima facie* case established under *res ipsa loquitur* doctrine.

3. Trial ⇨140(1).

Credibility of witnesses is for jury.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Herman R. Meyer against John T. Tobin and others, including James T. Tobin. Judgment for plaintiff, and the last named defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Joseph T. O'Connor and Leo R. Friedman, both of San Francisco, for respondent.

LANGDON, J.

This is an action for personal injuries. Defendant owned a concrete mixer which was being operated by his employees in certain construction work. The engine broke down, and plaintiff was sent by his employer, O. F. Werner, to make necessary repairs. Plaintiff worked on the engine for several hours, and, when his repairs were completed, defendant's employees put the mixer in motion to test it, and plaintiff followed closely behind to see how the engine was working. Part of the machinery consists of a container called a "skip," in which the materials to be mixed are placed and raised to the body of the mixer. The skip was raised and lowered several times during the course of the repairs, but was kept in a raised position while being moved. In the course of the progress of the mixer along the street the skip fell suddenly, striking and injuring plaintiff. He brought this action, alleging negligence in general terms, relying upon the doctrine of *res ipsa loquitur*. Defendant's motion for a nonsuit was denied, and the jury brought in a verdict in favor of plaintiff, from which order and judgment defendant appeals.

[1] The record shows that plaintiff acted with due care and was justified in following the machine to examine the effect of his repair work.

The only important question is whether the doctrine of *res ipsa loquitur* is applicable under the facts. We think it is. Although plaintiff had asked to have the machine started, it was under the control of the employees of defendant, and was operated by them. The skip was usually secured by a brake, or a "dog" or pawl on a ratchet wheel, and its fall was an occurrence which would not ordinarily take place. Recent decisions of this court have restated the principles and reviewed the authorities on this subject, and they fully support our conclusion herein. See *Michener v. Hutton*, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; *Brumhall v. Sutherland* (Cal. App.) 293 P. 672.

[2, 3] It is contended, however, that, even if the doctrine applies, the prima facie case established by it has been met. We cannot agree that this is so. An expert witness testified that there were four ways in which a skip might fail: (1) A worn or defective cable might part under strain; (2) the "dog" might fail properly to engage the teeth of the ratchet wheel; (3) the operator might release the brake; or (4) the brake band might part. Defendant's employee testified that an examination of the machine after the accident failed to disclose any defective parts, and that he did not release the brake. The cause of the accident is still unknown. From this evidence defendant argues that his burden of going forward has been met. It is perfectly plain, however, that he has not met the burden until evidence is presented which has some tendency to show that the accident occurred without the negligence of his employees. It is quite possible to infer from the evidence in this case that the cause of the accident was such negligence. For example, the "dog" might not have been properly engaged in the teeth of the ratchet wheel. No examination of it was made before the machine was started, and the foreman testified that he did not know whether it was in place or not. Moreover, the credibility of defendant's employees as witnesses was a matter to be determined by the jury. See *Michener v. Hutton*, supra.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.

Action by Muriel Plum against the Indian Valley Bank. From an adverse judgment, plaintiff appeals.

Affirmed.

John V. Filippini, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, and M. C. Kerr, of Quincy, for respondent.

PLUMMER, J.

The complaint in this action alleges that on certain dates mentioned therein, the plaintiff deposited certain sums of money with the defendant, a banking corporation, aggregating in all the sum of \$1,060.10, and that there was due and unpaid from the defendant to the plaintiff, said sum, for which judgment was asked. The answer of the defendant denied the allegations of the complaint.

The court found that the allegations of the plaintiff's complaint were untrue, and further found as follows: "The court finds from the evidence that the sums of money referred to and specified in paragraph II of plaintiff's complaint (being the items to which we have referred), were paid to defendant pursuant to the terms of a certain contract between C. D. Plum and Forgay Lumber Company, as to a portion thereof, and pursuant to the terms of a certain temporary injunction issued by the above-entitled court in an action heretofore and now pending in the superior court of the state of California, in and for the county of Plumas, whereby Forgay Lumber Company is plaintiff and C. D. Plum is defendant. That the sums of money deposited pursuant to the terms of said temporary injunction were and are held by the defendant herein as a stakeholder under and pursuant to the terms of the temporary injunction." Judgment went for the defendant for costs. From this judgment the plaintiff appeals.

The testimony introduced on the part of the appellant is to the effect that there was deposited by the plaintiff with the defendant the sum of \$819.79, under and by virtue of the conditions above referred to. The testimony on the part of the defendant is to the effect that there is still in the hands of the defendant the sum of \$462.89, held under and in accordance with the terms of a temporary injunction order to which we will hereafter refer, and a certain letter written by the plaintiff.

The record shows that C. D. Plum, the husband of the plaintiff, had a contract with the Forgay Lumber Company for the felling of trees belonging to said company, converting the same into lumber, disposing of the same, and paying the Forgay Lumber Company a certain portion of the proceeds thereof. The record further shows that during all the

118 Cal.App. 13

PLUM v. INDIAN VALLEY BANK.
Civ. 4394.

District Court of Appeal, Third District, California.

Oct. 29, 1931.

1. Evidence 43(3).

Courts do not take judicial notice of proceedings in other cases.

2. Estoppel 91(1).

Plaintiff seeking recovery of deposit made under terms of temporary injunction in another case held not entitled to question its validity on appeal, where failing to show it was not still in full effect.

Appeal from Superior Court, Plumas County; J. C. Moncur, Judge.

times mentioned and covered by these proceedings, the proceeds received from the sale of the lumber just referred to were deposited in the bank belonging to the defendant, by the plaintiff in this action; that C. D. Plum, prior to these transactions, had opened an account with the defendant bank, in the name of Muriel Plum. On or about the 8th day of November, 1927, the plaintiff wrote to the defendant bank as follows:

"In accordance with instructions and restraining order granted the Forgay Lumber Company, on Nov. 7, 1927, by the Superior Court of Plumas County, State of California, please be advised that all moneys received to be credited to the account of the Forgay Lumber Company from the sale of lumber, are to be impounded, until further advised by said court, or until such time as the suit in action has become satisfied and settled.

"Yours truly, Muriel Plum.
B"

"MP/B

During the trial of this action there was placed in evidence on the part of the defendant the following temporary injunction issued in the case of the Forgay Lumber Company against C. D. Plum, from which we quote the following: "We therefore, in consideration thereof, and of the particular matters in said affidavit set forth, it is strictly commanded that you, the said C. D. Plum, and C. D. Plum, doing business under the firm name and style of Round Valley Lumber Company, and each and every of you, and each of your agents, attorneys, employees, servants and assigns, be, until further order of the above entitled court, and during the pendency of the above entitled action, enjoined and restrained from in any manner shipping, selling or disposing of any of the lumber manufactured on the Forgay Lumber Company premises, until there has been deposited with the Indian Valley Bank the sum of \$2,782.15, to the credit of the said Forgay Lumber Company, provided, however, that such lumber may be sold and shipped if all of the proceeds of such sales are deposited with the said Indian Valley Bank, at Greenville, California, to be held by said bank to the credit of Forgay Lumber Company until the final determination of said action, subject to the retaining the actual cost of sale of said lumber but not to exceed the sum of \$3.00 per thousand feet, board measure." At the conclusion of the trial in the instant case, the court announced that its findings, conclusions of law, and judgment would have to be based upon the record before it, and our decision will likewise have to be based upon the record presented to us upon this appeal.

Without having introduced any of the files, records, proceedings, or judgment in the case of *Forgay Lumber Co. v. C. D. Plum*, the appellant's brief sets out that judgment finally went for the plaintiff in that action, followed by an appeal to this court, and that the

judgment in said action was reversed and the cause remanded for a new trial. Upon this basis it is argued that the temporary injunction to which we have referred became of no further force or effect. Whether the contention of the appellant is correct as a matter of law is wholly immaterial under the case made out in the trial below, and as presented to us. As we have stated, there is nothing in the transcript in this case showing any further proceedings in the case of *Forgay Lumber Co. v. C. D. Plum*, other than the issuance of the temporary injunction. This temporary injunction applied to the plaintiff in this case just as to others, having to do with the lumber manufactured on the Forgay Lumber Company's premises. The plaintiff in this action was handling the money, or, rather, the moneys received from the proceeds of the manufactured lumber taken from the premises belonging to the Forgay Lumber Company were handled in the name of the plaintiff in this action, and as shown by the letter which we have set forth herein, the plaintiff possessed full knowledge.

[1] In basing her argument upon this appeal, that the temporary injunction was superseded by the proceedings recited in her brief, the appellant has overlooked the fact that there is nothing in the record upon which to base such an argument, and that courts do not take judicial notice of proceedings in other cases.

In *Brown v. Brown*, 83 Cal. App. 74, quoting from page 85, 256 P. 595, 600, this court said: "Upon the hearing of this cause on appeal, the appellant produced and asked to have admitted as a part of the record, under a suggestion of a diminution thereof, copies of pleadings in a case numbered 6895, entitled *Sarah M. Brown, Plaintiff, v. George H. Brown, Defendant*, filed and dismissed in the office of the county clerk of Placer county, on the theory that the files in that proceeding were taken judicial notice of by the trial court in this action. In this, however, appellant is in error, as courts do not take judicial notice of the papers and files of other actions. As stated in *Sewell v. Price*, 164 Cal. 265, 128 P. 407, while courts take judicial notice of their own records, the rule is limited to proceedings in the same case. It is well settled that courts cannot in one case take judicial notice of other records in another and different case. 16 Cyc. 918; *People v. De La Guerra*, 24 Cal. 73; *Lake Merced Water Co. v. Cowles*, 31 Cal. 214; *Ralphs v. Hensler*, 97 Cal. 297, 32 P. 243. In order to have brought the proceedings in a former case to the attention of the trial court in this case, it would have been necessary to introduce in evidence the files and pleadings sought to be admitted here as a part of the record. This not having been done, such papers constitute no part of the record in this, a distinct and separate action."

[2] Having failed to introduce any evidence in the trial court showing that the temporary injunction introduced in evidence by the respondent is not still in full force and effect, appellant is not in any position to question its validity and binding force upon this appeal. The record showing that the moneys involved in this action were deposited in pursuance of the temporary injunction referred to herein, of which the plaintiff had full knowledge, and which deposits of money were made either by her or in her behalf, it follows that the judgment of the trial court must be affirmed. And it is so ordered.

We concur: PRESTON, P. J.; THOMPSON, J.

117 Cal.App. 701

WESTERGARD v. BAKER et al.*
Civ. 6980.

District Court of Appeal, Second District, Division 2, California.

Oct. 28, 1931.

Rehearing Denied Nov. 25, 1931.

1. Brokers ⇨86(1).

In broker's action for commissions in negotiating lease, finding that lease was executed after agreement for commissions held supported by evidence.

2. Brokers ⇨84(1).

Owners have burden of establishing defense that lease negotiated by broker was executed before commission agreement.

3. Brokers ⇨75.

Agreement for commissions construed to mean that first payment became due when lease was delivered, notwithstanding condition respecting escrow; lease being delivered without escrow.

Agreement drawn by one of lessors recited that the broker "is negotiating a tenant" and stipulated for agreed commission "if deal is consummated," to be paid "when said transaction is completed and papers come out of escrow." The lease was executed and delivered without a preceding escrow.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Dagmar Westergard, as executrix of the estate of P. Westergard, against Frank G. Baker and another. From an adverse judgment, H. C. Tucker appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Armand H. Blum and Gail Selig, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

This is an appeal from a judgment for plaintiff in an action for a broker's commission under a contract reading as follows:

"Los Angeles, California, Sept. 7, 1926.

"Commission Agreement.

"Whereas P. Westergard, Realty Broker is negotiating a tenant for a Ninety-nine year Lease on Lots 8-9 and 10, Spence Tract, Wicks addition, owned by H. C. Tucker, F. G. Baker and G. W. Baker, it is hereby agreed that Mr. Westergard will accept \$1,800 as Commission, if deal is consummated, Commission to be paid as follows: \$450.00 per Month starting when said transaction is completed and Papers come out of escrow.

"[Signed] Frank G. Baker.

"[Signed] H. C. Tucker.

"Agreed to: P. Westergard."

The defendants and one G. W. Baker were the owners of a certain parcel of real property in the city of Los Angeles. Whittier Boulevard Pools, Inc., were desirous of securing a location for the construction of a swimming pool, and consulted P. Westergard, the plaintiff, a real estate broker, who in turn got in touch with defendants, and a lease was entered into between them and Whittier Boulevard Pools, Inc. The trial court found that the lease was executed "on or about" September 8, 1926. The lessee paid six months' rent in advance and started excavating, but, before its completion, abandoned the project. Subsequent to the taking of this appeal the executrix of the plaintiff was substituted as plaintiff and respondent herein.

Appellant's basic contention is that the finding of the court that the lease was executed after the commission agreement is not supported by the evidence. Both appellant and respondent assert that the date of the execution of the lease and whether it was before or after the execution of the commission agreement are of vital importance and largely determinative as to the rule of law applicable to the case. Appellant's counsel asserts that there is "not one iota" of evidence to show that the lease was signed subsequent to the agreement, while respondent declares that not only did the proof show that the lease was executed after the agreement, but also that the case was tried upon that theory. The answer to the complaint refers to the agreement as one for a commission "to be paid upon the consummation of a deal for the leasing of said lots * * * upon the condition that the plaintiff would obtain a tenant who would sign a lease for said prem-

ises," a concession that the lease was signed after the commission agreement, and at the outset of the trial we find counsel for plaintiff and respondent offering to stipulate that the lease was executed on the same date as the agreement, an offer which, however, was not accepted by appellant. Though the lease was in court and in the hands of the trial judge, who directly inquired whether it was the desire of counsel to put it in evidence, this important document was neither received nor offered as an exhibit. There is in the record testimony that the lease was executed "on or about" September 7, 1926, and there is testimony that it was executed "on or about" September 8, 1926; there is testimony from which the inference may be drawn that the agreement came first, and other testimony that the lease was the first of the documents to be executed; but we have not been referred to, nor have we found any testimony as to, the exact date of the execution of the lease.

[1, 2] The finding of the trial court that the lease was executed on September 8, 1926, and after the execution of the commission agreement, is supported by the evidence. It may be added that, under the theory of defense here advanced by appellant, the burden of establishing that the lease was executed before the commission agreement was upon appellant.

The other points raised by appellant depend upon his theory that the evidence showed that the execution of the lease preceded the commission agreement, and that, under the terms of the latter, no commission would become due and payable until the transactions between the lessee and lessors, involving the financing of proposed construction, were completed. With the supported findings of fact of the trial court against this theory of the facts, the rules of law applicable to such a theory are not applicable here.

[3] The commission agreement was drafted by appellant's codefendant Baker, who appears to have acted as the spokesman for defendants, and we may therefore assume that it expresses the intent and knowledge of appellant at the time of its execution. It recites that P. Westergard, a realty broker, "is negotiating a tenant" for the lease of the lots in question. It stipulates for an agreed commission "if deal is consummated," to be paid "when said transaction is completed and papers come out of escrow." The word "deal" and "*said* (italics ours) transaction" can refer only to the only "deal" and "transaction" mentioned in the agreement, to wit, the "negotiating" of a tenant for a lease of the lots. Excluding the last five words in the body of the agreement, it clearly provides that the first payment of the commission became due when the lease was negotiated and

executed. This leaves for consideration the six words "and papers come out of escrow." No other subject being mentioned in the agreement, the reference can only be to papers and an escrow concerned in the "deal" and "said transaction," in other words, to the consummation of the lease.

As the lease was executed by defendants, the lessors, without the formality of a preceding escrow, the condition of the agreement relating to papers coming out of escrow was thereby waived by the said lessors and the time for the payment of the commission was no longer contingent upon such escrow.

Appellant contends that the term "escrow" refers to an escrow entered into between the lessor and lessees involving the financing of the swimming pool project. There is nothing to show that the real estate broker's commissions here involved had any connection with any such escrow or that he had any duties to perform in connection therewith; in fact, there is direct testimony that he had nothing to do with the financing of the proposed structure.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

**BANK OF ITALY NAT. TRUST & SAVINGS
ASS'N v. BENTLEY et al. ***

Civ. 4334.

District Court of Appeal, Third District,
California.

Oct. 22, 1931.

Rehearing Denied Nov. 20, 1931. Hearing
Granted by Supreme Court Dec. 21, 1931.

1. Mortgages ⇨8.

"Trust deed" cannot strictly be called either lien or mortgage (Civ. Code, §§ 2872, 2920).

[Ed. Note.—For other definitions of "Trust Deed," see Words and Phrases.]

2. Mortgages ⇨8.

"Trust deed" is conveyance, absolute in form, to trustee to secure debt, with power of sale on default, and upon trust to apply net proceeds to debt and pay over surplus to grantor.

3. Mortgages ⇨218.

Independent action cannot be maintained upon note secured by trust deed providing for sale of premises and applying of proceeds to payment of indebtedness (Code Civ. Proc. § 726; Civ. Code, § 2924).

4. Pleading ⚡193(4).

Action prematurely commenced is demurrable on ground complaint does not state facts constituting cause of action.

5. Pleading ⚡279(1).

Where action was prematurely brought, plaintiff cannot obtain relief by supplemental complaint founded upon matters subsequently occurring.

6. Limitation of actions ⚡48(1).

Right of action for deficiency, following sale of premises under trust deed, which came into existence after four years from date of maturity of note, *held* barred (Code Civ. Proc. § 726).

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Bank of Italy National Trust & Savings Association against G. J. Bentley and others. From the judgment, plaintiff appeals.

Affirmed.

Louis Ferrari, C. H. White, S. J. Tosi, and Tobias J. Bricca, all of San Francisco, and R. C. Minor and Gumpert & Mazzeria, all of Stockton, for appellant.

Nutter & Rutherford and A. P. Hayne, all of Stockton, and David Bush, of Oakdale, for respondents.

PLUMMER, J.

The record in this case shows that on February 14, 1923, the defendants executed their promissory note in favor of an assignor of the plaintiff, in the sum of \$4,000, due one year from date, and at the same time, for the purposes of securing the payment of said sum and other items of expense not necessary to be mentioned herein, executed a trust deed, whereby 160 acres of land in the county of Stanislaus were conveyed to trustees therein named, giving to the trustees the usual powers of sale contained in such instrument, if default occurred in the payment of the note.

On February 11, 1928, three days before the statutory period of four years had expired, the plaintiff began action to collect the amount represented by said note, by filing a complaint in the usual form of a suit counting simply upon a promissory note. Just prior to the filing of this complaint, notice of breach was filed, and thereafter, on the 8th day of June, 1928, sale was had of the premises covered by the trust deed, under the power contained therein. Thereafter, the plaintiff filed an amended complaint in this action, making no reference to the sale of the premises under the trust deed, and praying for judgment for the face of the note, plus interest, costs, and attorneys' fees. The

amended complaint does not purport to be for any deficiency remaining due after the sale under the trust deed. None of the pleadings, on the part of the plaintiff, allege that the security had become valueless, and at the time of the trial which was had upon a stipulation of facts, the property was stipulated to have been of some substantial value.

The answer of the defendants sets up the trust deed, the foreclosure thereof by sale, and relies upon the defense that the action of the plaintiff was premature; that no cause of action existed at the time of the filing of the original complaint.

While the findings of the court are all with reference to the different paragraphs of the complaint and answer, the conclusions of law drawn therefrom and the judgment entered indicate that judgment went in favor of the defendants on the theory that no action could be maintained upon the promissory note without sale first being had of the lands conveyed by the trust deed, as security for the payment of the promissory note, the proceeds of the sale applied to the note, and then an action for a deficiency judgment in the event that the sale of the lands did not realize a sufficient sum to pay the amount of the note, and the items of expense, advancements, and costs covered by the trust deed.

Upon this appeal, one vital question only is presented, *i. e.*: Can an action at law be maintained upon a promissory note secured by a trust deed containing a power of sale to be exercised and the proceeds arising from a sale of the premises conveyed as security, applied toward the payment of the promissory note? In the consideration of this question, it must be kept in mind that the pleadings do not show that the security of the defendant became valueless, or that any attempt whatever had been made to realize upon the property conveyed as security at the time of the filing of the original complaint.

The arguments revolve around the first paragraph of section 726, Code of Civil Procedure, which reads: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter."

Our attention is first called to the text found in 41 Corpus Juris 839, where it is said: "In the absence of a statutory prohibition upon default of the mortgagor, the mortgagee may bring an action for possession of the mortgaged premises, may sue upon the debt or obligation secured, and may proceed to foreclose his mortgage, and may pursue all these remedies at the same time." This statement of the common-law rule may be strictly accurate if limited in time of its application, but a reference to the well-considered case

of *Young v. Vail*, 29 N. M. 324, 222 P. 912, 34 A. L. R. 980, discloses a different application or interpretation of the common-law rule, prior to certain acts of parliament therein mentioned. On pages 1000 and 1001 of the acts referred to, as reported in American Law Reports, we find the following: "By the early common law, a mortgage was a legal conveyance of the fee by the mortgagor to the mortgagee, upon condition that, if the former paid to the latter a specified sum at a specified time and place, the conveyance should be defeated and the mortgagor's right and title restored; but, in default of such payment, at such time and such place, the right and title of the mortgagee became absolute, and those of the mortgagor lost forever. There could thereafter be no redemption. * * * The practice seems to have been for the mortgagee, if he was not in possession at the time of default and could not procure a voluntary surrender of possession by the mortgagor, to bring an action in ejectment against the mortgagor, and thereby recover possession of what had become his absolute estate." (Then followed the right of the mortgagor to bring an action to be allowed to redeem.) "After the chancellor had given the mortgagor an opportunity to pay up and thereby save his estate, and, upon his refusal, had fixed and declared the legal rights of the mortgagee to the estate, there was nothing further to be done. Complete relief, within the then-prevailing theory of mortgage foreclosure, had been afforded all parties. No personal judgment was granted or sought, recovery of the money not being the object of the suit. A sale was not ordered by the court, since the object to be attained was the establishment of the legal rights of the mortgagee in the estate." Following the acts of parliament referred to, it became permissible for the mortgagee, after his legal rights to the estate had been established, to institute an action at law on his bond or covenant for the recovery of the difference between the value of his estate secured in the foreclosure and the amount of the indebtedness, if he was still in a position to reconvey the premises to the mortgagor upon the payment in full of the whole indebtedness.

The opinion in the case of *Young v. Vail* is almost a treatise on the subject of mortgages, and the procedure followed under the common law and the authorities there cited show that the principle governing mortgages was, and always has been, to the effect that the security should first be resorted to and the proceeds thereof applied to the extinguishment of the debt; and also that where separate suits are permissible, equity will interpose and allow but one recovery. Thus the rule stated in 41 Corpus Juris, page 654, § 645, where it is said that "unless it is otherwise provided by statute, where a mortgage is given to secure the payment of a bond or a promissory note, the creditor may pursue his

remedy either on the mortgage or on the evidence of the debt, or on both concurrently." It is added further on page 656: "The creditor can have only one satisfaction, and his action on the note or bond will be defeated by proof of the payment, release, or satisfaction of the mortgage."

Keeping in mind the principle involved, the text found in 19 Ruling Case Law, page 269, § 40, is applicable: "In consideration of the controlling principle that a conveyance intended to secure the performance of an obligation, will be construed, irrespective of its form, to be a mortgage, the rule obtains generally that a conveyance to a trustee in trust, to provide for the discharge of the obligation of the grantor to the cestui que trust, and power of sale being granted the trustee for that purpose, though in form a deed of trust, will be given effect as a mortgage, if the fact is established that it was intended by the parties, at the time of its execution, so to operate. Its purpose is the factor determinative of its character. This doctrine has found frequent application both in cases where the conveyance in question was held not to be a mortgage, and in cases wherein it was held to be such. Thus, if real property is conveyed to a third person in trust as security for a debt, and it is provided that in case of default the trust is to be executed by the creditor, the trustee having no authority to perform any act in relation to the trust property, the conveyance is, according to the obvious intent of the parties, a mortgage, and it will be so construed. And it has been held that an instrument by which land is conveyed to the grantee as trustee, to secure the payment of a note given by the grantor to a third person, and which provides that the trust deed or mortgage may be foreclosed, and that a reconveyance may be made upon payment of the indebtedness, is a mortgage. Of course, a deed of trust to secure a debt, if recorded as a mortgage is governed by the law applicable thereto." Some confusion arises in the different cases by reason of the fact that the distinction is not clearly drawn between a conveyance in trust and a trust deed conveying property as security for the payment of an indebtedness set forth in the trust deed.

The policy of the law by requiring resort to the security is well stated in the case of *Merced Sec. Sav. Bank v. Casaccia*, 103 Cal. 641, 37 P. 648, 649. We quote therefrom the following: "In these cases, when the personal action was instituted, the debt was not secured by mortgage. If the mortgagee had voluntarily released his mortgage, his debt would then be unsecured. Such a mortgagee, however, would not be entitled to his personal action. It would be an attempt on his part to evade the operation of the statute, while the other cases supposed would not be within the policy of the law, although two actions have been allowed upon a debt which was originally secured by

a mortgage. The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action." We are here dealing with the policy of the law and not with the literal wording of section 726, Code of Civil Procedure; in other words, the question constantly arises, Can the policy of the law be defeated by a change in the form of the instrument by which real estate is made a security for the payment of the debt? If such is the case, then the beneficiary whose debt is secured by a trust deed on real estate can begin his action, and under a like construction given to section 537, Code of Civil Procedure, which allows an attachment, except where the contract is secured by any mortgage or lien upon real or personal property, make his affidavit of attachment, secure an attachment, and proceed against the general assets of the creditor, and, if not successful in obtaining full payment of his note, resort to the property covered by the trust deed.

[1] Under the definitions given in the Code, a trust deed given as security for the payment of a debt cannot strictly be called either a lien or a mortgage. Section 2872, Civil Code, reads: "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." And section 2920, Civil Code, defining "mortgages," reads: "Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Under the trust deed involved in this action, there is no change of possession; no lien is imposed upon the property, nor is the property hypothecated, which carries with it the idea of pledging without transfer of title. Under the trust deed in this case, title is transferred, but in every other particular the trust deed is identical with a mortgage. It is given to secure the payment of a debt, and provides for the subjection of the property conveyed to effectuate payment of the secured obligation.

[2] In *Hollywood Lumber Co. v. Love*, 155 Cal. 270, quoting from page 273, 100 P. 698, 699; we find the court adopting the language of Mr. Justice Angellotti, used in the case of *MacLeod v. Moran*, 153 Cal. 99, 94 P. 604, where trust deeds are thus defined: "It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes

thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale." Citing *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 P. 813; *Tyler v. Currier*, 147 Cal. 31, 81 P. 819; *Weber v. McCleverty*, 149 Cal. 316, 86 P. 706. A like definition, in substance, is found in 25 California Jurisprudence, beginning on page 8. "A trust deed may be defined as an instrument, absolute in form, whereby property is conveyed to one—whether a third person or the creditor—called a trustee, for the purpose of securing a debt or other obligation owing from the grantor to another, or an obligation owing from a person to the grantor or another, with a power of sale upon default, and upon a trust to apply the net proceeds to payment of the debt and to pay over the surplus to the grantor. Such a deed is distinct from a mortgage—though, as has been observed, in some cases it is difficult in principle to distinguish them. But, like a mortgage, a trust deed is a mere security, its primary purpose being to secure the payment of a debt or the performance of some act. Accordingly, a trust deed has been said to be practically, though not in legal effect, little more than a mortgage with power to sell and convey," etc.

The first case called to our attention, directly in point on the question of procedure, is that of *Powell v. Patison*, 100 Cal. 236, 34 P. 677. It is there said: "The court cannot properly render a personal judgment against the makers of a promissory note which is secured by a valid deed of trust before the security has been legally exhausted." In support of this statement the cases of *Barbieri v. Ramelli*, 84 Cal. 154, 23 P. 1086; *Crim v. Kessing*, 89 Cal. 487, 26 P. 1074, 23 Am. St. Rep. 491, and *Biddel v. Brizzolara*, 64 Cal. 362, 30 P. 609, are cited. These cases, however, had to do only with mortgages, and may not be considered as definitely deciding the question, unless the primary principle relating both to mortgages and trust deeds be given effect, to-wit, that the real property put up as security constitutes the primary fund for the payment of the debt, irrespective of the form of the instrument that may be used in furtherance of such purpose.

In the case of *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 P. 745, 747, the court, referring to the case of *Powell v. Patison*, supra, without deciding the question here involved one way or the other, intimated that the decision in the *Powell* Case could hardly be considered an authority. However, in the same opinion the court used the following language: "It may be said, however, that the question is not concluded by the fact that section 726, Code Civ. Proc., merely provides that there shall be only one action for a debt secured by mortgage, and that a trust deed

is not a mortgage. Assuming that a trust deed is not within that section, still there are other considerations to be weighed in determining whether a creditor who has accepted such a deed as security has not contracted to pursue the terms of the deed when he attempts to forcibly collect the debt." By reference to the opinion in the same case, when it was heard in department, 6 Cal. Unrep. Cases, 923, 68 P. 1020, and reading the two opinions together, it appears that what was said in the department opinion relative to trust deeds was not overruled. While the decision rendered by the court in bank affirmed the trial court, it did so upon questions other than whether an action could or could not be maintained upon a note secured by a trust deed, without first resorting to the property given as security. Nor is what is said in the department decision (quoting from 1st Jones on Mortgages, § 62), in anywise limited in its scope or effect.

Again, in *United Bank & Trust Co. v. Brown*, 203 Cal. 359, 264 P. 482, where the action was to recover an alleged balance due upon two promissory notes secured by a trust deed, the defense to the action was that proper notice of sale had not been given under the trust deed, and that the sale was consequently void, and therefore the proceeds of the land conveyed as security for the payment of the debt had not been fully obtained, and, as no legal sale had been had, the action was prematurely brought. The language of the opinion in this particular states: "The defense which the said defendant urged in his pleadings and upon the trial related to an alleged insufficiency in the notices given of the sale of his property under each of these deeds of trust, and which, as he contended and here contends, rendered the said sales thereunder void and hence this action as to both its counts premature and nonmaintainable. The trial court found in the defendants' favor upon the defense and gave judgment accordingly against the plaintiff upon both causes of action." The judgment of the trial court was affirmed. While there is nothing said in the opinion to the effect that an action on the note cannot be maintained without first resorting to the security by way of sale of the lands covered by the trust deed, yet the conclusion reached by the court is a substantial affirmance of the principle which we have heretofore stated, and the judgment of the trial court could not have been affirmed upon any other theory, because if proceedings by way of sale of the lands conveyed by the trust deed were not a prerequisite to any action upon the note, then in that case the action of the trial court should have been reversed and the plaintiff awarded judgment. The holding of the court in the above-entitled case is really to the effect that a valid sale of the conveyed premises must be made under the power contained in the trust deed,

before an action can be maintained for any alleged deficiency in the proceeds to make full payment of the obligation secured thereby. The creditor cannot sue on the debt alone in case of a mortgage, unless the security has ceased to exist. *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 135 P. 502; *Avery v. Hagenios*, 45 Cal. App. 176, 187 P. 119; *Lewis v. Hornback*, 28 Ariz. 546, 237 P. 952.

Section 2924, Civil Code, with reference to sale under a power contained in the instrument, provides that "the trustee, mortgagee or beneficiary shall first record, in the office of the recorder of the county wherein the mortgaged or trust property or some part thereof is situated, a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation." And section 692, Code of Civil Procedure, specifies the procedure to be followed. In the instant case, the plaintiff made its selection to foreclose the trust deed by way of sale of the premises conveyed thereby. Whether an action can be maintained to foreclose a trust deed wherein property is conveyed to a third person, to be by him sold upon demand of the creditor in the event of the failure of the debtor to pay the amount due, is not material to a decision in this case, though in the case of *Cortelyou v. Vogel*, 51 Cal. App. 785, 197 P. 968, the language used by the court indicates that such an action may be maintained, while in *Galusha v. Meserve*, 58 Cal. App. 174, 208 P. 348, 351, the following language is used: "We are unable to agree with the contention of appellant that the trust deed was a mortgage, under which there could be no sale without foreclosure. The instrument is a typical trust deed, running not to the creditor, but to a third party as trustee. 'It has no feature in common with a mortgage except that it was executed to secure an indebtedness.' On such an instrument a suit for foreclosure and sale will not lie, for the contract of the parties is that upon default the trustee shall sell, and there is no equity of redemption to foreclose." Citing *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Kraft Co. v. Bryan*, 140 Cal. 73, 73 P. 745. Irrespective of whether such an action may be maintained, this case is authority to the effect that if the trust deed amounts to a contract that a specific remedy shall be resorted to in the event of the creditor defaulting in payment of his obligations, then and in that case the contract must be followed.

[3] In support of its contention that the plaintiff had an independent cause of action upon the promissory note executed by the defendants, the point is made that in a number of cases it has been held that such a note outlaws upon the expiration of four years after the date of maturity, and the point is made that a statute does not run unless there is the right to bring a suit on the note. In

this contention, there is a confusion of ideas. There is a right of action owned and possessed by the plaintiff during the entire period of four years, to wit, his right of action is for any deficiency that may arise from the sale of the conveyed premises. That the right of action is within the power of the plaintiff to create, invoke, and use at its pleasure by conforming to the contract by which the conveyed lands and premises are made the primary fund for the payment of the debt. A party may not complain of his own failure to proceed and subject the mortgaged or conveyed premises to the payment of the secured obligations prior to the expiration of the four years upon finding that he has delayed so long that he cannot maintain a suit for any deficiency that may exist in the funds realized upon foreclosure or sale. To void the effect of the trust deed in making the conveyed lands the primary fund to which resort must first be had, the appellant quotes two or three excerpts from the deed, to wit: "Trustees or banks, their successors or assigns may, at any time at their option, commence and maintain actions or proceedings to obtain aid or direction in the execution of these trusts, or to conserve said property or their rights." The language itself refutes the contention of the appellant; it all relates to the execution of the trusts and to conserve said property or the rights of the beneficiary or trustee therein. The trust deed is in usual form, and provides that the trustee shall take all actions necessary to preserve the property, pay assessments and taxes, insure buildings, etc., in the event of default of the debtors, and shall, upon demand, sell the property, etc., and apply the proceeds, first, to the payment of costs and expenses, and then to the payment of the indebtedness. The trust deed is too lengthy to be set out in this opinion, but nothing has been called to our attention to show that there is anything in the instrument indicating an intent other than that the mortgaged premises were to be considered the primary fund, and constituted the security for the payment of the defendants' obligation.

In the case of *Hodgkins v. Wright*, 127 Cal. 688, 60 P. 431, 432, we find the following reference to a question somewhat similar to the one we are considering as to the right of an independent action, but without deciding the question, the court said: "It is not admitted that if the conveyances were expressly trust deeds, given to secure the indebtedness, plaintiff could bring a personal action before she had exhausted the security. It has only been held that such deeds are not mortgages which require foreclosure."

To the same effect is the case of *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 P. 813, where the court takes up the question of *stare decisis*, holding that trust deeds to secure indebtedness are valid by reason of

the effect which should be given to this principle, and, if followed in this case, the holding must be that no independent action can be maintained upon a note secured by a trust deed providing for sale of the premises and applying of the proceeds to the payment of the indebtedness.

The effect of what we have said cannot be avoided by the filing of an amended complaint or a supplemental complaint after the expiration of the four-year period named in the statute of limitations.

[4, 5] In 1 California Jurisprudence, page 379, § 55, it is said: "At common law, a general denial enabled the defendant to prove that the cause of action had not accrued at the time the suit was brought, and in California practice an action prematurely commenced is demurrable on the ground that the complaint does not state facts sufficient to constitute a cause of action. The plea that an action was prematurely brought is not a plea in abatement, for it goes to the merits of the action and shows that it never existed when the suit was brought. It does not merely abate the action; it defeats it. It is an answer to the whole action and a perfect defense. Where an action is prematurely brought, a supplemental complaint has no place as a pleading. Consequently, if a suit be brought on a promissory note before it becomes due, the complaint will not be aided by a supplemental complaint filed after it becomes due, alleging its maturity at a date subsequent to the commencement of the action." And as said in 21 California Jurisprudence, page 172: "A supplemental complaint may not be used to make a new case, or for the purpose of substituting a distinct and independent cause of action. Thus if the action was prematurely brought, a plaintiff may not obtain relief by way of supplemental complaint founded upon matters subsequently occurring. A complaint or amended complaint and a supplemental complaint are considered as separate pleadings."

To the same effect is the case of *Landis v. Morrissey*, 69 Cal. 83, 10 P. 258, where it is said that such a defense may be made without any plea of abatement; that it does not simply abate the action, but that it defeats it.

[6] Likewise, in the case of *Morse v. Steele*, 132 Cal. 456, 64 P. 690, it was held that an action prematurely brought cannot be helped out by any supplemental pleadings. The trial court in this action held that the cause was not barred by the statute of limitations. As the amended pleading could only be supported by a right of action for a deficiency following the sale of the premises, which came into existence after the expiration of four years from the date of the maturity of the note, the finding should have been that the action was barred. This, however, does not affect the judgment of the trial court, as

it necessarily follows from what we have said, that it must be affirmed, and it is so ordered.

I concur: R. L. THOMPSON, J.

Presiding Justice PRESTON, deeming himself disqualified, did not participate in the decision in this case.

117 Cal.App. 755

KUCK v. RAFTERY et al.

Civ. 7593.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1931.

Rehearing Denied Nov. 28, 1931. Hearing Denied by Supreme Court Dec. 28, 1931.

1. Trusts — 34(3).

Person depositing his money in name of himself and beneficiary to enable beneficiary to draw money after depositor's death creates valid trust, notwithstanding depositor retains bank book with power of withdrawal (Civ. Code, § 2280).

2. Trusts — 44(1).

Finding that person depositing his money in his name as trustee for third person did not intend to create trust *held* unsupported (St. 1909, p. 87, § 15a, as added by St. 1921, p. 1367, § 5).

It appeared that depositor had previously had a savings account in his own name, that, at a time when the third person was present, he withdrew such account and re-deposited money in a new savings account in his name as trustee for the third person, and that both depositor and third person signed deposit card of bank, and third person temporarily had in her possession the bank book, thereby indicating that she knew of the making and form of deposit.

3. Evidence — 65.

Person depositing money as trustee for third person must be deemed to know of statute authorizing payment thereof to third person on depositor's death (St. 1909, p. 87, § 15a, as added by St. 1921, p. 1367, § 5).

4. Appeal and error — 1012(1).

Weight and credibility of testimony are for court in juryless trial.

5. Evidence — 581.

In action involving trust, allowing reading of witnesses' testimony in will contest between same parties *held* error, in absence of statutory foundation (Code Civ. Proc. § 1870, subd. 8).

It was not shown that witnesses in question were dead or out of jurisdiction or unable to testify, in any of which cases their testimony in a former action between the same parties might be introduced under Code Civ. Proc. § 1870, subd. 8, provided their testimony related to same matter.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Lillian Kuck, as special administratrix of the estate of John D. Siemers, also known as John Diedrich Siemers, deceased, against Catherine Raftery, also known as Catherine Buckle, and another. Judgment for plaintiff, and defendant named appeals.

Reversed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Clarence A. Henning, of San Francisco, for appellant.

William P. Hubbard, Grant & Zimdars, and C. F. Humphrey, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by defendant Catherine Raftery from a judgment in favor of plaintiff as special administratrix of the estate of John D. Siemers, deceased, adjudging plaintiff entitled to a certain savings bank account and determining that appellant, Raftery, has no interest therein. The undisputed facts established by the written records of the San Francisco Bank are that John D. Siemers in 1923 had two savings accounts in said bank in his own name. On August 20, 1923, John D. Siemers and appellant were present in the bank together, and at that time Siemers withdrew the entire amount, \$4,711.22, standing in one of such accounts, and redeposited it in a new savings account which he thereupon opened in the name of "John D. Siemers, Trustee for Catherine Raftery." While it is customary in such cases for the bank to take only the signature of the depositor, in this case, at the time of the opening of the deposit, both Siemers and appellant, Raftery, signed the deposit card of the bank, which is kept by it as a part of its permanent records. The other account in the name of Siemers was not changed, and thereafter and until his death on December 29, 1923, the personal account and the trustee account were maintained in the bank, and there were no deposits in or withdrawals of principal or interest from the trustee account. These facts cannot be disputed, as they are established by the records of the bank introduced into evidence in this case. One other fact is established by the findings, that in some man-

ner appellant had the passbook of this account in her possession while she and Siemers were together in the bank at the time that the account was opened; the finding in this regard reading: "On said August 20th, 1923, said Catherine Raftery had possession of said bank book at said bank, but did then and there, while in said bank, hand said bank book back to said John D. Siemers, deceased." In the foregoing statement of facts we have limited ourselves to those facts only as to which there can be no dispute.

The court, after finding these facts, found that: "Said John D. Siemers never at any time had any intention of giving the said sum, or any part thereof, to said Catherine Raftery, or creating any interest in her, in or to said bank account or the money represented thereby either as or by way of gift or trust or otherwise." This finding in so far as it negatives the existence of a trust in favor of appellant is attacked by appellant as finding no support in the evidence.

[1] So far as we have been able to ascertain, no case has reached the appellate courts of this state involving the disposition of a bank account deposited by one person in his name as trustee for another. There is, however, abundance of authority in this state on the legal effect of the deposit by one person of his own funds in the joint names of himself and another. The leading case on this subject is *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 P. 370, which has been often cited on the subject and must be taken as announcing the settled rules of law in this state on the questions therein decided. That case may be taken as settling the rule for California that, where a person deposits his own money in his name and that of another jointly with the intention of enabling the other party to draw the money after his death, a valid trust is created in favor of the other person as beneficiary. Two other rules are announced in this case which are important in the consideration of the case before us: (1) The circumstance that the depositor retains the power to withdraw the deposit during his lifetime does not affect the validity of the trust so created; and (2) the retention of possession of the bank book by the depositor until his death is immaterial and does not affect the validity of the trust.

When we turn to the decided cases from other jurisdictions dealing with trustee accounts in the form of the one before us, we find ourselves embarrassed by their number and contrariety. At the outset, however, we may dismiss from consideration the rule announced in many of them that in order to create a valid trust the depositor must transfer the beneficial interest irrevocably to the beneficiary. It is settled by the *Booth Case* that, under section 2280 of the Civil Code, allowing the power of revocation to a trustor where that power is expressly reserved in

the declaration of trust, the power in the depositor to withdraw the deposit in his lifetime may be reserved without destroying the trust. Dismissing the decisions from other jurisdictions which adhere to the contrary rule as being in conflict with the law of this state, there are two lines of authority upon the subject which are founded respectively upon the New York and Massachusetts decisions. The two rules are well stated by the Supreme Court of Minnesota in *Walso v. Lat-terner*, 140 Minn. 455, 168 N. W. 353, 354:

"Where the depositor dies without withdrawing the deposit, the authorities are in conflict. In Massachusetts it is settled by a long line of decisions that the mere fact of such a deposit being made 'in trust for' another, coupled with the retention of the passbook by the depositor, is not sufficient evidence of a trust to entitle the beneficiary to the deposit on the death of the depositor. [Citing cases.]

"In New York the rule is the other way. The doctrine of the New York cases at the present time is best stated in *Matter of Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, also reported with an elaborate note in 1 Ann. Cas. 900. We quote: 'A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.'

* * *

"The authorities are practically in accord on the proposition that the existence of the trust in every such case is a question of fact involving the intention of the donor and an apt declaration of that intention. See above note in 1 Ann. Cas. at page 904, and cases cited. The conflict between the New York decisions and those in Massachusetts is not at all over the validity of such a trust, but wholly as to what is sufficient evidence to make a question for the jury on the issue of the intention of the depositor. Even in Massachusetts, where the evidence shows declarations of his intention to create a trust, or to give the money to the beneficiary, the court refuses to disturb a finding that the trust is complete and enforceable on the death of the depositor. [Citing cases.]"

[2, 3] One distinction between the rules adhered to in New York and Massachusetts which is not pointed out in the quoted language of the Supreme Court of Minnesota is that, while the New York courts hold that

the trust may be revocable during the life of the depositor, the Massachusetts courts hold that the entire beneficial interest in the fund must be immediately vested in the beneficiary in order to constitute a valid trust. This is not the rule in California, as we have already shown. But putting aside that part of the Massachusetts rule which holds that the reservation of the power of withdrawal by the depositor during his lifetime is inconsistent with the existence of a trust, it would seem to make no difference in this case whether we follow the Massachusetts rule as so qualified or the New York rule. This is so because in this case appellant is not relying on the mere presumption which the New York courts say arises from the form of the deposit upon the death of the depositor, but upon the other facts established without dispute by the records of the bank and hereinabove set out. The circumstances surrounding the making of the deposit, the presence of appellant at the bank with Siemers, the fact of her placing her signature upon the identification card along with his, and her knowledge at the time of the making and form of the deposit, would seem to furnish facts sufficient to satisfy the Massachusetts rule that the intention of the depositor to create a trust must be proved by evidence other than that furnished by the form of the deposit itself.

These acts must be viewed also in the light of the statutory law existing at that time. At the time when this deposit was made, section 15a of the Bank Act (as added by St. 1921, p. 1367, § 5) provided: "When any deposit [with a bank] shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to such savings bank, in the event of the death of the trustee, the deposit or any part thereof, together with the dividends thereon, may be paid to the person for whom the deposit was made."

It may be admitted that this statute is solely for the protection of the bank (*Alger v. North End Sav. Bank*, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331), but the conduct of the decedent must none the less be measured in the light of the existence of this law. He must be taken to have known that upon his death this law authorized the payment of the deposit to the appellant, and no reason for his having appellant place her signature on the card at the bank has been suggested by counsel for respondent or occurs to us unless it was done to facilitate the withdrawal of the deposit by appellant after his death. We are satisfied that the only rational conclusion which can be drawn from the circumstances surrounding the making of the deposit is that Siemers intended thereby to create a trust in favor of appellant.

The only evidence relied upon by respondent

to support the contrary conclusion of the trial court is the testimony of certain persons that Siemers told them at various times that appellant was trying to get his money and that he was anxious to get rid of her. In a will contest between the same parties in *Estate of Siemers*, 202 Cal. 424, 435, 261 P. 298, 303, the Supreme Court characterized the evidence of these same witnesses as meager, but held that this evidence, coupled with the fact that Siemers a few days later executed another will in many, if not all, respects inconsistent with a will which appellant was seeking to probate, was sufficient to support a finding of the probate court "that decedent did not intend that the first of said writings should be or remain his last will and testament."

In this case we have the same meager evidence, but not coupled with the doing of any later act inconsistent with the creation of a trust in the bank account. We feel justified in assuming that but for the making of the later will the testimony in question would not have been held sufficient to establish that the earlier will was not made with testamentary intent. In the case before us the deposit as trustee was at all times subject to Siemers' control, and he could have withdrawn it from the trust account at any time that he chose, just as he did make a new will after drawing an earlier one in appellant's favor. But he chose rather to leave the account in such a form that he knew appellant could withdraw it upon his death. This fact in our judgment sufficiently distinguishes the present case from *Estate of Siemers*.

[4] We have not referred to the oral testimony of appellant and her witnesses which, if believed, would amply corroborate our conclusion, because we are mindful of the rule that the weight and credit to be given to the testimony is a matter for the trial court and not for this court on appeal. But disregarding all such testimony and confining our scrutiny to the evidence of the facts surrounding the making of the deposit itself, which cannot be disputed, we are of the opinion that standing alone they establish clearly the intention to create a trust, and that the evidence relied upon to overcome their effect fails wholly to do so. The evidence of respondent's witnesses might support an inference that Siemers was induced reluctantly to create the trust, but in the face of his undisputed conduct at the bank it cannot support an inference that he did not intend to create it. In the presence of appellant he did everything which was necessary or calculated to enable her to withdraw the deposit upon his death. It is inconceivable that he did not realize this or that he would not later have withdrawn the account if he desired to prevent or undo it.

There is here no issue of undue influence

made by the pleadings, and in our judgment that is the only issue in view of the facts to which respondent's evidence might by any possibility be successfully directed. Upon that subject, however, we feel that it would be improper to express an opinion.

[5] Even if respondent's evidence were sufficient to support the judgment, we would feel compelled to order a reversal by reason of an error in the admission of some of it. Over appellant's objection, the testimony of three witnesses given on the will contest was read into the record in this case. Under section 1870, subdivision 8, of the Code of Civil Procedure, "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter," may be introduced. There was in this case no pretense of laying a foundation by showing that these witnesses were either dead, out of the jurisdiction, or unable to testify. Nor did the testimony relate to the same matter; the inquiry in the former case having been as to the validity of a purported will and in this case as to the existence of a trust. Ordinarily this error might not be considered prejudicial, since other witnesses testified to similar, although not the same, conversations. But, where the case for appellant was so strong and that for respondent so meager, we cannot say that appellant was not prejudiced by the reception of this testimony.

The judgment appealed from is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

118 Cal.App. 7

PEOPLE v. EPSTEIN.

Cr. 2063.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1931.

Rehearing Denied Nov. 10, 1931. Hearing Denied by Supreme Court Nov. 27, 1931.

1. Embezzlement §44(6).

Evidence warranted conviction of grand theft where defendant, as president, had signed corporation's checks, whereby corporation appropriated escrow funds.

It appeared that complaining witnesses deposited moneys in escrow with investment and loan corporation involved; that defendant, as president and general manager of corporation, determined on its behalf that escrow moneys should be mingled with corporation's moneys in general bank account; that checks on such ac-

count required defendant's signature together with that of another officer; that some of money drawn out was paid on account of defendant's salary; and that defendant was large stockholder, and therefore money, when used by corporation for its own advantage, was used indirectly for his benefit.

2. Embezzlement §11(1).

That corporation holding moneys deposited in escrow was authorized to collect depositors' checks and pay out proceeds did not authorize corporation to appropriate escrow moneys.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

I. Harry Epstein was convicted on two charges of grand theft, and he appeals.

Affirmed.

Paul W. Schenck, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Dep. Atty. Gen., for the People.

CONREY, P. J.

The first count of the information, on which defendant was convicted, charges that defendant committed the crime of grand theft in that he did, at a stated time and place, wilfully, etc., take away \$6,000 of the personal property of one David Spiegel. The second count, in similar terms, charges grand theft of the sum of \$10,000 of the personal property of one Louise P. Klein.

[1, 2] Defendant was the president and general manager of a corporation called the Beverly Hills Investment & Loan Corporation. This corporation was engaged in a general loan and investment business, including the negotiation and completion of loans of money for its customers. In February, 1930, Spiegel delivered to the loan corporation a check payable to the order of said corporation for the sum of \$7,000, with the understanding that this money was to be held in escrow, and used for the purposes of a real estate loan to one Johnson. The loan corporation deposited the check as a credit on its own general account in the Republic Bank, at Hollywood. The check was in due course collected from the bank on which it was drawn, and remained in the Republic Bank to the credit of the loan corporation. Later, it appeared that the Johnson loan could not be completed. Thereupon, on March 25th, a new escrow was created, wherein Spiegel was to lend to one Hogan \$6,000 on certain real property, and \$6,000 of the previously deposited \$7,000 was transferred to the Hogan escrow; the remaining \$1,000 being then returned by the loan

corporation to Spiegel. The Hogan loan also failed of completion, but Spiegel was unable to obtain return of his money notwithstanding he demanded the same. The evidence shows that within less than one week from the date of deposit of the Spiegel check in said bank, the total balance of the loan corporation in that bank was less than \$6,000. Said balance gradually decreased to a very small sum. There is no doubt that the loan corporation converted Spiegel's money to its own use.

The transactions relating to the \$10,000 of Mrs. Klein are so closely parallel to those of the Spiegel transaction that they require no separate consideration. The case presents on both counts the same questions concerning the liability of Epstein to prosecution for his part in the transactions. Epstein was general manager of the corporation. It was he who determined, on behalf of the corporation, that its escrow moneys should not be kept in a separate account, and that such moneys should be mingled with the moneys of the corporation in its general bank account. All checks on the bank account required his signature, together with that of one other officer. When the balance in the bank account ran below the amount of the escrow money, and the loan corporation thus began to take and appropriate to its own use the moneys thus held in trust, such appropriation was directly participated in by Epstein, by his act in signing those checks. According to his own testimony, at the time of signing such checks he did not know that the corporation's own funds were exhausted, and that he was drawing upon trust funds. But there is abundant circumstantial evidence that he did know that very important fact. Especially significant is the act of defendant in borrowing from an employee of the loan corporation first the sum of \$1,000, and again the additional sum of \$2,500, at which time defendant stated to the employee that the corporation was short of funds for a few days.

In presenting his appeal, appellant suggests that the decision of this case must rest primarily upon one single question of law, which he states thus: "What is the measure and extent of the criminal responsibility of a president and general manager of a corporation for acts done by it in the regular course of its business?" We are assured by counsel for appellant that the following seven cases constitute a complete list of the authorities bearing upon the stated question: *People v. Borchers*, 199 Cal. 52, 247 P. 1084; *State v. Carmean*, 126 Iowa, 291, 102 N. W. 97, 106 Am. St. Rep. 352; *Weber v. State*, 190 Wis. 257, 208 N. W. 923, 45 A. L. R. 928. (Relied upon by appellant.) *State v. Thomas*, 123 Wash. 299, 212 P. 253, 33 A. L. R. 781; *Milbrath v. State*, 138 Wis. 354, 120 N. W. 252, 131 Am. St. Rep. 1012. (Relied upon by re-

spondent.) *State v. Ross*, 55 Or. 450, 104 P. 596, 106 P. 1022, 42 L. R. A. (N. S.) 601, 613; *State v. Cooley*, 141 Tenn. 33, 206 S. W. 182. (Relied upon by *State v. Thomas*, supra.) We shall not extend this opinion by an attempted analysis of those decisions. It is conceded by appellant here, as a deduction from the decisions, that where the corporate entity is in fact but a makeshift, subterfuge, or so-called "dummy" corporation, entirely controlled by a person, or a limited number of persons, who perpetrate criminal acts under the guise of, or under the name of, such corporation, the corporation entity will be ignored in criminal courts, and the said persons will be treated as though they were individuals, and had acted as such. But appellant contends for the following additional deduction from the decisions, viz.: That the only other circumstances under which officers may be held criminally responsible for corporate acts are where, with relation to such acts of a criminal nature, the particular officer sought to be charged has personally acted in the premises in such a way concerning that particular matter as would have made him a principal therein under the doctrines pertaining to aiders, abettors and accomplices.

"The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission." *State v. Thomas*, 123 Wash. 299, 212 P. 253, 254, 33 A. L. R. 781, citing cases. As has been noted herein, appellant signed all of the checks by which the account was depleted. It even appears by the testimony of the witness Henry, that some of the money drawn out was paid on account of appellant's salary. (Rep. Tr., p. 165.) Moreover, appellant was a large stockholder of the loan corporation, and the money when used by the corporation for its own advantage was used, indirectly, for his benefit. Upon the facts thus shown, the guilt of defendant is established by the evidence which sustains the implied finding that appellant knew that the corporation was appropriating to its own use the money of the complaining witnesses, and that, so knowing, he performed the acts by which that appropriation was accomplished. The facts, that the corporation was authorized to collect the checks of the complaining witnesses, and was authorized to pay out that money by check in completing the contemplated loans, did not give to the corporation any right to appropriate those funds for its own use.

The judgments and the order denying motion for a new trial are affirmed.

We concur: BISHOP, Justice pro tem.; YORK, J.

117 Cal.App. 723

VUILLEUMIER et ux. v. KELLEY et ux.

KELLEY et ux. v. VUILLEUMIER et ux.

Civ. 4301.

District Court of Appeal, Third District, California.

Oct. 28, 1931.

1. Mortgages ⇨38(1).

Evidence sustained finding that transaction was sale, not mortgage.

2. Appeal and error ⇨1010(1).

Finding that transaction was sale, not mortgage, sustained by sufficient evidence, could not be successfully attacked for insufficiency of evidence.

3. Mortgages ⇨608½.

Though testimony respecting value of property would be evidence on issue whether transaction constituted sale or mortgage, failure to find value would not invalidate finding.

4. Mortgages ⇨608½.

On issue whether transaction was sale or mortgage, court in finding value was not bound to specific figures testified to.

5. Mortgages ⇨608½.

Where party's own witness testified rental value was \$100 to \$125 per month, party's contention that court erred in finding rental value to be \$100, *held* not sustained.

6. Mortgages ⇨608½.

Where both parties offered evidence on value of realty, court was justified in finding value to be \$25,000, notwithstanding answer denied property was worth \$50,000.

Finding was justified, though under technical rules of pleading the denial in answer that property was of the value of \$50,000 constituted admission that value was \$49,999.99.

7. Mortgages ⇨608½.

Alleged failure to find whether there was a loan, on issue whether transaction constituted mortgage or sale, *held* immaterial.

Party, who contended that transaction was mortgage and not bona fide sale, admitted that court intended to find there was not a loan, and court did find that property was not transferred as security for indebtedness due, nor for performance of any act or condition by grantors or any one else, that there was no agreement for loan of any nature whatever, and that transaction was sale of property for good and valuable consideration.

8. Mortgages ⇨608½.

Finding that deed was intended to transfer fee title, *held* not inconsistent with finding that grantees granted lease of property to grantors.

9. Appeal and error ⇨1058(1).

Any error in excluding evidence respecting price for which grantors could have sold property, as bearing on question whether transaction constituted sale or mortgage, being cumulative, *held* harmless (Const. art. 6, § 4½).

10. Trial ⇨395(2).

Finding that certain allegations of complaint were untrue, *held* not unintelligible because there were two actions and but one set of findings.

The contention that as there were two actions, one of which was brought by grantees for ejectment and the other by grantors to have transaction declared mortgage and not sale, it was impossible to ascertain to which complaint finding referred, was without merit because findings were divided into two subdivisions, so that it was clear from its place in findings that finding complained of dealt with the equitable action.

Appeals from Superior Court, Los Angeles County; A. C. Finney, Judge.

Separate actions by A. E. Vuilleumier and wife against Dorsey M. Kelley and wife, and by Dorsey M. Kelley and wife against A. E. Vuilleumier and wife, consolidated for trial. From adverse judgments in both cases, A. E. Vuilleumier and wife appeal.

Affirmed.

Carroll Allen and Lyle Pendegast, both of Los Angeles (William A. Sumner, of Los Angeles, of counsel), for appellants.

Rohe & Freston, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondents.

BURROUGHS, Justice pro tem.

The above causes were consolidated for trial and are brought here on one record. The first cause mentioned was commenced for the purpose of having a deed, absolute in form, made and executed by the plaintiffs Vuilleumiers to the defendants Kelley declared a mortgage. The second cause was commenced by the Kelleys, as plaintiffs, to eject from the premises described in the above-mentioned deed, the defendants Vuilleumiers. Issues were joined in the two actions, and, after trial, findings and judgment in favor of the Kelleys were made and entered in both actions. The Vuilleumiers have

appealed. The court found that the deed was not a mortgage, but was an absolute conveyance of the property described therein by the Vuilleumiers to the Kelleys, and also found that the latter were entitled to the possession of said property. The cause is brought to this court under the alternative method of appeal. The record discloses without conflict that on March 29, 1927, and for a number of years prior thereto, the appellants were the owners of and in the possession of a portion of the Rancho San Rafael situated in the county of Los Angeles, state of California; that on the day last named said property was incumbered by a deed of trust previously given by the appellants to the Citizens' Trust & Savings Bank of Los Angeles, as trustee, to secure the payment of a promissory note in the principal sum of \$15,000, together with interest and certain other charges as specified in said note; that the appellants had defaulted in the payments required, and the property had been advertised for sale in accordance with the terms of said trust deed. Several days before the sale, William J. Chitarin, a relative of the appellants who acted for them in an effort to raise money to pay off the amount due under the terms of the promissory note and trust deed, was introduced by one James E. Bond to the respondent Dorsey M. Kelley. From this part of the transaction there is a material variance in the testimony of the witnesses, and, from the viewpoint we take of the case, it is necessary to cite only so much thereof as may be necessary to sustain the findings of the court that the transaction constituted a bona fide sale of the property involved, and was not a mortgage.

[1] Dorsey M. Kelley testified that he was introduced to Chitarin about March 28th by Mr. Bond; that Chitarin wanted to borrow some money to pay off the loan; that he, Kelley, told Chitarin that he did not lend money, but that if the property was going to be sold—foreclosed at a sale and it was a good buy, he might be interested in buying it. The witness and Chitarin then visited the property, and a few days later he, the witness, told Chitarin that he had just come to California and did not know anything about conditions here, but the property looked good to him, and, if he could buy it at the right price, he would be willing to do so, and give Chitarin an option to rebuy it, but he would not do anything that was not done under the advice of the escrow department of the bank with which he did business; that Chitarin agreed to that, and the next day the parties met at the bank. They were referred to Mr. Collyer of the escrow department, and the witness told Mr. Collyer of the agreement of the parties and asked him if it could be done fairly and squarely, which Collyer seemed to doubt, and he said the matter must be referred to the legal depart-

ment. Messrs. Collyer, Chitarin, the witness, and both appellants went to the office of Mr. Nevitt, an attorney, and after being advised of the facts as outlined above, the attorney advised that if it were ever contested the court might look through the transaction and misconstrue it. The witness then turned the deal down, and left the bank. That evening Chitarin and the two appellants called at respondent's home, and they again tried to get him to put up the money. The witness finally made the proposition that he would buy the property, pay them \$1,000 in money, pay the indebtedness, and give them a lease of the property for a year, and they agreed to that. The next morning appellants, Chitarin, and the witness again met at Mr. Collyer's office, and the witness told Collyer that he had agreed to buy the property outright without any conditions, and pay appellants \$1,000 in money, pay off the note, and give them a lease of the property one year rent free. Mr. Collyer asked them if it was agreeable to them, and they said, "Yes." They again went to Mr. Nevitt's office and told Mr. Nevitt the proposition, and Mr. Nevitt leaned over the table and said to appellants: "Do you know now that you are giving up all your equity and all your rights to this property?" and they said, "Yes." As the witness did not know the true state of the title, escrow papers were signed and the \$1,000 went through escrow, also the lease and deed; that the witness, as soon as sufficient papers had been signed, hurried to his bank and received a certified check for \$18,000, and deposited it with the trustee, to prevent a sale of the property. The instruments were subsequently drawn, closing the deal by which respondents were given a deed to the property, and the debts were canceled.

L. S. Collyer testified that the parties came to his office and Mr. Kelley stated the transaction as above outlined by him; that he took the parties to Mr. Nevitt, who explained to them that such a transaction would be looked upon with suspicion by a court, and that Kelley therefore refused to enter into the deal; that the next morning, being the day of the sale, all parties again came to his office and Mr. Kelley explained that appellants and Chitarin had been very insistent that he accommodate them, and that they were about to lose their home, and that they had decided to go through on the basis of an outright sale of the property; that the other parties said yes, that was what they had agreed to do. The witness took them all to Mr. Nevitt's office, where the agreement was again stated by Mr. Collyer to Mr. Nevitt, and Mr. Nevitt asked Chitarin and the Vuilleumiers if they understood that it was an outright sale of their property, and that Mr. Kelley was to give them a lease of the property for a year, and did they understand that Mr. Kelley would be under no obligation at

the end of the year to resell them the property and they said yes, they understood; that the witness then took all of the parties to Mr. Leon Keys in the escrow department of the bank and told him the parties desired to open an escrow for the sale of the property, the consideration to be \$1,000, and the procurement of a release of the reconveyance of the trust deed that was about to be foreclosed; that it was necessary that arrangements be made with the Citizens' Bank to stop the sale. The witness then telephoned the Citizens' Bank, but they refused to postpone the sale unless they had the money. He told this to Mr. Kelley and the latter asked how much they required, and they said \$18,000 and Mr. Kelley said he would get the money up there. The escrow instruments were signed just before Mr. Kelley left. Leon Keys prepared the escrow papers.

Mr. Keys' evidence shows that the appellants and their adviser, Mr. Chitarin, were fully advised that the deal was a sale.

Guy T. Nevitt testified that the respondent Dorsey Kelley came to his office with the parties to the transaction, being brought there by Mr. Collyer; that the deal was explained to him, and, after questioning Kelley and Chitarin, the witness stated that in his opinion it was a subterfuge, at least it looked like it to him, and that he was afraid the court would look at it the same way; that he thought it was a subterfuge to conceal a loan, and that if it really was a loan it was usurious; that after explaining to the parties that a bona fide sale could be made for a consideration, that would be all right; that Kelley said he could not make any deal that was not legal; they left the office of the witness without reaching a conclusion; that the next day they returned and stated they had agreed upon a sale of the property; that the consideration was to be "the amount necessary to redeem from the foreclosure sale, plus the thousand dollars, plus a lease to live in the place one year. I asked them if they were all in good faith about it, and if they meant it, and if they understood what I had said to them the day before; and the Captain (Chitarin) said he guessed that was the best deal he could make, or else he was going to lose the property." All the documents carrying out the conditions of the escrow agreement are drawn as a completed sale.

[2] As against this evidence, William J. Chitarin testified that the final agreement entered into with Mr. Kelley was that the latter should pay off the loan secured by the trust deed; that the loan was to run for a year at the rate of eight per cent. per annum, and Kelley was to receive a bonus of \$2,000. That it was a "gentleman's agreement" for a loan, with the further agreement to reconvey the property at the expiration of one year, upon the payment to the Kelleys of the amount loaned, with interest and the

bonus. This evidence is in a measure corroborated by the evidence of the appellants. There is also some evidence that at the time of the deal the appellants were not in good health and were thus imposed upon. But there is nothing in the record either by way of evidence or pleading to show that any undue advantage was taken by the respondents. There is also evidence that the value of the property was from \$21,000 to \$50,000, both at the time of the transaction and at the time of the trial. The foregoing does not contain all of the evidence received, but it is sufficient to show that the finding of the court that the transaction was a bona fide sale and not a mortgage is sustained by substantial evidence, and therefore cannot be successfully attacked on the ground of insufficiency of the evidence.

[3, 4] The first point of attack by the appellants is the failure of the court to find the value of the property on March 29, 1927. We believe that this claim is disposed of by the fact that such issue is not material to sustain the judgment. The issue before the court was whether or not the deed under which respondents hold title was intended by the parties as a mortgage. While the testimony of the witnesses as to its value would, in connection with the rest of the evidence, be more or less persuasive on the subject of what the transaction between the parties really was, it certainly could not control the ultimate decision of the court on that question. In other words, the value of the property was simply a part of the evidence to be weighed by the court. The court found the value of the property to be \$25,000. From the reading of the findings on that subject, it probably relates to the time of the trial. It is claimed that this finding is without support in the evidence. An analysis of the evidence discloses that the value of the property is placed as low as \$21,700. It is true that there was no direct testimony that its value was \$25,000, but, as we understand, the court is not bound by a specific figure, but has a right to consider the figures given and the various theories and processes by which the witnesses arrive at their conclusions, and, from them, arrive at its own view as to the true value. But as said in answer to the final point discussed, the finding does not affect the result in this case.

[5, 6] It is also contended that the court erred in finding the rental value of the property at \$100 per month. While we deem this point immaterial, if it were material Mr. Crittenden, their own witness, testified that \$100 to \$125 per month would be a fair rental value. It is also claimed that the answer admits the value of the property to be \$49,999.99, by the denial of the answer that property was or now is of the value of \$50,000. Under technical rules of pleading, such con-

tention is correct. *Janeway & Carpender v. Long Beach Co.*, 190 Cal. 150, 211 P. 6; 21 Cal. Jur., p. 155, § 105. However, evidence was offered on this question by both parties and received without objection, and we therefore deem the court justified in its finding. In any event, it is only a matter of evidence to be weighed by the court, and no matter what the value of the property, it does not control the action of the court as against the weight of other evidence satisfying the court as to the true nature of the transaction.

[7] It is next advanced as a ground for reversal of the judgment that there is no specific finding as to whether or not there was in fact a loan from the defendants to the plaintiffs. Appellants admit that the court intended to find that there was not in fact any loan. The court did find that the property was not transferred to the Kelleys as security for an indebtedness due, nor for the performance of any act or condition by the appellants or any one else; that there was no agreement between the parties for a loan of any nature whatever; that the transaction was a sale of the property for a good and valuable consideration. These findings are a sufficient answer to appellants' contention.

[8, 9] The next objection is that the finding of the court, that the deed was intended to and did transfer said property to defendants in fee simple, and that subsequent to the delivery thereof the plaintiffs retained no title in or to the said property is inconsistent with the court's finding that they did retain a leasehold interest therein. Said findings are not inconsistent for the reason that the finding, which it is claimed is to the effect that the appellants retained a leasehold interest in said property, is that as a part of the consideration for the transfer of the property, the respondents granted to appellants a lease of said property for one year. It was not a retention of an interest in the property by the appellants, but a grant to them by respondents. It is next claimed that the court erred in sustaining objections to plaintiffs' offered evidence of the price for which he could have sold the property. This evidence is directed to the value of the property as bearing upon the question of the transaction as a sale or a loan. There is a great deal of evidence upon this subject, and the evidence offered would be cumulative. Even though the ruling were error, it would, under the circumstances, be harmless. Section 4½, art. 6, Const. of California.

[10] It is also claimed that the court's finding five is unintelligible. This finding is to the effect that the allegations of paragraph number five of plaintiffs' complaint are untrue. It is argued that as there are two actions and but one set of findings, it is impossible to ascertain to which complaint the

above finding refers. However, the findings are divided into two subdivisions, and it is clear from its place in the findings that the one complained of deals with the equitable action. The point is without merit.

The last ground urged for a reversal of the judgment is the sufficiency of the evidence to support the judgment. We have heretofore set forth sufficient of the evidence to sustain the findings, and, notwithstanding appellants' argument, we think the question is one of conflict which has been decided against them. *Ratto v. Younie*, 206 Cal. 421, 274 P. 522; *Capelli v. Dondero*, 123 Cal. 324, 55 P. 1057; *Burt v. Los Angeles O. G. Ass'n*, 175 Cal. 688, 166 P. 993.

We are satisfied that the transaction between the parties was a bona fide sale, and not a mortgage. This being true, it necessarily follows that the relief granted in the action of ejectment was also right.

The judgment in both cases is therefore affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

117 Cal.App. 667
In re EDWARDS.

STEVENS v. AKERS.
Civ. 872.

District Court of Appeal, Fourth District, California.
Oct. 23, 1931.

Infants $\Rightarrow$ 19.

In action to have child declared ward of juvenile court, evidence held not to sustain judgment of juvenile court that child had been abandoned (St. 1915, p. 1236, § 15, subd. 1).

Evidence disclosed that in 1922 on separation of spouses by mutual consent the mother took their two daughters with her, and the father took the two sons; that from 1922 until 1927 the mother did not know anything of the whereabouts of the child involved herein; that when the mother did learn in 1927 that the child had been placed in custody of petitioner by its father, she immediately took steps to regain custody of the child; that in 1926, petitioner had instituted proceedings to have the child declared a ward of the juvenile court; that later, by writ of habeas corpus, the Supreme Court ordered the child restored to her mother to be held by her subject to final determination by the juvenile court; and that on Decem-

ber 2, 1930, that court made an order declaring the minor an abandoned child under Juvenile Court Law St. 1915, p. 1236, § 15, subd. 1.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Petition by Cornelia Stevens, to have Damon Edwards declared a ward of the juvenile court. From a judgment for the petitioner, Alice M. Akers, the mother of the child, appeals.

Reversed with directions.

See, also, 284 P. 916, 208 Cal. 725.

Everts, Ewing, Wild & Everts, C. M. Ozias, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Utley & Nuffer, of El Centro, for respondent.

ALLISON, Justice pro tem.

This is an appeal taken by Alice M. Akers, mother of Damon Edwards, from an order of the juvenile court of Imperial county decreeing that said minor be and remain a ward of the juvenile court of Imperial county, and that said child is an abandoned child, pursuant to the provisions of subdivision 1, section 15 of the Juvenile Court Law of the state of California (St. 1915, p. 1236), and further adjudging and decreeing that said minor child be declared free from the custody and control of his parents Mrs. Leon J. Akers and Damon Barrett Edwards, and that said parents be and they are by said decree deprived of the custody and control of said minor.

It appears from the record that the appellant and Damon Barrett Edwards, father of said minor child, separated in 1922, and that appellant secured an interlocutory decree of divorce from Edwards on the 28th day of August, 1923, in the superior court of Alameda county, and that on the 4th day of September, 1924, a final decree of divorce was entered in said action. Both of said decrees are silent as to the custody of the children of said marriage. At the time of the separation there were four children living, the issue of said marriage, two girls and two boys, and by mutual agreement between the parents the mother took the two girls and the father the two boys. It was agreed between them that the father was to take the two boys and raise them. The boys were twins. During the month of April, 1923, the father of said boys took them to Calexico, Imperial county, Cal., and on the 16th day of September, 1923, placed them in the care and custody of the respondent. At that time the father agreed to pay respondent for their care and maintenance. Pursuant to said agreement, he did pay her for the care of the boys for about eight months, but has paid nothing more

thereon. Respondent continued to keep and care for said children without compensation until the summer of 1925, at which time the father took said boys with him on a short trip to the mountains, and on July 12, 1925, respondent received a letter from the father of said boys stating that they were at the home of his brother at Venice, Cal., and requesting her to come after them, which the respondent did, but returned with the boy Damon only, leaving the other boy at Venice. This letter is the last word that respondent has received from the father. The boy Damon remained in her care and custody until the 17th day of December, 1928, at which time the appellant instituted proceedings in the juvenile court of Fresno county and obtained custody of the boy Damon and retained his custody until, through a habeas corpus proceeding filed in the District Court of Appeal, the minor was restored to the jurisdiction of the juvenile court of Imperial county and to the custody of the respondent at El Centro in said county, subject to such further orders as may or shall be made by said juvenile court. In re Edwards, 99 Cal. App. 541, 278 P. 910, 290 P. 591. On the 12th day of September, 1926, the respondent caused to be filed in the juvenile court of Imperial county a petition to have the minor made a ward of the court pursuant to the provisions of the Juvenile Court Law. Pursuant to this petition, an order was entered by said juvenile court declaring said minor a ward of the court, and adjudging the child to be free from the custody and control of his parents. This order was thereafter set aside because of irregularity in the proceedings. Thereafter a petition for a writ of habeas corpus was filed in the Supreme Court of the state of California, and, after hearing thereon, the Supreme Court ordered that the minor be restored to the mother, the appellant herein, to be held by her subject to the final determination by the juvenile court of Imperial county of the proceedings instituted therein, for the purpose of declaring said child to be free from the custody and control of its parents. In re Edwards, 208 Cal. 725, 284 P. 916. On the 2d day of December, 1930, in the proceedings then pending in the juvenile court of Imperial county, Cal., the court made an order declaring said minor to be and remain a ward of the court, and adjudged that he was an abandoned child pursuant to the provisions of the Juvenile Court Law, and was by said judgment declared to be free from the custody and control of his parents, who were deprived of his custody. He was ordered to remain in the custody of the probation officer of Imperial county to be placed by said probation officer in the care and custody of his mother, the appellant herein, until the final hearing and determination of this action, and until further order of said court. This appeal is from the order above referred to.

It is first contended that the record contains no evidence which in any way tends to show that the appellant ever at any time entertained any intention to abandon her son. It appears that the original petition in this proceeding was filed on September 12, 1926. The petitioner therein and respondent here testified that she had never corresponded with the appellant concerning the minor, had never received any communication of any kind from her while the minor was with her; that she made a number of inquiries to ascertain the mother's whereabouts but was unsuccessful; that she had supported the boy since the father left him with her; that she wrote a number of letters addressed to the appellant, some of which were sent in care of Mr. E. E. Edwards at Sanger, Cal., but received no reply from the mother. She was unable to say whether any of the letters were mailed to the mother as early as, or prior to, September, 1925. The first knowledge she had of the fact that the appellant was endeavoring to recover her child was when she wrote to the probation officer. She could not recall just when that was. She had knowledge from then on that the mother desired to obtain custody of the child, and that she might have written as late as 1927. She kept writing because she did not hear from her. Naturally she did not know whether the mother received the letters or not.

Mrs. Akers testified that she separated from the father of the boys in 1922. They had four children, the issue of their marriage, two boys, twins, and two girls; that they were living at that time at Huntington Lake, Fresno county; that her husband took the two boys, and she kept the two girls. This arrangement was mutual. She obtained a divorce from him, and about two months after the interlocutory decree was entered he took the boys away. He did not tell her where he was going. She had no knowledge concerning the whereabouts of the children. She made inquiries of his brothers and sisters, but could get no information. The next time that she heard of the boys was through a brother of the boys' father and his wife. They told her that Damon was in Calxico; that Raymond was with another brother of her former husband. They told her that Mrs. Stevens had Damon. That was in 1927. About that time she received a letter from Mrs. Stevens stating that she had been looking for her for a long time trying to locate her; that there was \$700 due for the support and maintenance of Damon. The question of the payment of this money was taken up with her by Mr. Dean Edwards, a brother of her former husband, in an effort to arrange for Mr. Edwards to pay the \$700, but nothing came of it. She was unable to pay the money herself. She further testified that she did not receive a letter from Mrs. Stevens in 1925 nor in 1926, and that the first that she heard of the where-

abouts of the boys was in the spring of 1927. She did not know where Matt. Edwards and Dean Edwards were prior to the time that Matt. came to Fresno in the spring of 1927 and revealed the whereabouts of the boys. That she is the fit and proper person to have the custody of the minor. That she can provide for him a suitable home, and will send him to school.

The agent of the state department of social welfare, after investigation and a visit to the home of respondent, found that it was a good home, and that the respondent is capable of providing proper maintenance, training, and education for said child.

On this record, the court found that the mother of said child had known of the whereabouts of said minor for more than one year prior to the filing of the original petition herein (September 12, 1926), and at no time since said minor child has been in the care and custody of said Cornelia Stevens has she communicated with said minor child nor with said Cornelia Stevens, and has at no time ever made provision for the support and/or maintenance of said minor child, and has at no time since said child has been in the custody of said Cornelia Stevens, ever contributed in any manner to the support and/or maintenance of said child. That the mother of said minor child never made any effort to secure the custody or control of said minor child until long after the filing of the original petition herein, and that said minor child has been intentionally abandoned by his parents.

Section 15 of the Juvenile Court Law provides that a person should be declared free from the custody and control of his parents who has been left in the care and custody of another by his parent or parents without any provision for his support or without communication from such parent or parents for a period of one year with intent to abandon said person. When this case was before the Supreme Court on the habeas corpus proceedings, that court had occasion to discuss the facts in this case to some extent, and made the following comment: "These facts show that at the time said order of September 11, 1929, was made and for months before, the petitioner, the mother of said minor, a child of only eight years of age, had been endeavoring to secure the care and custody of said minor, but had been prevented from so doing by the respondents. We are not now questioning the right nor the motives of respondents in resisting petitioner's claims. These facts, however, show the truth of the recital made by the court in its order of September 11, 1929, that is that petitioner had not exercised any parental control over her child and that the child was in need of it. On the other hand, these facts fail to show that the petitioner was incapable of providing parental care for her child, or that she failed or neglected to provide such care for her child.

They show that at the time of the making of said order, and for some months before, she had strenuously endeavored by legal means, and by means which were not at all times strictly legal, to gain control of her child that she might exercise parental control over him." In re Edwards, 208 Cal. 725, 284 P. 916, 919.

Since the above was written, the record discloses that appellant here has been active in her efforts to obtain possession of her child. In re Cordy, 169 Cal. 150, 146 P. 532, 533, 534, after quoting section 224 of the Civil Code relative to adoption proceedings of minors, the court proceeds to say:

"The first and most pertinent question raised by a reading of this section is the question as to whether it contemplates that a child, left in the care and custody of another without provision for its support, may be declared by the court to be 'an abandoned child,' without an intention on the part of the parent to abandon it having been shown. The word 'abandon,' as defined by Webster, means: 'To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance or fidelity; to quit; to forsake.' Webster's New International Dictionary. If this is the usual and ordinary meaning of the word 'abandon,' then it is not to be construed as having a different signification in the section of the Code above quoted, unless the intent of the Legislature to give it another and narrower meaning is to be clearly discerned in the context and from the whole language of the section. This rule of construction should have an especial application to cases of this character, where the natural relation existing between a parent and child is sought to be severed by law. It is the respondent's contention in this case that the language of the section is plain; and that the mere fact of a parent's leaving her child in the care and custody of another for a space of a year without provision for its support is sufficient to warrant a court in determining that the child is an abandoned child. But this cannot have been the legislative intent, for instances will at once occur to the right-thinking and sympathetic mind of the monstrous injustice of the rigid application of such a rule. We think rather that the meaning of the word 'abandoned,' as above given, was intended by the makers of the law to dominate the section, and to cause to be read into every part and provision of it the idea that the acts of the parent in relation to the child enumerated in the statute must have been done with an intent to abandon the child. She must have left it to the care and custody of others with that intention, and a like intent must be shown to underlie her failure, if she

has failed, to make provision for its support.

* * *

"The power of the court in adoption proceedings to deprive a parent of her child, being in derogation of her natural right to it, and being a special power conferred by the statute, such statute should be strictly construed; that 'the law is solicitous toward maintaining the integrity of the natural relation of parent and child; and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. * * * Every intendment should be in favor of the claim of the mother under the evidence, and if the statute is open to construction and interpretation it should be construed in support of the right of the natural parent.'"

In the Matter of the Petition of Kelly, 25 Cal. App. 651, 145 P. 156, the court uses the following language:

"In the second place, we are persuaded to say that the mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of said section of the Code. If the rule were otherwise—that is, if an adjudication of abandonment could legally be predicated on the mere failure by the parents to support their minor children—the result, in innumerable instances, would be to work a manifest wrong upon parents. It is not difficult to conceive of circumstances wholly beyond the control of parents having the deepest affection for their children which would render it impossible for them to support their children or care for them in a proper way. It would, indeed, be a harsh rule which would, under such circumstances, authorize a judicial determination by which the natural right of the parents to the custody and control of their children would be forever severed. * * *

"The promise by the father of the child that he would compensate, when able to do so, the petitioners for taking care of and supporting it, constituted the 'agreement or provision for its support' contemplated by said section, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement."

We are of the opinion that the judgment of the juvenile court is not sustained by the evidence. It is therefore ordered that said judgment be, and the same is, reversed, and the said juvenile court is ordered to dismiss the petition filed herein.

We concur: JENNINGS, P. J.; MARKS, J.

117 Cal.App. 586

CRUM et ux. v. MT. SHASTA POWER CORPORATION.

Civ. 4264.

District Court of Appeal, Third District, California.

Oct. 21, 1931.

Rehearing Denied Nov. 20, 1931. Hearing Denied by Supreme Court Dec. 18, 1931.

1. Waters and water courses ☞39.

Impounding and commingling of bulk of water of river in pool during dry season rendered land adjoining pool tributary to river during that period, as respects riparian ownership.

2. Waters and water courses ☞39.

Commingling of waters of respective streams in same reservoir is sufficient to render land adjoining reservoir riparian to both streams.

3. Waters and water courses ☞39.

Land adjoining pool was, so long as bulk of water from river remained impounded therein, riparian to river.

4. Waters and water courses ☞39.

Land adjoining pool in which water from river was impounded during dry season was not, during season that flood waters and current carried river water down over dam, riparian to river.

5. Waters and water courses ☞79.

Riparian owner has no authority to divert water from river at point above its own riparian land.

6. Waters and water courses ☞46.

Use of water of river for production of hydroelectric power *held* for proper riparian and beneficial purposes.

7. Waters and water courses ☞133.

Adverse possession must be accompanied with actual use of water for continuous and uninterrupted period, must be open, notorious, and exclusive, and hostile to rights of parties against whom it is claimed under claim of right.

8. Waters and water courses ☞133.

Use of water of river by riparian owner for hydroelectric purposes *held* not such use under circumstances as would ripen into claim of adverse possession.

9. Waters and water courses ☞85.

Law will presume damages as result of unlawful diversion of natural flow of stream past riparian land.

10. Waters and water courses ☞85.

Presumption of existence of damages as result of unlawful diversion in natural flow of stream is merely for purpose of affording equitable relief.

11. Waters and water courses ☞87.

Presumption of existence of damages as result of unlawful diversion in natural flow of stream being inapplicable where injunction had been abandoned, burden was on riparian owner claiming damages to establish same.

12. Waters and water courses ☞51.

Riparian owner has right to have stream flow past land in its usual course.

13. Waters and water courses ☞86.

Measure of damages for unlawful diversion of water from land which is riparian to stream is difference between market value of land before and after diversion.

14. Waters and water courses ☞86.

\$20,000 damages for diversion of water of river from riparian land thereto *held* excessive, under circumstances.

Owner of land adjoining pool into which river discharged water and which was riparian to river during certain seasons of year was deprived of no water for irrigation or domestic use by virtue of diversion of water from river, in that he only pumped a portion of water from pool to irrigation land, and pool after diversion remained at normal depth, and the damages awarded was in excess of price at which land was purchased when sold at higher valuation.

15. Waters and water courses ☞51.

Riparian owner is entitled to maintain such natural conditions of stream which flows past land as are beneficial thereto.

16. Waters and water courses ☞51.

Riparian owner could not complain because level of pool was maintained by artificial dam so long as owner secured original quality and quantity of water.

17. Waters and water courses ☞51.

Mere artificial change in natural condition of stream is not necessarily actionable by riparian owner, unless it results in injury to land.

18. Eminent domain ☞145(1).

In eminent domain cases other than those involving right of way, benefits accruing to property may be set off against damages assessed (Code Civ. Proc. § 1248, subds. 3, 4; Const. art. 1, § 14).

19. Waters and water courses ⇨86.

Benefit accruing to riparian lands from improvements to natural dam was to be considered in estimating amount of damages, if any, sustained by diversion of water (Code Civ. Proc. § 1248, subs. 3, 4; Const. art. 1, § 14).

20. Waters and water courses ⇨64.

Riparian owner is entitled to substantially unpolluted stream.

21. Waters and water courses ⇨87.

Evidence *held* insufficient to establish defendant's diversion of water caused pollution of water in pool to which riparian land was adjacent.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Merton Crum and wife against the Mt. Shasta Power Corporation. Judgment for plaintiffs, and defendant appeals.

Reversed.

Superseding opinion in 299 P. 822.

Wm. B. Bosley, Thos. J. Straub, Jones & Dall, Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellants.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This cause is presented to this court upon rehearing.

The appeal is from a judgment which was entered upon the rendering of a verdict for \$20,000 as damages for the diversion of the water of Fall river from land which was deemed to be riparian thereto. The defendant, which is a hydroelectric power company, was also enjoined from using the water of that river until the judgment for damages is satisfied. The respondents, husband and wife, for convenience will be referred to as plaintiff.

Fall river empties into Pit river in the northeastern portion of Shasta county. The plaintiff owns 116 acres of farm land bordering on the south bank of Pit river, on Pitville pool, a distance of 5 miles above the mouth of Fall river. This pool is a mere enlargement of the bed of Pit river. Its waters are impounded during the summer months by a lava rock reef which forms a dam across Pit river below the mouth of Fall river. The plaintiff's land does not border on Fall river, but, upon the contrary, is located a distance

of five miles from the nearest point to the last-mentioned stream. The plaintiff's land is, however, claimed to be riparian to Fall river since this stream contributes a substantial quantity of water which is impounded in this tributary pond and mingles with the body of the water of Pitville pool upon which the land is located.

Pit river is a perennial stream, the source of which is Goose lake in Northern California. It flows in a southwesterly direction through Modoc and Shasta counties, emptying into the Sacramento river north of Redding. It has a drainage of 4,000 square miles. In the lower reaches of Pit river it has a maximum flow of 10,000 second feet of water in the winter time. In the hot months of summer the minimum flow is but 30 second feet. Fall river rises in the foothills of Western Shasta county and flows southeasterly, emptying into Pit river at Fall river mills. Fall river has a maximum of 1,800 second feet of water, with a minimum of approximately 1,000 second feet.

Pitville pool extends from the rock reef above mentioned upstream a distance of 8½ miles to Young's Falls, just south of the town of Pitville. The bed of this pool is substantially level throughout its entire length. The pool has an average depth of 13½ feet of water in the summertime. Its width is 145 feet. It covers an area of 150 acres. It then contains 2,000 acre feet of water. It is perpetually filled by the natural flow of water down Pit river, which stream is augmented by water from its upper tributaries, together with a quantity of water which is drained into the pool from the McArthur canal, which conveys water from Tule river. Fall river empties into this pool at a point 500 feet above the rock reef dam across Pit river. It contributes a large quantity of water to this pool, which mingles with, and becomes an inseparable part of, the corpus of water in Pitville pool. Before and after the diversion of Fall river, the surface of this pool was always maintained at an elevation which caused water to flow over the rock reef below the confluence of these two rivers. The average loss of water from this pool because of evaporation during the months of May to September, inclusive, of each year, is 7.3 vertical inches. There is no evidence of additional loss from seepage. The loss of water from this pool during the dry season, from evaporation and all other causes, is overcome by the minimum flow of 30 second feet which descends Pit river over Young's Falls at the head of the pond. The maximum quantity of water which was pumped by the plaintiff from this pool for irrigating 20 acres of his land never exceeded a fraction of one second foot of water. There is no evidence that the irrigation of his entire tract of 116 acres of

land would require more than one second foot of water during these summer months. The amount of water retained in this pool was never diminished, except temporarily, by the diversion of Fall river. The plaintiff does not complain of a diminution of water from this pool or a lack of water necessary for irrigation or domestic purposes. His claim of damages is based upon the doctrine of usufructuary title to the water of Fall river upon his riparian land which entitles him to the natural flow of the stream regardless of his actual use of the water.

The defendant is a hydroelectric power company. It owns all the land riparian to Fall river from its confluence with Pit River to a point $2\frac{1}{2}$ miles up Fall river. It also owns all the land riparian to Pit river from a point 600 feet above the juncture of these streams, down to the power plant which is located 7 miles below the rock reef dam.

In 1920 the defendant began the construction of its dam, penstock, and tunnel at Manning Falls on Fall river one mile above the mouth of this stream, for the purpose of diverting the water therefrom. The plaintiff had knowledge of these operations and of the purpose of the defendant to divert the water. He, however, testified he did not know the diversion of Fall river would affect the level of the water in Pitville pool. He also testified he did not then know his land was riparian to Fall river. He made no protest against the diversion of this stream. From the point of diversion at Manning Falls, the defendant extended its tunnel southerly several miles across the intervening tract of land, connecting it with Pit river at a point 7 miles south of the rock reef dam. At the juncture of this canal with Pit river, the defendant's power plant No. 1 was constructed. September 30, 1922, the construction work for this enterprise was completed. On that date the defendant first temporarily diverted the water of Fall river through its penstock, tunnel, and power plant for a trial run. This diversion resulted in lowering the water in Pitville pool a depth of 5 feet. The water of Fall river was immediately turned back into its natural channel, and the pool was again filled to its normal depth. The plaintiff does not complain of damages resulting from this temporary diversion of the stream.

There was a break in the western portion of this natural rock reef barrier in Pit river below the mouth of Fall river. This natural break contained a V-shaped crevice some 8 feet in depth. Through this break in the reef a considerable quantity of water was enabled to escape from the Pitville pool. Below the reef there was a series of rapids. Below the dam the elevation of the bed of Pit river dropped 18 feet in a distance of 300 feet of its course. After the water of Pitville pool was lowered by means of the diversion of Fall river, the defendant constructed a substantial

concrete apron or dam across the break in the reef connecting the intact portion of the rock ledge with the western shore of Pit river. The V-shaped crevice was closed. The concrete dam was built from a line level with the top of the rock reef to a depth of 9 feet. It contained seven gates to act as spillways in time of flood water. The artificial improvement to the natural rock reef dam effectually impounded the water and restored the pool to its normal depth. The water of Fall river was then again diverted through the defendant's canal. The permanent diversion of Fall river, however, did not lower the depth of Pitville pool after the concrete wing of the rock reef dam was constructed. The water from this pool continued at all times to flow over the dam. The plaintiff always had access to all the water he required, and to all the water he had ever enjoyed the use of from this pool.

This action was commenced June 4, 1923. The complaint contained two counts. The first cause of action sought injunctive relief to prohibit the diversion of Fall river. The second cause prayed for damages. All of the material allegations of the complaint were controverted. The cause was tried with a jury. A verdict of \$20,000 damages was rendered in favor of the plaintiff. Findings were adopted favorable to the plaintiff. A judgment was accordingly entered in his favor for \$20,000 damages, and the defendant was perpetually enjoined from diverting any of the water of Fall river, unless said judgment was satisfied within sixty days after the same became final. From this judgment, the defendant has appealed.

The appellant asserts that certain findings and the judgment are not supported by the evidence. The chief contentions are that plaintiff's land is not riparian to Fall river, for the reason that the current from that stream does not flow up Pitville pool as far as the location of the land; that the diversion of Fall river has not diminished the water in Pitville pool and the plaintiff has therefore shown no actual damage as a result thereof; that the court was without authority to issue an injunction which disregards the defendant's riparian rights to at least a portion of the water of Fall river; and that the amount of damages which was allowed is grossly excessive, and is unsupported by competent evidence.

A vast amount of evidence was adduced at the trial, and much space is devoted in the briefs to the question as to whether the current from Fall river carries any portion of the water of that stream up Pitville pool to the land of plaintiff. The evidence which was offered for the purpose of showing that the current from Fall river actually did convey the water of that stream up to the land of plaintiff, 5 miles above the rock reef dam, is very unsatisfactory. The plaintiff's theory is

that the water of Fall river which is slightly colder than the water of Pit river therefore displaces the Pit river water at the bottom of the pool, and thus creates a subsurface current which finds its way upstream along the bed of the pond. This theory furnishes no scientific principle which appeals to reason. It was also contended that the water of Fall river is purer and clearer than that of Pit river. No satisfactory experiments were offered by means of which the actual particles of the water of Fall river may be traced to the plaintiff's land. By neither analysis, color, temperature, nor ingredients may it be reasonably said the identical corpus of the Fall river water was traced to the land of plaintiff five miles above the confluence of these two streams. It seems more reasonable to believe that, when the water of Fall river was poured into this reservoir called Pitville pool, it circulated and mingled indiscriminately with the waters contributed thereto from all other sources, so as to equalize the temperature and form the corpus of a miniature lake which was impounded by the barrier of the rock reef dam at its lower extremity.

[1] This solution regarding the effect of impounding the water of Fall river and mingling it in Pitville pool with the water of Pit river during the dry season is amply supported by the findings of the court, which read in part: "When the waters of Fall river flowed into said pool in the state of nature they commingled with the waters of Pit river and flowed up the channel of Pit river to Young's Falls, filling the pool in Pit river between said rock reef and said Young's Falls during the low water season of each year." In accordance with this view, the impounding and commingling of the bulk of the water of Fall river with that of Pit river in Pitville pool during the dry season, regardless of the existence of a current which may actually carry Fall river water up to the lands of the plaintiff, constitute a pond which thereby becomes tributary to Fall river during the dry season, and renders the plaintiff's land which is situated on Pitville pool riparian to Fall river during that period of time. The findings of the court to the effect that an upstream current does exist in Pit river which carries Fall river water up to the lands of plaintiff are surplusage and harmless.

[2] It may seem like fiction to say that land which is located on a pond formed by a dam in the bed of one stream may still be riparian to another stream which is 5 miles distant from this land. While Fall river contributes a substantial quantity of water which mingles with and remains in Pitville pool, this pond may be deemed to be an inlet or arm of Fall river, in spite of the fact that there is no current in the pool by means of which the water of the last-mentioned stream may be actually traced to the locality of the land. It

is not essential there shall be a current of the stream which actually washes the shores of plaintiff's land. It is sufficient if the waters of the respective streams mingle in the same reservoir to form the corpus of the same pool. The pond then becomes a basin which is tributary to both streams. This situation may then make plaintiff's land riparian to both rivers. The case of *Turner v. James Canal Co.*, 155 Cal. 82, 99 P. 520, 522, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, is authority for this exact conclusion. It is there said: "The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. *Duckworth v. Watsonville, etc., Co.*, 150 Cal. 526, 89 P. 338. Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream. * * * We have never heard that riparian rights depended upon the character of the current in the water upon which these rights extend. They exist if the water be an artificial pond made by a dam in a water course, as well as when it is an unobstructed running stream."

[3] So long as the bulk of water from Fall river remains impounded in Pitville pool, we may assume, upon the reasoning of the last-mentioned case, that plaintiff's land is riparian to Fall river.

[4] It must be conceded, however, that the same situation does not prevail in times of flood water during which these two rivers rush down over the dam with mighty velocity at a depth of many feet. It is apparent that under such conditions very little of the water of Fall river remains impounded in the pool. During the season when the flood water and current of Pit river carry Fall river water down over the dam, the plaintiff's land is not riparian to Fall river. It follows that, while the plaintiff's land may be riparian to Fall river during times of low water in the

summer, it is not riparian to that stream during the season of flood water in the winter months.

The appellant suggests upon rehearing that this court has misconstrued the application of the case of *Turner v. James Canal Company*, 155 Cal. 82, 99 P. 520, 524, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, by holding that, because the Pit and Fall rivers both contribute to the supply of water in the Pitville pool, the land of plaintiff would become riparian to Fall river during the season when its water became an inseparable part of the corpus of that pond. It is pointed out that the Supreme Court held that the Fresno slough was an arm or inlet of the San Joaquin river only when the water from Kings river was not flowing into the slough; that the court did not hold that the land which was situated on the slough was riparian to both rivers at the same time. It is therefore argued that this court erred in holding that the plaintiff's land was riparian to both Fall and Pit rivers at the same time. We have re-examined that case with great care, and have concluded there is nothing therein contained which is in conflict with what was said in our former opinion and which is herein adopted as the law of this case respecting that subject.

It is true the *Turner Case* declares that: "When Kings river does not run into the slough, the latter becomes a part of the San Joaquin river, with which it is then connected." It appears from the *Turner Case* there were seasons when no water flowed into the Fresno slough from the Kings river. It is said in that regard: "The court does not find the length of time of each season that it happens that the water of Kings river does not reach Fresno slough and when, consequently, the slough receives water from the San Joaquin river exclusively, nor does it find what proportion of the years this latter condition prevails during the entire year. It clearly appears from the evidence, however, that this is the usual and ordinary condition, that seldom, during the dry season of any year, does Kings river water flow into Fresno slough for more than six weeks, and that, during that season, in some years it does not flow into the slough at all."

Nowhere is it stated in the *Turner Case* that the land of the defendant, which was situated on Fresno slough, could not become riparian to both Kings and San Joaquin rivers at the same time. It does not appear the waters of both of these rivers were ever mingled to form the corpus of the slough. That question does not appear to have been an issue in that case. There is no valid reason why land which borders on an inlet, lake, or pond, which is substantially contributed to by the waters of two rivers, may not become riparian to both streams at the same time. If the land could become riparian to only

one river at a time, under such circumstance it would become difficult to determine which stream should bear the burden of the riparian rights.

In the present case the facts are somewhat different from those of the *Turner Case*. In this case there is a natural rock reef dam below the confluence of the two rivers which serves to impound the bulk of the waters of both streams during the dry season. In the *Fresno slough case (Turner Case)*, no such condition exists. We are unable to escape from the principle determined in the *Turner Case* which makes the plaintiff's land in the present case riparian to Fall river while that stream contributes a substantial quantity of water to Pitville pool which is impounded therein.

[5] It is true that the defendant in the present case has no authority to divert water from Fall river at a point above its own riparian lands. In the case of *Miller & Lux v. Enterprise, etc., Co.*, 169 Cal. 415, 441, 147 P. 567, 577, it is said: "It is to be remembered that a riparian proprietor's title to the water begins only when it reaches his land and lasts only so long as it is flowing past his land. Until it reaches his land he has no title whatsoever, and no right other than the protective right to see that the full flow past his land to which he is entitled is not illegally diminished."

But it will be observed the defendant owns all land on both sides of Fall river from a point above the diverting canal in that stream to a point on Pit river below the place where the water is returned to the last-mentioned stream where its power plant is located. It also owns the land riparian to the lower end of the Pitville pool from a point which is 600 feet above the confluence of the two rivers. The defendant has therefore not violated the above rule. That rule has no application here.

[6] The first cause of action which was alleged in the complaint herein asked for an injunction to prohibit the diversion of the water of Fall river. It appears that an injunction was granted as mere security for the payment of the judgment for damages. There may be some uncertainty regarding the application of the injunction in this case. Upon oral argument on the rehearing of this cause, the respondent conceded that the injunction which was granted might be disregarded. Relying upon this concession, we shall therefore omit all that was said by this court in the original opinion on that subject, except that in justice to the respondent the question of appellant's title to the water of Fall river by adverse possession should be determined. In his briefs, the respondent contends that he is entitled to an injunction to prevent the continued diversion of the water of Fall river so that its use by the appellant may not ripen into title by adverse

possession. The appellant, however, specifically disclaims title to this diverted water by adverse possession. It asserts the right to divert and use this water as a riparian owner thereof for the beneficial purpose of manufacturing hydroelectric power only to the extent that other riparian owners are not in need of the water. It has been specifically determined by the Supreme Court in the case of *Fall River Irrigation District v. Mt. Shasta Power Corp.*, 202 Cal. 56, 259 P. 444, 50 A. L. R. 264, that the appellant's use of the water of Fall river was for proper riparian and beneficial purposes. *Seneca Cons. G. Mines Co. v. Great Western Power Co.*, 209 Cal. 206, 215, 287 P. 93, 70 A. L. R. 210.

[7] Adverse possession must be accompanied with actual use of the water for the statutory period; it must be open, notorious, and exclusive; it must be hostile to the rights of the party against whom it is claimed; it must be under a claim of property right; it must be continuous and uninterrupted. 2 *Kinney on Irr. & Water Rights*, p. 1876, § 1048; 27 R. C. L., p. 1290, § 201.

[8] Under the circumstances of this case, it may not be said the appellant's diversion of the water of Fall river will ripen into a claim of adverse possession. In the case of *Pabst v. Finmand*, 190 Cal. 124, 130, 211 P. 11, 13, it is said with regard to adverse possession of water: "In the absence of a showing that the upper owner is using the water under a claim of prescriptive right, the lower owner has the right to presume that such owner is only taking that to which he is entitled as a riparian owner by virtue of his riparian right. * * * Even if the upper riparian owner is using all the water of the stream, still, if the lower riparian owner is not then using any and has no desire to do so, such use by the upper riparian owner would not be adverse, and, if continued five years, would not gain him a prescriptive right."

So, also, in the case of *Oliver v. Robnett*, 190 Cal. 51, 55, 210 P. 408, 410, it is said: "Title by prescription is only gained to the extent to which the rights of the lower riparian owner are interfered with. * * * The lower riparian owner * * * cannot complain of the use by an upper riparian owner except by showing that the upper owner uses an unreasonable quantity of the stream, having regard to the needs of the lower owner, and, consequently, that the lower owner cannot enjoin the use by an upper owner unless he alleges such unreasonable use to his injury."

There is no issue in the present case regarding an alleged unreasonable use of water on the part of the appellant, nor is there an issue involving the partition of water between riparian owners. Adverse title on the part of the appellant is not an issue in this case. It follows that an injunction is not warranted on the theory that it would pre-

vent the appellant acquiring title to the water by adverse possession.

The plaintiff asserts his right to damages in the present case under the doctrine of usufructuary title on the theory that the fee to his land has been impaired by an unlawful diversion of the water of Fall river. There is a conflict of authorities regarding the application of this doctrine. Some California cases assert that it should be modified so as to permit all riparian owners of land to enjoy the use of a reasonable share of the water of a stream for beneficial purposes. *Turner v. James Canal Co.*, 155 Cal. 82, 94, 99 P. 520, 525, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823; *Half Moon Bay Land Co. v. Cowell*, 173 Cal. 543, 160 P. 675; *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11. Most modern authorities from other jurisdictions agree that this doctrine is inequitable and obsolete. It is founded upon a fiction of law.

In a rapidly developing state, with a growing population, mighty industries, and expansive farms which demand an increased allotment of water, it seems imperative this ancient common-law rule should be speedily modified to serve the needs of the public. It is incompatible with the interests of modern agricultural and industrial conditions in this state that a riparian landowner be permitted to watch a stream flow uselessly past his premises to the sea while upper riparian owners are deprived of their reasonable share of the water for beneficial purposes. Mr. Justice Shaw wisely said in the case of *Turner v. James Canal Co.*, supra: "If this supposed rule were strictly enforced against riparian owners, as well as appropriators, the waters of the streams in the state could not be used at all, but would flow to the sea. * * * The rule is evidently not suited to the conditions of a dry climate such as we have in this state. * * * Each riparian owner has a right to a reasonable use of the water on his riparian land, for the irrigation thereof, and that the so-called common-law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water."

The learned author of *Kinney on Irrigation and Water Rights*, in volume 3, page 2943, says: "We deem the true rule to be that the lower riparian owner seeking the injunction must show some real, material, and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water. * * * Owing to the great need and scarcity of water in this western country, and the necessity that all of the available water supply be put to some beneficial use or purpose, the courts are rapidly coming to this view."

The justice of this suggested modification applies with increased force to the fact. 

the present case. The water of Fall river never flowed past the premises of the plaintiff. His property is situated 5 miles above the mouth of this stream. The depth of the water in Pitville pool remains exactly the same as it was before the diversion complained of. There is no satisfactory evidence that either the quality or the quantity of water in the pool has been changed by the diversion of Fall river. There was adequate water in this pool for all purposes for which the plaintiff desired it. The small quantity of water which he pumped from this pool had no appreciable effect upon its volume. There is no evidence that a continuation of the present condition would ever result in depriving the plaintiff of the use of any water which he now possesses.

[9-11] It is true the law will presume the existence of damages as the result of an unlawful diversion of a stream, under certain circumstances, without proof of that fact. But this presumption is for the purpose of affording equitable relief. Since the injunction has been abandoned in the present case, the application of the doctrine of presumptive damages does not apply. The burden is on the plaintiff to sustain his allegation of damages by competent proof thereof. It becomes necessary for him to show that his property was actually damaged by the diversion of the water of Fall river.

[12] The plaintiff asserts his right to damages in this case upon the doctrine of usufructuary title to the water of Fall river as a part and parcel of his land which is technically riparian to that stream by virtue of the fact that it contributes a substantial quantity of water to the pool in Pit river upon which his land actually borders. The principle of usufructuary title to water is declared in 27 Ruling Case Law, 1091, § 30, as follows: "It is the well settled general rule that a riparian proprietor has a right to have the water of a stream flow down to his land as it is wont to run, in its natural mode and course, undiminished in quantity and unimpaired in quality, unless this right has been limited or destroyed by an appropriation and adverse use thereof by some other person, continued sufficiently long to create a right in the adverse holder. This right of the riparian proprietor to the flow of the water is inseparably annexed to the soil, and passes with it not as a mere easement or appurtenant, but as a part and parcel of it. * * * It is a private property right in the proprietor within the protection of the constitutional provision that private property shall be forever held inviolate. * * * The property consists, not in the water itself, but in the added value which the stream gives to the land through which it flows."

The controversy regarding the application of the foregoing doctrine of usufructuary ti-

tle to water has been set at rest in this state by the case of *Herminghaus v. So. Calif. Edison Co.*, 200 Cal. 81, 112, 252 P. 607, 615, wherein it is said: "The riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.'"

We have held that plaintiff's land is technically riparian to Fall river because it borders on Pitville pool, to which pond that stream contributes a substantial quantity of water during the dry season. It follows that a diversion of that river destroys the natural condition which makes the land bordering on Pitville pool riparian to that stream. If the contribution of Fall river water to Pitville pool is beneficial to the land of plaintiff, then he is afforded a remedy for its withdrawal, by means of a suit for damages or for injunctive relief. He has seen fit to rely upon a suit for damages.

The appellant contends that, since the flow of Pit river is always adequate to keep the pool filled to a depth which results in a constant flow over the rock reef barrier, the contribution of Fall river water is neither necessary nor beneficial to plaintiff's land. This is not necessarily true. Conditions may change. The removal of Fall river water may diminish the quantity or impair the quality of the water which is impounded in that pool. Assuming the evidence does adequately show the water which is normally contributed to Pitville pool is beneficial to the land of the plaintiff which is located thereon, the plaintiff would be entitled under the pleadings in this case to whatever actual damages he has suffered from the diversion of the stream.

[13] The measure of damages for the unlawful diversion of water from land which is riparian to a stream is the difference between the market value of the land before and after the diversion. 26 Cal. Jur. 550, § 794; *Seneca Cons. Gold Mines Co. v. Great Western Power Co.*, 209 Cal. 206, 222, 287 P. 93, 70 A. L. R. 210. This is the method by which the plaintiff sought to establish his damage in the present case.

[14] In view of the circumstances of this case, the damages which were found by the jury and fixed by the judgment are excessive. The water of Fall river did not flow past the plaintiff's property. His land was situated 5 miles from the nearest point to this stream. The quantity of water in Pitville pool remained exactly the same after the diversion as it was before that occasion. The plaintiff was deprived of no water by virtue of the diversion. The pool was kept filled by the natural flow of Pit river. The plaintiff pumped from Pitville pool all the water which he

desired or could use. He did not know, until shortly prior to the commencement of this action, that his land was deemed to be riparian to Fall river. It seems highly speculative to say that his land depreciated in value on account of the diversion of a stream which is 5 miles distant from the property, unless the removal of Fall river water from Pitville pool detrimentally affected his property rights. Some tangible evidence of actual damage should be shown.

The evidence of damage in the present case is insufficient to support the judgment. The amount of damages is excessive. In spite of the fact that the plaintiff was deprived of no water which he desired to use, that he pumped only one second foot of water from the pool to irrigate less than 20 acres of land which was used chiefly for grazing purposes, that the flow of water down Pit river kept the pond filled to the normal depth so that it always ran over the top of the dam, that the plaintiff did not know his land was deemed to be riparian to Fall river until shortly before this action was commenced, that he suffered no monetary loss by virtue of the diversion, the jury awarded damages in the sum of \$20,000. This is over \$172 an acre. The evidence shows that his entire tract of land was purchased in 1920 for \$14,000. This was the time when land sold for its highest valuation. There is no evidence of sales of land in that vicinity for more than \$100 an acre. There were sales testified to for from \$30 to \$60 an acre.

Moreover, the evidence in support of damages is incompetent. It was based upon the erroneous assumption that the depth of Pitville pool was permanently decreased 4 or 5 feet after the diversion of the water of Fall river, and that the plaintiff's land was therefore deprived of the benefit of the use of water. This is not true.

The plaintiff's evidence of damage sustained by virtue of the diversion of the water of Fall river rests upon the testimony of six witnesses, to wit, Loosley, Lee, Reynolds, Joerger, Opdyke, and Roderick McArthur. These witnesses testified that before the diversion in 1922 the land was worth from \$250 to \$400 an acre. Over the objections of the defendant, each of these witnesses was erroneously permitted to answer a hypothetical question in substantially this language: "Assuming that on and after September 30, 1922, the Mt. Shasta Power Corporation diverted all of the waters of Fall river above its confluence with Pit river, and by reason of the diversion of the waters of Fall river the water level in Pit river at the Crum place dropped from four to five feet in elevation, and that the source of supply of Pit river from Fall river was thereby eliminated, what in your opinion would be the market value of the Crum lands after that condition existed?" To this mis-

leading question these witnesses replied that the value of the land would be reduced to from \$15 to \$40 an acre. Some witnesses testified that under such circumstances it would have no value. These estimates of damage were based upon the erroneous assumption that the water in Pitville pool was permanently reduced in depth 4 or 5 feet, and that the Crum land was thereby permanently deprived of the benefit of all water for irrigation purposes. Mr. Reynolds said: "The water being withdrawn from the land, it can only be used for one purpose, practically. That would be dry farming, grain farming you might say. In my opinion, when you withdraw the water from the land in this country, you are taking about all the value that it has. * * * I wouldn't consider that it had any value [without the water], for that reason, very little value. Probably it would sell for something, but not to me."

The undisputed fact, according to the record in this case, is that the water in Pitville pool was immediately restored to its original depth, and thereafter remained at its normal level when the dam was improved by the construction of the concrete apron. The depth of the water in Pitville pool was diminished only temporarily during a "trial run." The plaintiff does not complain of damage which occurred during the brief period in which the depth of the water in the pool was reduced. The witnesses did not base their estimate of damages upon the mere diversion of the water of Fall river, nor upon the diminution of the value of the land because of an artificial change in the natural rock reef dam, by the construction of a concrete apron. It may not be reasonably said this artificial change damaged the plaintiff's land. Upon the contrary, it benefited his land. For it served to retain more water in Pitville pool than would have otherwise been impounded therein. It seems conclusive that these witnesses based their estimate of the amount of damages solely upon the theory that the level of the water in Pitville pool was lowered 4 or 5 feet by the diversion of the stream. The explanation of the estimate of damages which was fixed by the witness Reynolds was that "the water being withdrawn from the land, * * * [the result] would be dry farming. * * * Withdraw the water from the land in this country, you are taking about all the value that it has." From the hypothetical question above quoted it is apparent the witnesses based their estimates of damages solely upon a permanent absence of water in the pool to the extent of 4 or 5 feet in depth. This assumption is in conflict with the undisputed facts of the case. A verdict for damages based upon such an erroneous hypothesis is clearly unsupported by the evidence.

[15] It is suggested the defendant had no right to change the natural condition of the rock reef dam by closing the V-shaped orifice therein with a concrete apron so as to impound more water in the pool than it would have otherwise retained; that the plaintiff was entitled to have the dam maintained in its original natural condition; that, since the depth of the pool was temporarily diminished 4 or 5 feet by the diversion of Fall river before the dam was improved, the measure of plaintiff's damages should be estimated on the basis of the condition of the dam before the concrete apron was constructed; that the hypothetical question based upon a permanent reduction of the water in Pitville pool was therefore proper. We are convinced this is not true. The construction of the artificial concrete apron on the natural rock reef dam was not detrimental to the plaintiff. Unless it caused the water of Pitville pool to become stagnant by impounding more water therein than it formerly held, it would become a benefit rather than an injury, for it furnished the plaintiff with an increased quantity of water. The water thereafter continued to flow over the dam at all times. It is true that a riparian owner is entitled to maintain such natural conditions of a stream which flows past his land as are beneficial thereto. But it is unreasonable to hold that one may complain of alterations in natural conditions, which changes are not detrimental.

[16] The respondent may not complain of the mere artificial means of supplying the water so long as he secures the same quantity and quality which were furnished by the natural flow of the stream. In the case of *Wiggins v. Muscuplabe L. & W. Co.*, 113 Cal. 182, 196, 45 P. 160, 164, 32 L. R. A. 667, 54 Am. St. Rep. 337, it is said: "The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream, or by artificial means."

It will be recalled the defendant owns all the land on both sides of the river where this dam is located. Since the improvement in the natural dam served to impound a greater quantity of water in the pool, we assume the change was a benefit and not an injury to the land of plaintiff.

Referring to the remedy of a riparian owner of land for injuries resulting from the construction of a dam by an upper owner, it is said in 40 Cyc. at page 682: "To justify a recovery on any of these grounds, some actual and appreciable injury to the plaintiff must be shown."

On page 666 of the same volume it is said: "A riparian owner may lawfully erect a dam

across the stream on his own land, provided it does not materially injure other owners on the stream."

Mr. Justice McFarland says in the case of *Fisher v. Feige*, 137 Cal. 39, 69 P. 618, 619, 59 L. R. A. 333, 92 Am. St. Rep. 77: "A man may build a dam across a stream on his own land, provided that thereby he does not appreciably diminish the amount of water which should naturally flow onto the land of his neighbor below."

[17] A mere artificial change in the natural condition of a stream is not necessarily actionable by a riparian owner, unless it results in injury to his land. In *Coleman v. Le Franc*, 137 Cal. 214, 69 P. 1011, the court quotes with approval from *Charnock v. Higuerra*, 111 Cal. 473, 44 P. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195, as follows: "'Every diversion of water from a stream is artificial—a disturbance of the natural order of things. A dam or a ditch is as such an artificial mechanism as a pump—* * * the one alters the natural condition in the same sense that the other does,' and it was held that the method of diversion was immaterial, so long as the use did not infringe the like and equal rights of others."

Upon the foregoing authorities we are persuaded the defendant's construction of the improvement to the dam did not create a liability against it, in the absence of evidence that this change in the natural condition of the rock reef was detrimental to the land of the plaintiff.

[18, 19] It is asserted that damages should be estimated in the present case, regardless of the benefit which may have resulted from the impounding of water in Pitville pool by means of the improvement to the dam which was constructed by the appellant, that the doctrine of eminent domain is here involved, and that compensation for the water taken must be allowed under article 1, section 14, of the Constitution of California, "irrespective of any benefits from any improvement" which may have been made. That section of the Constitution reads in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation, except a municipal corporation or a county or the state until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation. * * *"

We are of the opinion the rule of excluding the value of improvements from an estimation of damages in certain eminent domain proceedings has no application in this case. The above provision of the Constitution limits the exclusion of the value of

improvements to the condemnation of rights of way. It has no application to the taking of other private property. *S. F., A. & S. R. R. Co. v. Caldwell*, 31 Cal. 368; *Calif. Pac. R. R. Co. v. Armstrong*, 46 Cal. 85. The rule in California is well established in eminent domain cases, other than those which involve rights of way, to the effect that both general and special benefits which accrue to either the portion of property which is taken or that which remains may be considered and set off against the damages which are assessed. 2 *Lewis on Eminent Domain* (3d Ed.) 1192, § 692. The rule is different in some other jurisdictions. In accordance with the preceding statement of the rule in California, section 1248 of the Code of Civil Procedure specifically requires the court to ascertain and allow the value of improvements as an offset to the damages resulting from the condemnation of private property. That section of the Code under the title of Eminent Domain reads in part:

"The court * * * must ascertain and assess: * * *

"3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

"4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property."

It seems clear that any benefit which may have accrued to the land of plaintiff as a result of the improvement to the dam, so as to impound a larger quantity of water for his use, should be taken into consideration in estimating the amount of damages, if any, which were sustained on account of the di-

version of Fall river. Moreover, it is competent to consider the result of the improvement to the dam in determining whether the plaintiff's riparian title to the water was impaired. The appellant contends that, because of its improvement to the dam, the plaintiff lost no water to which he was entitled. This is a proper question of fact to be determined.

[20] The respondent further asserts that the diversion of the water of Fall river resulted in the pool becoming stagnant and caused a dense growth of weeds and other vegetable matter in the water of the pool, rendering it unsanitary and unwholesome. Under the California authorities, a riparian owner of land is entitled to not only an undiminished flow of water but also to a substantially unpolluted stream. He is entitled to maintain substantially the same quantity and quality of water with which nature provided his land.

[21] While it is true there is some evidence of the presence of weeds, tule, and scum in Pitville pool, we are of the opinion the testimony will not warrant a finding to the effect that this condition was caused by the diversion of the water of Fall river. All that the court finds upon this subject is: "That the waters naturally flowing in Pit river by plaintiffs' said lands during the low water season of each year without the waters of Fall river are negligible and constitute a stagnant pool of black water unfit for watering of stock or other uses on plaintiffs' said lands, except for irrigation." This is not a definite finding that the diversion of the water of Fall river caused the water of Pitville pool to become stagnant. Our attention is called to no evidence which will support such a finding. But, assuming that the finding may be so construed, we are of the opinion there is no substantial evidence to support a judgment of damages based upon pollution of the water of Pitville pool caused by the diversion of Fall river.

The appellant complains of various other errors in the admission of testimony, and in the giving and refusing of certain instructions. In view of the preceding application of the principles of law, it is unnecessary to analyze those instructions or pass upon the numerous other assignments of error.

The judgment is reversed.

I concur: PRESTON, P. J.

I concur in the judgment of reversal:
PLUMMER, J.

117 Cal.App. 612

ALBAUGH v. MT. SHASTA POWER CORPORATION.
Civ. 4318.District Court of Appeal, Third District,
California.

Oct. 21, 1931.

Rehearing Denied Nov. 20, 1931. Hearing
Denied by Supreme Court Dec. 18, 1931.**Waters and water courses** ⇨86.

\$65,000 damages to owner of 400 acres of land adjoining pool by reason of diversion of water of river *held* excessive.

Although land adjoining pool was technically riparian to river by reason of fact that water was impounded in pool during part of year, evidence established that owner of land never actually irrigated his land from water taken from pool, so that diversion never affected his beneficial use of water of stream, in addition to which it was shown that portion of land had been purchased ten years previously for \$55 an acre, and sales of similar land in vicinity had been made at prices ranging from \$30 to \$100 an acre, so that, in any event, an allowance of approximately \$162 an acre would be excessive.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by William J. Albaugh against the Mt. Shasta Power Corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Superseding opinion in 299 P. 830.

William B. Bosley and Thomas J. Straub, both of San Francisco, Chenoweth & Leininger, of Redding, and Jones & Dall, Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a rehearing in an appeal from a judgment for damages in the sum of \$65,000 for the diversion of the water of Fall river, and from the issuing of an injunction prohibiting the defendant from using any of the water of that stream until the judgment is satisfied. This is a companion case with that of Merton Crum et al. v. Mt. Shasta Power Corporation, 4 P.(2d) 564, in which an opinion of this court was this day filed. These two cases were tried upon substantially the same

evidence. The same issues are involved in both actions. Upon the authority of the Merton Crum Case, it becomes necessary to also reverse the judgment in this case.

The plaintiff in the present action owns 400 acres of farm land situated on the north bank of Pit river, on Pitville pool, opposite the property which is owned by Merton Crum. Upon the authority of the case of Turner v. James Canal Company, 155 Cal. 82, 99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, it may be assumed the plaintiff's land is technically riparian to Fall river during the low-water period in the summer time. On the theory that the water of Fall river comes in contact with the soil of his land during that period of the year when it is impounded in Pitville pool, upon the production of competent evidence of damages, he is entitled to compensation for its diversion.

For the reasons assigned in the Merton Crum Case, the damages which were awarded in this case are grossly excessive. The injunction has been waived and the application of its terms, which are too broad, is therefore not involved. The plaintiff never actually irrigated his land from water taken from Pitville pool. The water which he used upon his land was taken from Loosley pool, and was conveyed to his land by means of gravity. Loosley pool is also an enlargement of Pit river. It is situated above Young's Falls. The water upon which the plaintiff relies for irrigating his land was therefore not disturbed by the diversion of Fall river. The diversion of Fall river never affected his beneficial use of the water of that stream. It is only by virtue of the application of the doctrine of usufructuary title to water that his rights were thereby invaded. No actual monetary damage has been shown. The evidence of damages is insufficient and incompetent. It is based upon an erroneous theory of a permanent decrease of the quantity of water in Pitville pool.

The plaintiff was awarded damages equivalent to a valuation of \$162 an acre for all of the land he owns. The evidence discloses the fact that a portion of this ranch was purchased ten years previously for \$55 an acre. From evidence of a number of sales of similar land in that immediate vicinity, which ranged from \$30 an acre to \$100 an acre, it is apparent the amount of damages which was awarded in this case is excessive.

The judgment is therefore reversed.

I concur: PRESTON, P. J.

I concur in the judgment of reversal:
PLUMMER, J.

117 Cal.App. 717

SPEER v. KITTLE MFG. CO.

Civ. 4296.

District Court of Appeal, Third District, California.

Oct. 28, 1931.

1. Appeal and error ⇨1009(4).

Rule that, in action for contract reformation, evidence must be clear and positive, is for government of trial court, and appellate court cannot weigh evidence (Civ. Code, § 3399).

While equity will withhold relief unless proof comes up to this standard, rule is for government of trial court and not controlling in appellate court, where findings find support in evidence. It is duty of appellate court to ascertain if findings of trial court granting reformation of contract are sustained by evidence, and, if so, it cannot weigh evidence to ascertain its preponderance.

2. Reformation of Instruments ⇨45(2).

In action for reformation, evidence sustained finding of mutual mistake and that plaintiff was to be exclusive sales agent in certain territory for defendant, not mere selling agent (Civ. Code, § 3399).

3. Appeal and error ⇨1009(3).

In action for contract reformation, conflict in testimony is for trial court (Civ. Code, § 3399).

4. Contracts ⇨170(1).

Practical construction of contract by parties is strong evidence of its meaning.

5. Reformation of Instruments ⇨45(2).

In action for reformation, evidence sustained finding plaintiff, defendant's sales agent, was to have commission on all orchard heaters sold in his territory, by whomever sold, and that provision was omitted from contract by mutual mistake (Civ. Code, § 3399).

6. Evidence ⇨594.

Uncontradicted testimony may not be rejected by court, unless inherently improbable.

7. Appeal and error ⇨205.

In action for accounting, defendant having failed to offer checks in evidence, they were not part of evidence, and defendant could not complain of court's failure to credit them.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Charles P. Speer against the Kittle Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Rohe & Freston, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellant.

J. E. Ricketts, of Covina, and John T. Fuller, of Portersville (Walter C. Maloy, of Covina, of counsel), for respondent.

Mr. Justice pro tem. BURROUGHS delivered the opinion of the court.

This is an action in equity to reform a contract upon the ground of mutual mistake, and also for an accounting between the parties under the contract as reformed. Findings and judgment were made and entered, reforming the contract, and an accounting was had between the parties. Judgment was entered in favor of the plaintiff in the sum of \$6,934.80, together with interest and costs of suit. The defendant appeals from the whole of said judgment.

[1] It is contended by the appellant that the evidence is insufficient to sustain a judgment of reformation of the contract in this: That in such actions to justify a reformation the evidence must be clear and positive, leaving no room for doubt. Among other cases the appellant cites those of *Burt v. Los Angeles O. G. Ass'n*, 175 Cal. 668, 166 P. 993; *Hochstein v. Berghauser*, 123 Cal. 681, 56 P. 547; *Luning v. Brooks*, 1 Cal. Unrep. Cas. 29; *Home & Farm Co. v. Freitas*, 153 Cal. 680, 96 P. 308; which are to the effect that the proof in actions for reformation of a written instrument must be clear and positive. While this is undoubtedly the rule, yet as said in *Capelli v. Dondero*, 123 Cal. 324, 328, 55 P. 1057, 1058, in an action to reform a deed: "The principal question raised by appellants is that the evidence does not support the findings. It is true, as appellants contend, that evidence warranting the reformation of a deed must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; and, unless the proofs come up to this standard, equity will withhold relief. But these are rules for the government of the trial court, and are not controlling in this court where the findings find support in the evidence. *Ward v. Waterman*, 85 Cal. 502, 24 P. 930. This court cannot enter upon an examination of all the evidence to determine where the preponderance lies. Upon questions of fact its province is to determine whether there be evidence tending to support the findings, and it cannot decide as to the weight of the evidence where there is a conflict." *Hochstein v. Berghauser*, 123 Cal. 681, 56 P. 547; *Meyerstein v. Burke*, 193 Cal. 105, 222 P. 810; *California Packing Corp. v. Larsen*, 187 Cal. 610, 203 P. 102.

Under the foregoing rule it is our duty to ascertain if the findings of the trial court granting reformation of the contract are sustained by the evidence. If so, then we cannot weigh the evidence to ascertain its preponderance. *Capelli v. Dondero*, supra.

[2] The contract upon which the action is based and which was reformed by the decree of the trial court in its original form provided that the plaintiff was to act as the agent of the defendant, who was a manufacturer of orchard heaters, to sell said heaters in certain territory. According to the contract, the plaintiff was merely the selling agent, and it was sought to reform the contract to provide that he was the sole and exclusive agent in said territory for such sales, and entitled to commissions on all sales made in that territory, no matter by whom they were made. It was in these particulars that the court reformed the contract. The evidence upon which the reformation was granted, and which we deem sufficient to support the findings of the court, is as follows: J. W. Laycock was at the time of the execution of the original sales contract the sales manager for the appellant, and executed said contract on its behalf. In answer to the questions he said: "As I recall, Mr. Speer was to have the selling of the Kittle heaters in this particular territory covered by the period of time mentioned in the contract, and was to be the exclusive representative in that territory; that he (Speer) was to make the sales and make the demonstrations and attend to all sales work within the territory." The witness further testified that it was his understanding that all inquiries coming to the defendant were to be turned over to Mr. Speer; that it was his understanding, and he thought he followed the policy during the term Mr. Speer was with them, that inquiries to him and whatever work the witness did in the field was with Speer. On cross-examination he testified that, so far as his knowledge was concerned, he did not make a mistake when he drew the contract; that he and Mr. Speer both read it before it was signed, and, to the best of his knowledge, Speer took a copy of it. Charles P. Speer, the plaintiff, testified that he had several conversations with Mr. Laycock about an exclusive contract for the sale of the heaters, and it was agreed that the witness was to have an exclusive contract in the designated territory, to sell the heaters, and that he was to get twenty cents a heater on all heaters sold in that territory. There is also testimony to the effect that the appellant's secretary, in dealing with third parties, recognized plaintiff's exclusive contract; one instance being that of a witness named Webster, who testified that he declined to enter into a contract with plaintiff for the exclusive agency to sell the heaters in certain territory until he received assurance from the appellant that

Speer had authority to give such right, and that the secretary O. K'd the contract. Witness Washburn testified that he was told by Mr. Meehan, the secretary of appellant, in response to Washburn's request for an agency for the heaters, that Mr. Speer had an agency for most of the state, and he (Meehan) would have to make arrangements with Speer before he could make arrangements with Washburn. A contract was made between Washburn and Speer. It further appears from the evidence that all inquiries concerning the heaters were referred by appellant to respondent; that no agents were appointed by the appellant in that territory without reference to Speer.

There is other evidence in the record to support the finding that the plaintiff was appointed the sole and exclusive agent for the sale of the heaters, but we think the foregoing is a sufficient statement of the evidence to support a finding of mutual mistake, and to justify the finding that plaintiff had an exclusive contract for the sale of the heaters in the territory covered by the contract.

[3-6] The court also reformed the contract to allow the plaintiff a commission on all heaters sold in the territory, no matter by whom the sales were made. It is claimed that this was error. Plaintiff, Speer, testified in this behalf that it was understood that he was "to get twenty cents a heater on all heaters sold in the territory," and that "he was to be the exclusive agent for Kittle Manufacturing Company, receiving a compensation of twenty cents a heater." It also appears that in the interpretation of the contract the appellant paid the plaintiff a commission on sales made direct to customers by the appellant; one sale made by appellant to Jennie M. Jacobson for 450 heaters; another made by it to Jacob Stoll, and many others. These commissions were represented by vouchers coming from the appellant's office. These transactions were explained by the secretary of the corporation, but it was for the trial court to decide the conflict. That the practical construction of a contract by the parties themselves is strong evidence of its meaning is well settled. *Keith v. Electrical Engineering Co.*, 136 Cal. 178, 68 P. 598; *Kennedy v. Lee*, 147 Cal. 596, 82 P. 257. The evidence sustained the finding of the court that the plaintiff was to have a commission on all heaters sold in the territory. It is also claimed that the mistake was not a mutual one, and therefore, under section 3399 of the Civil Code, there could be no reformation of the contract. This claim is based upon the evidence of Mr. Laycock, the manager of appellant's business, and the person who prepared the contract in dispute, "that there was no arrangement or understanding concerning sales made within the territory by others than Speer," and his further statement, "that when he drew the con-

tract he had made no mistake." Standing uncontradicted, such evidence would no doubt be binding on the court as coming within the rule that the uncontradicted testimony of a witness may not be rejected by a court unless it is inherently improbable. *Tillotson v. Findley*, 87 Cal. App. 654, 262 P. 438; *Walker v. Clark*, 80 Cal. App. 520, 252 P. 334. But, arrayed against this evidence, the witness Speer testified that it was understood that he was to have a commission on the sale of all heaters made in his territory, and his evidence is supported by the fact that he was paid commissions on sales made in the territory by the appellant. Although Mr. Laycock testified, as above stated, that, when he drew the contract, he had made no mistake, the weight of this conflict was for the court to decide. In *Caldwell v. Weiner*, 203 Cal. 543, 264 P. 1100, it is said in effect that, while the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions, and the most positive testimony may be contradicted by the circumstances in evidence. However, we think the evidence of witness Speer, and the fact that commissions were paid plaintiff on sales made by the defendant himself, were sufficient to warrant the court in finding there was a mutual mistake. *Davis v. Judson*, 159 Cal. 121, 113 P. 147; *Blanc v. Connor*, 167 Cal. 719, 141 P. 217.

[7] It is next claimed that the court erred in settlement of the account between the parties. Appellant claims credits to the amount of \$2,118.60 were not allowed by the court. During the examination of the witness J. P. Meehan, the secretary of the defendant corporation, counsel for plaintiff called for two checks for \$500 each. These were produced by the witness, together with a check for \$250. Certain memoranda were also produced, from which it appeared that at least the \$250 checks were noted as advance commissions on orchard heaters. The slips were offered in evidence by counsel for the plaintiff, and were objected to by counsel for appellant, and the court sustained the objection. The three checks were never offered in evidence, nor were the memoranda again referred to. Whether these checks were payments to plaintiff on account, or payments on commissions from sales made by other parties, does not appear in the record. In any event, they are not a part of the evidence, and, having been excluded therefrom by the acts of the appellants, they cannot complain. Counsel for the appellants offered in evidence a check for \$316.65 at the same time he referred to four other checks. When the check for \$316.65 was offered, it was objected to by respondent as not responsive to the issue. After considerable discussion between the court, counsel, and the witness, the lat-

ter said that "those checks do not represent payment of commissions to Speer." This statement was stricken out on motion of respondent. No ruling was made on the admissibility of the check, and it does not appear whether it should be charged to plaintiff on account of commissions, or not. There is still another check of \$106.80. This check is referred to in Plaintiff's Exhibit No. 7 introduced in evidence on the subject of the reformation of the contract, but it does not appear whether it is a proper charge against plaintiff. There are other items referred to: A check in the sum of \$15; one for \$57.50; and one for \$372. These checks are not sufficiently identified to charge them against the respondent. The court found that the plaintiff was entitled to commissions in the sum of \$7,778.45, but gave him a judgment in the sum of \$6,934.80, which is \$867.95 less than the amount to which he was entitled. It is clear that appellants are not entitled to credit for the three checks of \$1,250. If it were conceded that appellant was entitled to all of the other credits making the \$2,118.60 claimed by it, the amount found due would be reduced, but the judgment would not be substantially altered.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.
R. L. THOMPSON, J.

118 Cal.App. 68

**AUSTIN v. AMERICAN SURETY CO. OF
NEW YORK.**

Civ. 6993.

District Court of Appeal, Second District, Division 2, California.

Oct. 30, 1931.

I. Brokers ¶4.

Sale of "equity in land" held a sale of "real estate" within statutory bond executed to protect clients from unfaithful performance of brokers' contracts (St. 1919, p. 1252, § 2).

"Equity in land" represents a share or interest commensurate with the amount paid upon the whole purchase price which one holds, and an "equitable estate" is the interest which a man has in lands, tenements, and hereditaments, while "real property" embraces such an interest in realty, or lands, legal or equitable, as may lie in contracts, executory or executed.

[Ed. Note.—For other definitions of "Equitable Estate or Interest" and "Real Property," see Words and Phrases.]

2. Brokers ⇨4.

Converting of client's funds received for sale of equity in land to own use by real estate broker *held* within purview of statutory bond executed for client's protection (St. 1919, p. 1252, § 2).

3. Brokers ⇨4.

Failure or refusal of real estate broker to receive compensation *held* not to prejudice surety's rights so as to abrogate its obligation on broker's bond (St. 1919, p. 1252, § 2).

4. Brokers ⇨4.

In action on real estate broker's bond, evidence *held* sufficient to support finding of employment of broker by plaintiff.

5. Brokers ⇨4.

Statute of Frauds *held* not to bar client's recovery against surety for broker's defalcations, though, aside from client's checks, no written agreement to sell her property existed (Civ. Code, § 1741).

6. Brokers ⇨4.

Broker having converted proceeds received from sale of client's lot, surety *held* liable for interest on value of lot from date of broker's defalcation rather than from date of judgment against surety.

7. Principal and surety ⇨66(2).

Liability of surety is same as that of principal.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Catherine F. Austin against the American Surety Company of New York. From a judgment for plaintiff, defendant appeals.

Affirmed.

Haight, Mathes & Sheppard, James C. Sheppard, and G. Allen Bisbee, all of Los Angeles, for appellant.

Cameron & Perkins, of Long Beach, for respondent.

CRAIG, Acting P. J.

Judgment having been rendered in favor of the plaintiff, against the defendant as surety of one B. F. McKee, a real estate broker, in an action sounding in fraud, said surety appealed.

It is undisputed that McKee was a regularly licensed realtor, that he was employed as such and engaged in selling upon installments acreage known as Ramola Farms; that he obtained from the respondent a contract

to purchase three acres therein, on account of which she exchanged other realty and a promissory note, which was paid; that thereafter he obtained from the respondent other real property upon an agreement that he would dispose of it for her; and that he converted the proceeds of sale and of respondent's check to his own use. Excerpts from her testimony reveal that McKee promised respondent that "if I would give up my contract he would sell the lot for me and get my money out of the lot, and that he would sell those four acres without any added expense beside the \$175 which I gave him, and he would get my money, the \$1456 out of the Santa Monica lot. * * * He gave me two contracts which I signed, for my equity in my Santa Monica lot. * * * This lot that I turned over to him was the last Santa Monica lot that I had. I saw McKee in August, 1925, and never saw him again." It is conceded that respondent was indebted to the original owner on account of the purchase price of the Santa Monica property, and that she had not completed paying for the Ramola land.

[1, 2] It is at first insisted that appellant's liability under its realtor's bond was confined to sales of real estate only, that "real estate" as defined by the common law consists exclusively of "lands, tenements and hereditaments," and hence that respondent's equity in the property sold by McKee was not legally the subject of a transaction embraced within the provisions of the broker's bond. Such an equity represents a share or interest commensurate with the amount paid upon the whole purchase price which one holds. An equitable interest is an interest in land. *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295. An equitable estate is the interest which a man has in lands, tenements and hereditaments. *Avery's Lessee v. Dufrees*, 9 Ohio, 145; *In re Qualifications of Electors*, 19 R. I. 387, 35 A. 213; *Rainey v. McQueen*, 121 Ala. 191, 25 So. 920; *Pogue v. Simon*, 47 Or. 6, 81 P. 566, 114 Am. St. Rep. 903, 8 Ann. Cas. 474. The term "real property" embraces such an interest in realty, or lands, legal or equitable, as may lie in contracts, executory or executed. *Fish v. Fowle*, 58 Cal. 373. Section 2 of the act of 1919 (Stats. 1919, chap. 605, p. 1252), enacted among other things "to define real estate brokers," designates a broker as "a person * * * who, for a compensation, sells, or offers for sale, buys, or offers to buy, * * * real estate * * * for others as a whole or partial vocation." Appellant's contract forming the basis of this action expressly provided that if the said B. F. McKee should "faithfully perform every undertaking entered into by him as a licensed real estate broker under the said act, and acts amendatory thereof, then the above obligation to be void; otherwise to remain

in full force and effect; and every person injured by the failure of said real estate broker to perform his duties or comply with the provisions of the above named act or acts amendatory thereof, shall have the right in his own name to commence and maintain an action against the above named real estate broker and sureties for the recovery of any damage sustained. * * * Appellant's circuitous reasoning leads but to the conclusion that the licensed broker's failure faithfully to perform his duties in the sale of real estate, to the damage of respondent, brought him and his surety within the purview of the statute and of the undertaking which was executed for her protection.

[3,4] It is next contended that the \$175 mentioned was in fact a part of the consideration, rather than a commission to McKee, and that if he was not in this instance acting as a broker "for a compensation," there could be no liability. We do not so interpret the Real Estate Brokers' Act. Since he was licensed and employed as "a person * * * who, for a compensation, sells" real estate, we are at a loss to conceive of an instance wherein the failure or refusal of such a broker to receive compensation could so prejudice the surety's rights as to abrogate its obligation to the public. Neither logic nor authority is suggested which tends to absolve from blame one who defrauds a client both of land and of the consideration. Further, since the jury were instructed that the plaintiff could not recover unless an employment were shown, the verdict for the plaintiff amounted to an implied finding that McKee was employed in this instance as a broker and that his work was performed in that capacity. Without reciting the evidence in detail, it is sufficient to say that it would amply support a finding to that effect.

[5] The appellant seeks to invoke the Statute of Frauds (Civil Code, § 1741) as a bar to recovery by the contention that aside from respondent's checks there was no evidence in writing of the agreement to sell her properties. But specific performance is neither an appropriate, available, or asserted remedy at this time. The statute does not limit the right of recovery from a surety to suits upon notes or memoranda signed by the parties defrauded. The contract guarantees the faithful performance by the broker of his duties as a salesman, among which duties

is the self-evident fidelity due to the client in handling the proceeds of his real estate.

[6,7] Interest upon the amount alleged to have been the value of respondent's lot at Santa Monica, and for which the broker had agreed to negotiate a sale, was allowed by the jury, from the date of the defalcation. The appellant resists the inclusion of this item upon the theory that in an action for unliquidated damages, as for recovery upon a contractor's bond guaranteeing the construction of buildings, interest may be allowed only from the date of the judgment. We think the cases are to be distinguished by obvious characteristics. In the case cited by appellant it was said that the test is "whether or not the sum found to be due was known and admitted by the appellant to be due to the respondent. * * * It is apparent that, until the trial court determined the cost of completing the building * * * the amount, if any, due from appellant to respondent upon the bond in question could not be fixed." *Perry v. Magneson*, 207 Cal. 617, 279 P. 650, 652. In the instant transaction McKee agreed to dispose of Mrs. Austin's property for the purpose of aiding in the financing of other properties, and to return to her the sum of \$1,456, which amount was demanded in the complaint against McKee and his surety. It would scarcely be urged that the principal was not liable for the proceeds of the sale from the date of its consummation, with interest from that date. The liability of a surety is the same as that of the principal. *Damon v. Pardow*, 34 Cal. 278; *Harlan v. Ely*, 55 Cal. 340; *Cal. Natl. Bank v. Ginty*, 108 Cal. 148, 41 P. 38. We are not confronted with the problem of determining the reasonableness of the jury's finding upon an unliquidated demand for failure to effect a sale. The sole question is, whether or not it may be said as a matter of law under an obligation to "faithfully perform every undertaking entered into by him as a licensed real estate broker under the said act," the jury erred in finding McKee liable and his surety bound to respond in the amount converted to his use after sale according to specific agreement between the broker and the obligee. We think the verdict and judgment wholly warranted by the record.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.;
FRICKE, Justice pro tem.

117 Cal.App. 684

FITZPATRICK v. HASKELL et ux.

Civ. 516.

District Court of Appeal, Fourth District, California.

Oct. 26, 1931.

1. Appeal and error — 1002.

Judgment may not be reversed for insufficiency of evidence, when evidence adduced upon whole case is in conflict.

Upon appeal with evidence in that situation, no inquiry may be made concerning preponderance of evidence.

2. Trial — 139(1).

Nonsuit *held* properly denied where, when plaintiff rested case, substantial evidence was before court legally tending to support cause of action.

3. Automobiles — 246(20).

Instruction that it is negligence for motorist to enter view-obstructed intersection at greater than statutory speed *held* not error (St. 1923, p. 553, § 113, subs. a, b).

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by H. P. Fitzpatrick against W. E. Haskell and wife. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Culver & Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellants.

Richard A. Dunnigan, of Los Angeles, for respondent.

ALLISON, Justice pro tem.

This action was tried before a jury. The plaintiff was awarded a judgment in the sum of \$3,000 as damages for personal injuries sustained when an automobile operated by the defendants collided with an automobile driven by the plaintiff. The collision occurred on the 12th day of July, 1926, at the intersection of Alvarado street and Twelfth street in the city of Los Angeles. From this judgment the defendants appeal.

[1] It is first contended by the appellants that the evidence is insufficient to support the verdict and judgment. Counsel's argument in support of his contention is based entirely upon a discussion of the weight of the evidence. We have examined the record, which shows a substantial conflict in the evidence adduced by the whole case concerning the cause of the collision and the conduct of the parties at the time of, as well as before and immediately following, the accident.

"It is the well-settled and generally well understood rule that a judgment may not be reversed for insufficiency of evidence when the evidence adduced upon the whole case is in conflict and that, upon appeal with the evidence in that situation, no inquiry may be made concerning the preponderance of the evidence." *Waer v. Waer*, 189 Cal. 178, 207 P. 891, 892, and cases there cited.

[2] It also appears from the record that, when plaintiff rested his case, substantial evidence was before the court which legally tended to support his cause of action, and therefore defendant's motion for a nonsuit was properly denied. *Townsend v. Keith*, 34 Cal. App. 564, 168 P. 402.

[3] Appellants next insist that the court erred in giving instructions numbered 4 and 15 to the general effect that a definite rate of speed was negligence per se. Before the case was submitted to the jury, the court withdrew from their consideration instruction No. 15, and instructed the jury to disregard the same. It was stipulated during the trial that the intersection of Alvarado and Twelfth streets, the intersection in which the collision occurred, was under the law an obstructed intersection; that is to say, that the view of traffic approaching within 200 feet of the intersection was obstructed within the last 100 feet approaching said intersection from the two directions from which the respondent and appellants approached. Section 113, subdivisions a and b, of the California Vehicle Act (St. 1923, p. 553), among other things, provides the rule for determining "when the driver's view is obstructed," and provides that it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding 15 miles per hour traversing such view-obstructed intersection.

In the remaining questioned instruction the court told the jury that, if they found from a preponderance of the evidence that the defendant at the time of the alleged accident did drive his automobile into said intersection at a greater speed than 15 miles per hour, that in itself constituted negligence on the part of the defendant, and, if they further found from a preponderance of the evidence that the defendant did drive in excess of 15 miles per hour into said intersection and that was the proximate cause of the accident, then their verdict must be for the plaintiff, provided they further found from the evidence that the plaintiff himself was free from any negligence that proximately contributed to the accident. In view of the speed limit specifically fixed by section 113 of the California Vehicle Act, *supra*, it was clearly within the province of the trial court to instruct the jury that a speed in excess

of the speed limit so fixed for traversing said intersection was and is negligence per se.

Instructions to the effect that it is negligence per se for a person to drive a motor vehicle faster than the permissive speed specified in section 113 of the California Vehicle Act have been approved so frequently that their correctness cannot now be questioned. *Benjamin v. Noonan*, 207 Cal. 279, 277 P. 1045; *Krause v. Rarity*, 210 Cal. 644, 293 P. 62; *Young Machinery Co. v. Cupps* (Cal. Sup.) 297 P. 538 1; *Cassinelli v. Bennen* (Cal. App.) 294 P. 748; *Edgar v. Citraro* (Cal. App.) 297 P. 645; *Kastel v. Stieber* (Cal. App.) 279 P. 932; *Machado v. Harm* (Cal. App.) 297 P. 626. There are numerous other recent cases to the same effect.

The instruction in question is not in our opinion open to the criticism urged. We find no prejudicial error in the record.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

117 Cal.App. 495

CORY v. COOPER.
Civ. 881.

District Court of Appeal, Fourth District,
California.
Oct. 15, 1931.

1. Appeal and error ⇨907(3).

On appeal on judgment roll, finding that sheriff unlawfully converted attached property was not conclusive, where contradicted by facts found.

2. Statutes ⇨190.

Court may not construe unambiguous statute, but must construe uncertain statute.

3. Sheriffs and constables ⇨113(1).

Sheriff attaching property, who complies with provisions of statute as amended, which require sheriff to procure undertaking indemnifying third party claimant, is not liable to such claimant for conversion (Code Civ. Proc. § 689, as amended by St. 1929, p. 661, and §§ 4, 1858).

Code Civ. Proc. § 689, as amended by St. 1929, p. 661, materially changes the former statute by eliminating the provision for an undertaking to indemnify the sheriff and by adding a paragraph providing for an undertaking to indemnify the third party claimant, and the section now provides that, after a third party claim is made and an undertaking is given in accordance with the terms of the section, the

sheriff must hold the property; thus it is made mandatory on the sheriff to hold the property, while his former protection is removed, and at the same time a new protection is given to the third party, so that the statute is evidently intended to mean that a third party claimant may not look to a sheriff who has in all respects complied with the statute in so far as recovering damages for conversion is concerned.

4. Constitutional law ⇨299.

Sheriffs and constables ⇨113(1).

Statute relieving sheriff complying therewith from liability for conversion of property attached by him held not unconstitutional as depriving third party claimant of property without "due process" (Code Civ. Proc. § 689, as amended by St. 1929, p. 661).

Statute is not unconstitutional, since nothing in Code Civ. Proc. § 689, as amended by St. 1929, p. 661, prevents a third party from bringing an action for the recovery of the property taken, and, even if "due process of law" includes the right to sue for damages for conversion, it does not necessarily include the right to sue a particular person, and the statute, by provision for an indemnity bond in favor of the third party claimant, gives additional security in regard to securing damages, the only change made being in the direction of holding the real party in interest.

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by A. Cory against Ed. F. Cooper. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Liggett & Liggett, of San Diego, for appellant.

Rorick & Cottingham, of Oceanside, and D. L. Ault, of San Diego, for respondent.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, amici curiæ.

BARNARD, P. J.

The defendant herein is sheriff of the county of San Diego. During the year 1930 a good and valid writ of attachment was issued out of the Superior Court of that county in an action then pending therein, and acting thereunder the said sheriff attached a certain Buick automobile. Thereupon this plaintiff filed with the sheriff a written ver-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ Superseded by opinion, see (Cal. Sup.) 2 P.(2d) 321.

ified third party claim, demanding that the property be released. The attaching creditor then furnished and filed with the sheriff a good and sufficient undertaking in accordance with the terms of section 689 of the Code of Civil Procedure, and demanded that he continue to hold the automobile under the attachment. Subsequently the third party claimant brought this action against the sheriff, alleging an unlawful conversion of the property, and praying for damages. Judgment was entered for the plaintiff, and the defendant has appealed upon the judgment roll alone.

The principal question here involved is thus stated by the appellant: "Is a sheriff, who has demanded and received indemnifying bond provided for by section 689, Code of Civil Procedure, personally liable to the third party claimant who can successfully establish his title to the attached property?" In support of the judgment the respondent makes three contentions, as follows: (1) That, since no evidence is before this court, a finding that the appellant unlawfully took and converted the property to his own use is controlling over all other considerations; (2) that the 1929 amendment to section 689 of the Code of Civil Procedure (St. 1929, p. 661) added a cumulative protection to a third party claimant, but did not relieve a sheriff from any liability theretofore existing; (3) that, if the amendment referred to be interpreted as relieving a sheriff from liability, it is unconstitutional, in that it deprives a person of his property without due process of law.

[1] Paragraph III of the complaint alleges that on or about the 12th day of March, 1930, the defendant unlawfully took and carried away said property, and converted and disposed of the same to his own use, to the damage of the plaintiff in an amount named. The court found that the allegations contained in paragraph III of the complaint were true, except that it found that damage was suffered in a different amount. It is neither alleged in the complaint nor found by the court that the sheriff took the automobile from the possession of the plaintiff. The conversion alleged in the complaint is predicated entirely upon a demand in writing for the immediate release and surrender of the automobile and the refusal on the part of the sheriff to deliver the same to the plaintiff. The court expressly found that this appellant was at all times mentioned the duly qualified and acting sheriff of the county of San Diego; that all of his acts in connection with the Buick automobile mentioned in plaintiff's complaint were done by him in his official capacity as sheriff, and under a good and valid writ of attachment issued out of a court of general jurisdiction; and that all of his said acts were done by him under cover of his office, and in compliance with the writ of attach-

ment. The court also found that upon the filing of the third party claim by this respondent, claiming said automobile as his own property, the attaching creditor in the other action filed with this appellant a good and sufficient undertaking in indemnity, or an indemnifying bond according to the terms of section 689 of the Code of Civil Procedure, and demanded of this appellant that he retain possession of said automobile and refrain from delivering the same to the said third party claimant. It thus appears that the appellant lawfully came into possession of the automobile in the first place, and that his refusal to surrender the automobile to the third party claimant after he had received an indemnifying bond for the benefit of that party was something that he was compelled to do by reason of the provisions of section 689 of the Code of Civil Procedure. We think it sufficiently appears that the so-called finding that the appellant unlawfully converted the property to his own use is contradicted by the facts found, that it is in effect a conclusion of law drawn from the facts found, and that it is not conclusive upon this appeal merely because the evidence is not before us.

[2, 3] The most important question presented is whether or not, under the 1929 amendment to section 689 of the Code of Civil Procedure, a sheriff is liable for damages to a third party claimant when he has strictly complied with all of the provisions of that section, as amended; in other words, whether the effect of the 1929 amendment to that section is merely to give to such a third party claimant a cumulative protection in addition to all remedies he theretofore had. Prior to the amendment in question, where a third party claim was made, a sheriff was not bound to keep the property attached unless he was indemnified against such third party claim by a sufficient undertaking. By plain inference, if he received such an undertaking, he was bound to hold the property, and, in case of becoming liable, had the protection of the bond furnished. As amended in 1929, the pertinent parts of this section (with the paragraphs numbered for convenience) read as follows:

(1) "*Indemnity Where Property Claimed by Third Party.* If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff must release the property if the plaintiff, or the person in whose favor the writ of execution runs, falls within five days after written demand, to give the sheriff an undertaking executed by at least two good and sufficient sureties in a sum equal to double the value of the property levied on. If such undertaking be given, the sheriff shall hold the property. The sheriff, however, shall not

be liable for damages to any such third person for the taking or keeping of such property if no claim is filed by any such third party.

(2) "Such undertaking shall be made in favor of, and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such seizing, taking, withholding, or sale of such property by the sheriff.

3. "Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, the sheriff must release the property; provided, however, that if no exception is taken, within five days after notice or receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

4. "The sheriff may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim served upon him."

It will be observed both that the provisions of the former section are materially changed and that new provisions are added. The former provision that the sheriff is not bound to keep the property unless the real party in interest indemnifies him by an undertaking is so changed in paragraph 1 as to require the sheriff to hold the property when he receives an undertaking, while the provision that this undertaking shall indemnify the sheriff is conspicuously left out, and paragraph 2 is added, specifically making the undertaking referred to in paragraph 1 an indemnity in favor of the third party claimant. And the added paragraphs 3 and 4 are entirely new. This section now provides that, after a third party claim is made and an undertaking is given in accordance with the terms of the section, the sheriff must hold the property. On the other hand, the undertaking provided for is not one to indemnify the sheriff, but is one to indemnify the third party claimant for any damages caused by either the taking, the withholding, or the selling of the property. This is an important change in the statute, a doubt as to the meaning and effect of which has led to this controversy. The respondent claims that its only purpose and effect is to give to the third party an added protection, while the appellant claims that the meaning thereof is to give to such a third party the protection of the undertaking provided for, in lieu of any right of action against the sheriff for damages for conversion. This brings the language of the statute before us for interpretation. It is true, as contended by respondent, that a court may not by judicial construction substitute its idea of the intent of a statute when that intent is unmistakably expressed and when

the statute is not ambiguous and not uncertain. It is also true that, if such uncertainty exists, a necessity for construction follows.

While it may be conceded that at common law a sheriff levied upon property at his peril, this rule has been more or less modified in nearly every state. It would appear that there is a modern tendency toward protecting such an officer and placing the responsibility for the acts which he is required to perform upon the real party in interest, in this case the attaching creditor. *Arena v. Bank of Italy*, 194 Cal. 195, 228 P. 441; *McGaffey Canning Co. v. Bank of America* (Cal. App.) 294 P. 45. Section 4 of the Code of Civil Procedure provides as follows: "*Rule of Construction of this Code*. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

There are a number of considerations, in respect to the amendment of this section, which seem to indicate an intention to relieve an officer from liability for damages for conversion, when an undertaking is secured in accordance with the terms of the section, and that it was not the intention of the Legislature merely to give an additional security to a third party claimant. Had the latter been intended, the logical and natural thing would have been to have added a provision for such an additional bond in favor of such a claimant, without removing from the section the provision theretofore existing for an undertaking in favor of the sheriff. In view of the well-known situation that a sheriff acts in such a case only in pursuance of his duty, and that the real parties in interest are the attaching creditor and the third party claimant, it is hardly reasonable to hold that it was intended to compel the sheriff to act, to make him responsible, and at the same time to take away such security, by way of an undertaking, as he formerly had. That this was not the intent, and that it is not the reasonable interpretation of the language used, is indicated by the provision in the act itself, that the new undertaking provided for shall not only be made in favor of the third party, but that the same shall "indemnify" him against loss arising by reason of the seizing, of the withholding or of the sale of the property attached. The only loss claimed here arises by reason of the seizing and withholding of certain property. The provision that the undertaking furnished shall "indemnify" this respondent for such damage indicates that it is to cover any such damage, and that it is given him in lieu of any claim for damages against the sheriff. While the section, before it was amended, provided that

the sheriff was not bound to hold the property unless he received an undertaking which was to protect him from the liability he was assuming, as amended the section makes no provision for any bond in his favor, although providing that he must hold the property when a bond is given for the protection of the third party. It is thus made mandatory upon him to hold the property, while his former protection is removed, and at the same time a new protection is given to the third party. We think these respective portions of the act should be considered together, and that, so taken, their meaning is that a third party claimant may not look to a sheriff who has in all respects complied with the statute, in so far as recovering damages for conversion is concerned. We are not here speaking of any other remedies that may be open to the third party. That it was intended to add to and not take away from the protection previously given a sheriff, and that, in so doing, it was intended to place the responsibility on the real party in interest and on sureties furnished by him, is further indicated by the provision that the sheriff may demand such an undertaking notwithstanding any defect or informality in the verified claim served upon him. If the sheriff is to remain liable when a perfectly good third party claim is made upon him, no reason appears for providing that he may exact something in case a defective or informal claim is made, which would be of no value or protection to him anyway. A statute should be so construed as to give effect to all of its provisions. Code Civ. Proc. § 1858. This provision plainly indicates an intention to extend to the sheriff, in case a questionable or informal third party claim is made, the same benefit given him by the statute, in case a good and sufficient claim is made. It seems to us to necessarily follow that this benefit is the very one we are here holding is given him by the amendment in question. To adopt the construction placed upon this statute by the respondent would compel the sheriff to perform an act for a party litigant involving great liability on his part, without any indemnity or protection. It is not only more reasonable to place this liability on the party interested, where it belongs, but, in our opinion, this has been done by the Legislature in the amendment referred to.

[4] The only point remaining to be considered is respondent's contention that the amendment we have been considering, if interpreted as relieving a sheriff from liability for damages for conversion, is unconstitutional, as depriving a third party claimant of his property without due process of law. It will be observed that nothing in this act prevents a third party from bringing an action for the recovery of the property taken. *McGaffey Canning Co. v. Bank of America*, supra; *Taylor v. Bernheim*, 58 Cal. App. 404, 209 P. 55. The respondent did not, in this action, seek to recover the specific property taken, and his right to pursue such a course is not here involved. In effect he elected to seek damages for its conversion. Conceding that "due process of law" includes the right to sue for damages for conversion in such a case, it does not necessarily include the right to sue a particular person. If a third party desires to waive the right to go after the property itself, and sue for damages, not only does this statute give him additional security in that respect, but any change made is in the direction of holding the real party in interest. We see in this nothing to indicate that respondent is in any way deprived of due process of law. A number of remedies are open to such a third party, including an intervention in the original action, a suit to recover possession of the specific property, and a suit for damages based upon the undertaking secured to him by the provisions of the act itself. Appellant relies upon *Foule v. Mann*, 53 Iowa, 42, 3 N. W. 814, and *Evans v. Thurston*, 53 Iowa, 122, 4 N. W. 895, but these cases are so obviously not in point as not to require analysis here. So far as the point is raised in the case before us, we are of the opinion that the amendment in question, as here interpreted, is not unconstitutional.

We think that the court's purported finding that the appellant unlawfully converted a Buick automobile to his own use is a conclusion of law, and that upon the findings of fact made judgment should have been entered for the defendant and appellant.

For the reasons given, the judgment is reversed, with directions to enter judgment for the defendant.

We concur: MARKS, J.; JENNINGS, J.

BAECHT v. MARSH BROS. & GARDENIER,
Inc. (ATCHISON, T. & S. F. RY.
CO., Intervener).

Civ. 6959.

District Court of Appeal, Second District, Division 2, California.

Oct. 30, 1931.

Rehearing Denied Nov. 28, 1931. Hearing Denied by Supreme Court Dec. 28, 1931.

1. Negligence $\S$ 122(1).

Burden was on railroad welder, injured by construction train, relying on doctrine of last clear chance, to establish that contractor, knowing his peril, could, and that welder could not, have avoided injury.

2. Negligence $\S$ 55.

Contractor operating repair trains owed railroad welder, both being employed by railroad, same care it owed its employees under like conditions.

3. Negligence $\S$ 83.

Last clear chance doctrine *held* inapplicable where railroad welder stepped on tracks without looking and was struck by construction train, engineer of which was unable to stop train in time to avoid injury.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Charles G. Baecht against Marsh Bros. & Gardenier, Incorporated, in which the Atchison, Topeka & Santa Fe Railway Company intervened. From a judgment of nonsuit, plaintiff and intervener appeal.

Affirmed.

Hugh L. Dickson, of Los Angeles, for appellant plaintiff.

Robert Brennan, M. W. Reed, and E. T. Lucey, all of Los Angeles, for appellant intervener.

Joe Crider, Jr., of Los Angeles, for respondent.

CRAIG, Acting P. J.

The plaintiff and the intervener in an action for personal injuries appealed from a judgment of nonsuit, upon the ground that under the doctrine of last clear chance a question of fact within the exclusive province of the jury was presented.

The defendant and respondent operated small construction trains in a switchyard of the intervener railway company, upon several easterly and westerly lines of track, as an independent contractor. The plaintiff was a welder of steel rails installed in said company's tracks, as an employee of the latter. He had completed the inspection of his previous work upon one line by looking in between the cars of a train then standing there-

on, and had started in a slightly northeasterly direction, about to step onto a nearby parallel track, when he heard a shout of warning from the defendant's superintendent whom he had just left, and was immediately struck by a train of repair-cars which came from the west. In his action against the contracting corporation it was alleged that the defendant so negligently operated its engine that it ran into and collided with his person, resulting in his permanent injury. The defendant joined issue, alleging that the plaintiff negligently, without looking where he was going, and without precaution to ascertain the presence of said engine, stepped from a place of safety onto the path on which the engine was traveling. The plaintiff's employer, the intervener, alleged that the defendant had been negligent, that subsequently said employer had expended large sums of money pursuant to the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831, as amended) for hospital and medical care of the plaintiff, and prayed recoupment from the defendant of any theretofore paid or which the intervener might thereafter be compelled to pay to the plaintiff.

Contributory negligence is conceded. The plaintiff testified that he was familiar with the various lines of parallel road operated in the yard, that he was an experienced employee, and that he had seen the trains "running up and down frequently; every 7 or 8 or 10 minutes." It was testified by the superintendent: "He was standing right beside the engine first, and he started to walk towards the tracks. I saw him right up until the time he was struck. He did not get between the rails on the construction company's tracks. * * * I was 10 or 15 feet from him when I saw him put one foot on or near the rail. When I saw him put his foot on the rail the engine was right upon him." "I don't know whether I looked at it or not, but it would have been in sight had a person looked in that direction. It was coming from the west and going east." It was elicited from the engineer that he was running easterly at a speed of about 10 or 12 miles per hour with eight cars weighing approximately 32 tons; that "when Mr. Marsh first hollered, he said, 'Look out,' and then I applied the brakes and when I got my eye on Baecht it looked like he was in about 6 or 7 feet of the locomotive, stepped afoul—backward into the locomotive. * * * I think Baecht was 6 or 7 feet from me when Marsh hollered; it was the same distance from Baecht when I first saw him." None of the essential facts as related by other witnesses are controverted by the plaintiff. From the brief moment afforded him for observation of the sudden occurrence, he was able to recall that he anticipated the approach of a train from the opposite direction. He swore, however, that he saw none, but:

"I don't think I looked behind me to see whether or not there was one coming from the west. I was looking east. * * * The first intimation I had that a train was about upon me or coming towards me was when I heard a shout 'look out.' * * * I didn't look, I didn't stop to look, I jumped; I tried to jump anywhere, but it was too late." An eyewitness who rode on the train corroborated the plaintiff in the following language: "After I heard these men hollering I turned around and I had not more than turned around until we hit him."

[1, 2] The burden in such cases lies with the plaintiff to establish that the defendant, knowing of the plaintiff's peril could, and that the latter could not, have avoided the injury. *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259. It appeared that a person standing between the lines of track could see a train approaching from a westerly direction about one-half mile from where the plaintiff attempted to cross. We are not concerned with the usual questions involved between a railroad company and a licensee or invitee as frequently presented in actions by employees against their employers. The plaintiff and the defendant were both employed by the intervener railroad company, and as such each was an invitee, each being rightfully upon the tracks when in performance of his respective duties. But under such circumstances the defendant owed the plaintiff the same duty and degree of care as it owed its own employees under like conditions. *Cent. R. Co. of N. J. v. De Busley (C. C. A.)* 261 F. 561; *Denver & R. G. R. Co. v. Elliott*, 59 Colo. 29, 148 P. 269; *Cent. of Geo. R. Co. v. Clark*, 139 Ga. 313, 77 S. E. 31; *Bailey v. La.*, etc., R. Co., 129 La. 1029, 57 So. 325; *Wells v. McIntyre (Tex. Civ. App.)* 136 S. W. 1196. In the appellant's cited cases conflicting evidence as to whether the plaintiff was negligent was held subject to the determination of the jury; but in the instant case, as stated, the negligence of the plaintiff was admitted, and is not questioned upon appeal.

[3] We are not advised of the existence in this state of a case in all its essentials similar to the one here presented. In similar railroad yard cases from other jurisdictions, however, it has been repeatedly held that the law would refuse to impose upon a defendant in the plaintiff's behalf any other than the doctrine of actually discovered peril. *Todd v. Cincinnati, N. O. & T. P. Ry. Co.*, 135 Tenn. 92, 185 S. W. 62, L. R. A. 1916E, 555; *Baker v. Shafter (Tex. Com. App.)* 231 S. W. 349; *M., O. & G. Ry. Co. v. Lee*, 73 Okl. 165, 175 P. 367; *Hovius v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.)* 107 S. W. 214; *Hummer's Ex'x v. L. & N. R. Co.*, 128 Ky. 486, 108 S. W. 885. "If a traveler voluntarily or without reasonable cause stops on the track, or so near it as to expose himself to injury by passing trains, and, while in such a position

of danger, fails to look in both directions and to listen for the noises which ordinarily indicate the approach of a train, and is struck by a locomotive or car negligently run upon the track, his own want of care must be held to be one of the causes of the accident, and there can be no recovery for the injury." *Quinn v. Chicago & E. R. Co.*, 162 Ind. 442, 70 N. E. 526, 528. "It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application." *Dunworth v. Grand Trunk W. R. Co.*, 127 F. 307, 310, 62 C. C. A. 225. "The exception does not apply where the plaintiff's negligence or position of danger is not discovered by the defendant in time to avoid the injury." *Denver City Tramway Co. v. Cobb*, 164 F. 41, 43, 90 C. C. A. 459. Authorities wherein this rule has been applied to a sudden appearance of a pedestrian within the path of danger are too numerous to require their further citation.

Hence, it becomes patent that the doctrine of last clear chance is inapplicable to the instant case. This doctrine was not intended as an instrument for the splitting of seconds when an emergency arose. "There seems still to be some misconception of this doctrine of last clear chance. It was not devised as a last resort to fasten liability on defendants. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances." *Glennini v. Southern Pacific Co.*, 98 Cal. App. 126, 276 P. 618, 623. "It is the exception to the general rule, relating to the defense of contributory negligence, that a showing of a failure to fulfill the duty of exercising reasonable and ordinary care to avoid injuring a person who is known to be in a situation of peril from which he cannot extricate himself by the exercise of ordinary care will render a defendant liable in damages for the resulting injury despite the previous negligence of the person injured. This exception to the general rule, however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury." *Young v. Southern Pacific Co.*, 189 Cal. 746, 210 P. 259, 262. We are not to be understood as here passing upon the issue as to negligence of the respondent, but we do hold that in the light of prevailing authority the ground assigned for reversal is untenable.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

**MISSOURI STATE LIFE INS. CO. v.
GILLETT, County Sheriff, et al.***

Civ. 404.

District Court of Appeal, Fourth District,
California.

Oct. 23, 1931.

Rehearing Denied Nov. 24, 1931. Hearing
Granted by Supreme Court Dec. 24, 1931.**1. Sheriffs and constables ⇨169.**

In mortgagee's action against sheriff and surety for conversion of personalty sold under execution, evidence sustained finding that property was turned over to mortgagee by mortgagor for money due mortgagee, and that value thereof was equal to amount found by trial court.

2. Sheriffs and constables ⇨157(5).

Surety on official bond of sheriff retaining possession of property levied on held not liable to mortgagee filing third party claim, where execution creditor indemnified sheriff (Code Civ. Proc. § 689).

No liability existed to plaintiff who had filed a third party claim to the property levied on by virtue of mortgage held thereon by plaintiff, in view of Code Civ. Proc. § 689, where execution creditor had thereupon indemnified sheriff by reason of the levy, since, under such circumstances, it was a duty of sheriff to hold the property, whether mortgagee owned it or not, and in so doing sheriff was performing an official duty required of him by law, precluding any assertion of liability against sheriff on his official bond.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by the Missouri State Life Insurance Company against C. L. Gillett, Sheriff, and others. From a judgment in favor of plaintiff as against defendant sheriff and defendant the Maryland Casualty Company, but against plaintiff as to defendants Watson and Brackenbury, both the Sheriff and the Maryland Casualty Company appeal.

Judgment against sheriff affirmed; judgment against the Maryland Casualty Company reversed.

Harry W. Horton, of El Centro, for appellant Gillett.

M. C. Atchison, of Calexico, for appellant Maryland Casualty Co.

Hickcox & Trude, of El Centro, and Chapman & Chapman, of Los Angeles, for respondent.

BARNARD, P. J.

The facts of this case are as follows: The plaintiff owned land in Imperial county, and

on October 8, 1927, leased the same to one Jack Kennedy for a term of three years, the lessor to receive as rental one-fourth of all the grain grown on the premises. On October 28, 1927, the plaintiff loaned to Kennedy the sum of \$680 for the purpose of enabling him to farm the land, and on that day Kennedy executed and delivered to the plaintiff his promissory note for that amount, with interest, secured by a crop mortgage covering all grain grown on the land, which mortgage was in all respects properly executed and recorded. During the crop season of 1928 a crop of barley matured first, and the plaintiff permitted Kennedy to sell the same in his own name and to retain all of the proceeds thereof except the sum of \$157, which was paid to the plaintiff. When the wheat matured, it was harvested and delivered to the plaintiff at Seeley, Cal., on May 12, 1928. On May 14, 1928, the defendant Gillett, as sheriff of the county of Imperial, levied an execution upon this wheat, the execution being issued in another action wherein another party had recovered a judgment against the said Jack Kennedy. The plaintiff filed with the sheriff a duly verified third party claim; setting forth its claim to the ownership and right of possession of the said wheat. An undertaking was then filed with the sheriff in accordance with section 689 of the Code of Civil Procedure. Following that, and on May 23, 1928, the sheriff sold the wheat at public auction. This action was brought by the third party claimant against the sheriff, the Maryland Casualty Company, the surety on the sheriff's official bond, and also against R. Y. Watson and Richard Brackenbury as sureties upon the undertaking filed in accordance with section 689 of the Code of Civil Procedure. After a trial, judgment was entered in favor of the plaintiff for \$1,358.70 as against the defendant sheriff and the defendant Maryland Casualty Company, and it was further ordered that the plaintiff take nothing against the defendants Watson and Brackenbury. From this judgment both the sheriff and the surety on his official bond have appealed; both appeals being, by stipulation, submitted upon one transcript and one set of briefs.

[1] So far as the appellant sheriff is concerned, the only grounds for reversal urged are that the amount of the judgment is excessive in any event, and that, under the evidence, the respondent had no right to the grain, since its claim was fully paid. In reference to the first contention, it is argued that the evidence shows that the grain weighed 61,620 pounds, that its greatest value according to the testimony was \$1.40½ per hundred, and therefore that the judgment should not have been for more than \$865.76. It is apparent that counsel has made a miscalculation, as the evidence of

value referred to was \$2.40½ per hundred instead of \$1.40½. Appellants' contention that the respondent's claim was fully paid rests partly upon a similar miscalculation and partly upon a reliance upon only a portion of the evidence, together with a mistaken claim of law. In arriving at their conclusion they not only figure the wheat at \$1.40½ per hundred instead of \$2.40½, but they claim the crop of barley sold for around \$1,500 and that the respondent received at least \$1,214 of that amount, while they figure the total amount coming to the respondent was \$1,340.50. The court found upon sufficient evidence that the barley in question sold for \$800, and that the said Kennedy, with the consent of respondent, retained all of the proceeds of said barley except the sum of \$157, which was paid to the respondent on account of the rent. While the appellants argue from a portion of the evidence that the respondent received all of the proceeds of the barley, and thereupon relented most of the same to Kennedy, the findings above referred to are fully supported by the evidence. The court was justified in finding that the respondent merely permitted said Jack Kennedy to retain most of the proceeds of the barley, that it merely waived its crop mortgage on that portion of the crop, and that the note and obligation of Kennedy was by no means extinguished. *Grangers' Business Association v. Clark*, 84 Cal. 201, 23 P. 1081. It fully appears from the evidence that upon the items of rent and the crop mortgage the respondent had coming from Jack Kennedy on the day the sheriff took possession of the wheat at least \$1,316. In addition to those items, it appears that the respondent had guaranteed the expense of harvesting the crop of wheat, amounting to several hundred dollars. It further appears that the wheat had been completely and entirely turned over to the respondent by Jack Kennedy two days before it was levied upon by the sheriff. The amount due to the respondent was unquestionably ample consideration for the delivery of the wheat, and, in any view of the case, the respondent was damaged in the full amount of the value of the property.

[2] In behalf of the appellant Maryland Casualty Company, which company was surety on the sheriff's official bond, the point is made that such a surety is not liable for the payment of such a judgment. We think this contention must be sustained. The official bond in question provided as follows: "That if the said principal, C. L. Gillett, shall well and truly and faithfully perform all official duties required by him by law, and also all such additional duties as may hereafter be imposed upon him as such official by any law of the State of California, that then said obligation shall be null and void and otherwise to remain in full force and effect."

Section 689 of the Code of Civil Procedure, at the time here involved, provided that, in the event the property levied on was claimed by a third person, the sheriff was not bound to keep the same, unless the person in whose favor the writ of execution ran indemnified the sheriff by an undertaking. By plain inference, if such an undertaking was furnished, it was the duty of the sheriff to keep the property. In the instant case, the undertaking was furnished and the sheriff was charged by law with the duty of keeping the property. If he had then released the goods, this might have been a breach of duty for which the sureties on his official bond might have been liable. *McGaffey Canning Co. v. Bank of America* (Cal. App.) 294 P. 45. On the other hand, where a valid third party claim was filed, the sheriff had the right to demand an undertaking of indemnity. *Arena v. Bank of Italy*, 194 Cal. 195, 228 P. 441. Having received such an undertaking, the sheriff had no choice, but must proceed. *Cowsert v. Stewart*, 72 Cal. App. 255, 236 P. 940. In this case, the sheriff was compelled by the provisions of section 689 of the Code of Civil Procedure to keep the property, and he was also compelled to proceed to execute the writ of execution in his hands. While the sheriff himself might incur a liability by doing his duty, such a liability is beyond the terms of his official bond. The bond itself provides that, if he faithfully performs all duties required of him by law, the obligation of the bond shall be null and void. Under the circumstances shown here, it was the duty of the sheriff to hold the property whether the third party owned it or not. That being the case, we are of the opinion that the surety on his official bond was not liable, since the sheriff was performing an official duty required of him by law. It follows that that portion of the judgment must be reversed. Respondent argues that, in making this sale without paying off the mortgage, the sheriff violated the provisions of section 2969 of the Civil Code, and therefore the surety on his official bond is liable. The evidence shows the grain had been turned over to the mortgagee to apply on the debt, the mortgage was extinguished so far as that grain was concerned, at least, and the respondent filed a third party claim as owner and not a claim as mortgagee. No violation of this section appears.

The court found that the defendants R. Y. Watson and Richard Brackenbury did not file a "bond of indemnification" with the said sheriff. This finding is not sustained by the evidence. It was both stipulated at the trial and testified to by a deputy sheriff that such a bond was furnished. The respondent has not appealed from that portion of the judgment which relieved Watson and Brackenbury from responsibility, and, therefore the question whether they could be joined

with the sheriff as defendants in this action is not before us. Furthermore, the indemnity bond which they signed does not appear in the record, and its provisions are unknown to us. In anything said in this opinion we are not in any manner attempting to pass upon whether these bondsmen are liable to the appellant sheriff.

For the reasons given, the judgment against the appellant sheriff is affirmed, and the judgment against the appellant Maryland Casualty Company is reversed.

We concur: MARKS, J.; JENNINGS, J.

117 Cal.App. 643

BOOTHBY v. TOWN OF YREKA CITY et al.
Civ. 4366.

District Court of Appeal, Third District,
California.

Oct. 23, 1931.

1. Municipal corporations ⇨848.

Where county had long used city's property as a polling booth with latter's consent without compensation, *held* that on election day county was tenant of city as regards city's liability for injuries to voter.

2. Municipal corporations ⇨848.

Where voter at county election went on city's property to vote with latter's consent, she was not affected by any informality in procurement of city's consent to use of property for election purposes.

3. Municipal corporations ⇨848.

Statute imposes on municipalities owning buildings used by public same obligations that rest on private owners to exercise care to prevent personal injury (St. 1923, p. 675, § 2).

4. Municipal corporations ⇨848.

Where, at county's request, a city's property had often been used for election purposes, city was chargeable with notice of purpose of use.

5. Municipal corporations ⇨848.

Where city was chargeable with knowledge of purpose of use of premises by county for election purposes, it was also chargeable with notice that voters would be notified to use premises on an election day.

6. Municipal corporations ⇨848.

Where county tenant of a city's property notified voters to cast their ballots on demised premises, city owed voter duty to see that premises were reasonably safe.

Appeal from Superior Court, Siskiyou County; R. M. Rankin, Judge.

Action for personal injuries by Amelia V. Boothby against the Town of Yreka City and County of Siskiyou. Judgment against both defendants, and the Town of Yreka appeals.

Affirmed.

Charles E. Johnson, Dist. Atty., and Allen & McNamara, all of Yreka, for appellant.

Jesse W. Carter, of Redding, for respondent.

PLUMMER, J.

Plaintiff had judgment in this action against both the town of Yreka City and the county of Siskiyou, from which judgment the town of Yreka City appeals.

The record shows that for some time prior to the 6th day of November, 1928, the appellant had maintained a certain building within the corporate limits of the city of Yreka, known as "Engine House No. 2." This building was situate within voting precinct No. 5 of the county of Siskiyou. The plaintiff in this action was a duly qualified voter of the county of Siskiyou, residing within voting precinct No. 5. Prior to the 6th day of November, 1928, notice was regularly given by the county of Siskiyou, notifying all persons residing within district No. 5 that their polling place would be in the upstairs of engine house No. 2.

Engine house No. 2 is a two-story building, and was on the 6th day of November, 1928, owned by, and for a long time prior thereto had been owned and maintained by, the appellant. The lower part of the building was used by the city fire department, where paraphernalia of the department was housed. The upstairs was used by the fire department, and its monthly meetings were held there. The chief of the fire department was intrusted by the city with the supervision and control of engine house No. 2. The upstairs portion of engine house No. 2 was kept locked when not in use. The chief and assistant chief of the fire department had access to the key opening a door to the stairway leading to the upstairs room of the engine house. The room upstairs had often been used for election purposes and occasionally for other purposes. Prior to the election held on November 6, 1928, Miles Evan Buckner, a supervisor of the Third district of Siskiyou county, which district included the town of Yreka City, assisted in the selection of engine house No. 2 as a polling place where the voters of precinct No. 5 of said county might be enabled to vote. Mr. Buckner, in securing the upstairs portion of engine house No. 2 as a polling place, asked one of the members of the board of trustees of the city for permission to use the same, and was directed to take

the matter up with the chief of the fire department. The chief, on behalf of the city, granted permission to the county of Siskiyou to use the upstairs portion of engine house No. 2 as a polling place for the election to be held on November 6, 1928. Buckner proceeded to make arrangements with the superintendent of streets of the appellant to construct election booths in the upstairs of said building, the county paying for the installation of the booths. These booths were installed prior to the primary election held in August, 1928, and were left there until after the general election held in said county in November, 1928.

On the 6th of November, 1928, the plaintiff in this action, being a resident of precinct No. 5, went to the upstairs room of engine house No. 2 and cast her ballot. After casting her ballot plaintiff started to descend the stairs leading from the polls to the street below. The day was dark and the hallway was poorly lighted. There were three steps with the nosing or furling broken off completely, and a nail was protruding from one of the steps. The plaintiff caught the heel of her shoe on the projecting nail, and, due to the condition of the steps and lack of a handrail, was thrown down the stairs to the landing below. As a result of the fall the plaintiff was injured and brought this action for damages. The damages awarded are not alleged to be excessive.

[1, 2] Upon this appeal it is insisted that the county of Siskiyou was either a mere licensee or a trespasser upon the property belonging to the appellant, and that the plaintiff, entering the premises not on the invitation of the city, and not in any manner connected with the city's affairs, stands in the shoes of the county of Siskiyou in so far as her right of action is concerned; that she was no more than a mere trespasser or licensee, and cannot recover in the absence of any showing of active negligence or wanton injury on the part of the city.

The record shows that the county of Siskiyou had for a long time prior to the 6th day of November, 1928, used the premises involved as a polling place, which, taken in connection with the evidence to which we have referred, shows, we think, very clearly that the upstairs room of engine house No. 2 was used by the county of Siskiyou with the knowledge and consent of the town of Yreka City, and that the conclusion is amply justified that the county of Siskiyou was, on the 6th day of November, 1928, occupying and using the upstairs room of engine house No. 2 as a tenant of the appellant city. Whether that tenancy was or was not for compensation is wholly immaterial. Furthermore, being there with the knowledge and consent of the city, so far as plaintiff is concerned we think it is immaterial whether permission was regularly given to the county of Siskiyou to occupy

said premises and use the same for a polling place by resolution adopted by the trustees of the appellant city. Not being a trespasser, as is shown by the evidence to which we have referred, the exact procedure by which the county of Siskiyou secured permission to occupy the upstairs portion of engine house No. 2 cannot in any wise prejudice the rights of the plaintiff, she being a third party and not at all interested in how the county of Siskiyou obtained the right or permission to establish a place for voters to cast their ballots in voting precinct No. 5.

[3-5] No argument is really made that the stairway to which we have alluded was not, on the 6th day of November, 1928, in a dangerous condition and for a long time prior to such date had been in such dangerous condition. Neither is any argument made that the appellant did not have knowledge of such dangerous condition, and had neglected for a long period of time to make repairs. However, we may cite the extended notes found in 25 A. L. R. p. 1295, showing that the length of time elapsing during which the stairway involved was allowed to remain in a dangerous condition was sufficient to charge the city with constructive knowledge. The cases are numerous, and we cite only the page of the volume in which they are collected. Section 2 of the act approved June 13, 1923, Stats. 1923, p. 675, Deering's General Laws of California, Act 5619, p. 2310, reads: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

It will be observed that this section refers to buildings, and requires the municipality owning the same to take such action as will protect the public against any dangerous or defective condition. This is an obligation resting upon the city as the owner of a building used, or which may be used, by the public with its permission or consent, to the same extent at least as that burden is borne by the owner of private property to which the public has access or to the use of which the public may be invited. The city, as the owner of said property used by the county

of Siskiyou, was chargeable with notice of the purpose for which it was being used, by reason of the fact that permission was asked to use the property for a certain public purpose, and had on a number of times previously used the premises for a like public purpose. Being chargeable with knowledge of the purpose of the intended use, and use of the premises by the county of Siskiyou, it was likewise chargeable with notice of the fact that all of the voters residing within precinct No. 5 would be notified to use the premises as a polling-place on November 6, 1928.

In this particular respondent calls our attention to the case of *Chafor v. Long Beach City*, 174 Cal. 473, 163 P. 670, 671, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, and quotes therefrom the following language: "It cannot be said then that Edith Chafor was a trespasser at the time and place of her death. She was at least a licensee by permission or invitation, and if the city is responsible at all it is responsible for the exercise of ordinary care to see that such a licensee is not injured." (Citing a number of cases.) In the instant case, however, the circumstances shown in the record go further and establish that the plaintiff in this action was at the polling place in question, by the express invitation of the county of Siskiyou, notifying all voters of precinct No. 5 to cast their ballot at the place designated.

[6] This brings us to what we think is the crux of the whole matter involved in this action, to wit, the responsibility of the owner of property let to a tenant to be used for a public or semi-public purpose. Under such circumstances the owner owes it to the public as the third party, and in this case the city owed it to the plaintiff as a third party, to see that the premises were reasonably safe for the uses and purposes intended to be made thereof.

In 36 C. J. 208 we find the rule thus stated: "While, as a general rule, all those entering under the tenant's title have no greater rights against the landlord than a tenant himself would have had, an exception to this rule prevails, according to the weight of authority, in respect to injuries sustained by invitees of a tenant by reason of a dangerous condition amounting to a nuisance existing on the premises at the time of the letting, and particularly when the premises are demised for public or semi-public purposes, and in such cases a landlord is liable even without actual knowledge of the defects."

The statutes which we have quoted, adopted by the Legislature in 1923, change this rule in so far as knowledge is concerned, but otherwise we think it applies to this case. The rule toward invitees of the owner or occupant in charge of property is as follows (45 C. J. 823): "While the owner, occupant or person in charge of property is not an in-

surer of the safety of an invitee thereon, he owes to an invitee the duty of exercising reasonable or ordinary care for his safety, and is liable for injury resulting from breach of such duty, although no element of lawlessness or wantonness enters into the act or omission complained of. The duty in this respect is an active, affirmative or positive one, and is not limited to merely refraining from injurious acts, although there is always a duty to refrain from any act which may make the invitee's use of the premises dangerous, or result in injury to him."

In 16 Ruling Case Law, p. 1069, the law cited by numerous authorities is stated: "Notwithstanding the general application of the rule of caveat emptor above stated, as exempting the landlord from liability for injuries arising from defects in the premises existing at the time of the lease, there are a number of decisions which hold that where the property is leased for public or semi-public purposes, and at the time was not safe for the purposes intended, or when there is a dangerous condition of the premises which is in the nature of a nuisance, and the owner knew, or by the exercise of reasonable diligence ought to have known of such condition, he cannot evade liability to a third person for damages resulting from such conditions. But it is his duty to make such property reasonably safe for the purposes intended, or discontinue the conditions which are in the nature of a nuisance, as the case may be," etc.

In the case of *Larson v. Calder's Park Co.*, 54 Utah, 325, 180 P. 599, 603, 4 A. L. R. 731, the Supreme Court of Utah, in considering the duty of the owner of property leased for public or semipublic purposes, used this language: "Where property is leased to a tenant for a public use the care required by the landlord should be of a higher degree than when the property is let for private purposes. Public policy demands such care for the protection of the public, and this is particularly applicable here in Utah, where public resorts and amusement parks are numerous and their attractions varied and alluring. In *Beaman v. Grooms*, 138 Tenn. 325, 197 S. W. 1090, L. R. A. 1918B, 307, the court says: 'While, so far as the basic question of the imposition of the duty on a landlord to know the condition of the premises he leases is concerned, no distinction can be made between private and public buildings or premises (citing a number of cases), it seems to be fair and reasonable to hold that due care on his part calls for greater exertion in the case of premises intended for use by the public than when they are let for purely private purposes.'" (Citing cases.)

To the same effect are a number of cases set forth in the annotations found in 22 California Law Reports, 624, dealing with the duty and liability of a lessor, where property is leased for public or semipublic purposes. The cases

collected and annotated are too numerous to be set forth herein; hence, we refer only to the volume and page.

We may here again call attention to the fact that the legislative act quoted in this opinion has for its purpose the protection of the public in the use of public property, and the duty of the owner of public property keeping the same in a safe condition.

The appellant calls our attention to the cases of *Sincerney v. City of Los Angeles*, 53 Cal. App. 440, 200 P. 380, and *Beeson v. City of Los Angeles* (Cal. App.) 300 P. 993. In the former case the city of Los Angeles was held not liable for injury resulting to an employee of a trespasser, upon the streets of the city. This case was decided prior to the act of the Legislature in 1923, making municipalities liable just the same as the owners of private property, subject only to knowledge of the defective condition, and of time to remedy the same. This case may also be distinguished from the one at bar, for the simple reason that the plaintiff in this action was not a trespasser, but was upon the premises for the uses and purposes contemplated both by the city and by the county of Siskiyou. In the *Beeson* Case a minor son of the plaintiff was drowned by falling into a pool of water in a drainage ditch. The evidence set forth in the opinion shows that the pool was not an attractive nuisance, was not connected with any playground, and was not intended for public use.

While the erection and maintenance of an engine house by a city is governmental, it is unnecessary to cite authorities to show that when a city leases a portion of its property, as was done in this case, it is proprietary in character. This is said without deciding whether the act of the Legislature of 1923 has or has not abolished such distinction, when the duty to render the same safe for the use of the public is involved.

That a landlord is liable for injuries occurring to third persons, by reason of the unsafe and dangerous condition of the leased premises, when the unsafe or dangerous condition was known and existed at the time of the leasing, is clearly set forth, and abundantly supported by authorities cited in the recent case of *Dennis v. City of Orange* (Cal. App.) 293 P. 865.

A number of other cases have been cited by the respondent in support of the contention that the town of Yreka City is liable as well as the county of Siskiyou (the county of Siskiyou has not appealed from the judgment), but are not referred to herein for the reason that the authorities cited seem to us conclusive. We may, however, add that section 1941, Civil Code, is applicable so far as the duty is cast upon the landlord, to make property reason-

ably safe, intended for use by the general public.

The judgment is affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

118 Cal.App. 18

PEOPLE v. GRIFFIN.

Cr. 220.

District Court of Appeal, Fourth District,
California.

Oct. 29, 1931.

1. Criminal law ⇨876½.

Acquittal of alleged statutory rape committed on minor held not inconsistent with conviction of contributing, on other occasions, to minor's delinquency.

2. Rape ⇨40(5).

In prosecutions for statutory rape, previous unchastity of girl under 18 is inadmissible except where force was used.

3. Infants ⇨20.

In prosecutions for contributing to delinquency of minor, minor's previous unchastity is no defense.

4. Witnesses ⇨319.

Witness may not be cross-examined for purpose of impeachment on irrelevant and immaterial matter.

5. Criminal law ⇨1159(3).

In prosecution for contributing to delinquency of minor, conviction on conflicting evidence could not be disturbed.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Clifton Griffin, also sometimes known as and called "Blackie," was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Utle & Nuffer, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was charged with the crime of statutory rape alleged to have been accomplished by him on February 9, 1931, on the person of La Verne Boone, a female under the age of 18 years and not his wife.

He was also charged with contributing to the delinquency of this minor, in that on November 12, 1930, he gave her intoxicating

liquor and attempted to have intercourse with her, and that he had intercourse with her on November 18, 1930, and February 9, 1931.

The charges were tried together. The jury found appellant not guilty of rape and guilty of contribution. He filed an application for probation, which was granted.

Appellant urges that the verdicts are inconsistent, and that the acquittal of the charge of rape was inconsistent with the conviction of contributing to the delinquency of the minor. He complains of rulings of the trial court on objections to the introduction of evidence, and implies that the evidence is insufficient to support the verdict and judgment.

[1] The contention that the verdicts are inconsistent is without merit. Were there no other reason for this conclusion, it would be sufficient to point out that the rape was alleged to have occurred on February 9, 1931, and that the acts of contribution were alleged to have occurred on February 9, 1931, the date of the alleged rape, and also upon two separate occasions, one on November 12 and the other on November 18, 1930.

[2, 3] Appellant complains that rulings of the trial court unduly restricted his cross-examination of La Verne Boone upon the question of whether or not he had difficulty in accomplishing the acts of intercourse with her. The girl testified that her first intercourse was with appellant on November 18, 1930. A physician testified that he examined her in June, 1931, and that she had been pregnant for about seven months. Appellant urges that, had he been permitted to continue his cross-examination, it might have developed that the girl had been immoral prior to the first intercourse with him, and that he was not the father of the unborn child. No force was used by appellant in accomplishing the acts of intercourse. There is but one exception to the rule that proof of previous unchastity of a girl under the age of 18 years is inadmissible in prosecutions for rape which is where force is used. *People v. Pantages* (Cal. Sup.) 297 P. 890. Lack of chastity has never been held to be a defense in a prosecution for contributing to the delinquency of a minor. The court did permit the cross-examination of the witness concerning the difficulty experienced by appellant in accomplishing the penetration of her person. There was no prejudicial error in these rulings of the trial court sufficient to justify a reversal of the judgment.

[4] The minor testified that she rode into El Centro with two girls on February 9, 1931. The trial court did not permit counsel for appellant to compel La Verne Boone to disclose the names of these girls. Counsel complains of this ruling and suggests that, if these girls had been produced as witnesses, they might

have denied accompanying La Verne Boone on this journey. It is well settled that a witness may not be cross-examined for the purpose of impeachment upon an irrelevant and immaterial matter. 27 Cal. Jur. 106.

[5] There is sufficient evidence in the record to sustain the conviction of appellant. La Verne Boone testified to each of the acts alleged in the information as contributing to her delinquency. She testified that she had never had intercourse with any one other than appellant. A physician found her in such a condition of pregnancy that the unborn child could have been conceived on November 18, 1930. The testimony of the girl was flatly contradicted by appellant and his witnesses. This created a conflict in the evidence which was resolved against appellant by the jury. The verdict cannot be disturbed by us.

Judgment and order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

117 Cal.App. 708

PEOPLE v. BRIGGS.

Cr. 1169.

District Court of Appeal, Third District,
California.

Oct. 28, 1931.

Rehearing Denied Nov. 12, 1931. Hearing
Denied by Supreme Court Nov. 25, 1931.

1. Infants $\Rightarrow$ 20.

Evidence held insufficient to warrant conviction of committing lewd or lascivious acts upon child under age of 14 (Pen. Code, § 288).

2. Criminal law $\Rightarrow$ 404(5).

Complaining witness held not entitled to write in jury's presence in attempt to corroborate her testimony that certain document was not in her handwriting.

3. Criminal law $\Rightarrow$ 741(1).

Weight and sufficiency of evidence are jury questions.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

George Briggs was convicted of violating Pen. Code, § 288, relating to the commission of lewd or lascivious acts upon the body of a child under 14 years of age, and he appeals.

Reversed.

Howe, Hibbitt & Johnston and O. F. Meldon, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PRESTON, P. J.

The defendant, George Briggs, was convicted by a jury of a violation of the provisions of section 288 of the Penal Code. He made a motion for a new trial. The motion was denied, and from the order denying a new trial and from the judgment of conviction he prosecutes this appeal.

[1] The complaining witness was Edith Eifert, a girl of 13 years of age. She and her sister, Iola Eifert, aged 12 years, had been in the care and custody of the defendant and his wife for three years, when this charge against defendant was made. They were placed there by their father, in whose custody they had been awarded by the superior court.

The defendant was convicted solely upon the testimony of these two girls. Edith testified that defendant committed the lewd and lascivious acts complained of at 7:30 p. m., on a Saturday evening, in the month of January, 1931 (the exact date she could not recall), in defendant's bed, in his home at No. 3069 Fifth avenue, in the city of Sacramento, in the presence of her sister Iola and defendant's wife, who were also at the time occupying the same bed; in other words, said four above-mentioned persons were all occupying the same bed when the lewd and lascivious acts were alleged to have been committed. She further testified: "He tried to put his privates in mine when he was on top of me and I screamed and cried and finally he got angry with me and he told me to go upstairs to bed, and I tried to get out of bed, and he caught hold of me. He turned the light on and then he told me if he ever caught me over to Arata's he would give me the worst beating I ever had."

Her sister Iola testified that she was in the same bed at the time and saw the defendant commit the acts charged against him, and watched the performance about twenty-five minutes.

The testimony of these girls, relative to the lewd and lascivious conduct of defendant, was directly and emphatically contradicted, not only by the defendant himself, but also by Mrs. Briggs, the defendant's wife. Circumstances related by the brother of defendant also directly contradicted the testimony of the two girls. They all positively denied that the alleged acts of lewd and lascivious conduct were committed, and, also, related facts and circumstances occurring on the evening of the night in question, which, if true, would show that the story told by these girls was undoubtedly a fabrication.

The testimony offered by the defendant also shows that prior to the time these girls were placed with the defendant and his wife, they had both been exposed to demoralizing influences, and were by no means unsophisticated. They had formed habits of telling falsehoods, purloining money and other articles of value

from stores and neighbors, and continued these practices after coming into the home of defendant. They were frequently severely punished and upbraided by both Mr. and Mrs. Briggs for their misconduct. In fact Edith admitted on cross-examination that she and her sister were given to lying and stealing and that they had been punished for these things by both defendant and his wife, and that Mr. and Mrs. Briggs had told them on many occasions "that if they did not stop lying and stealing they would be put in a convent."

The credibility of the story of these girls was further seriously impaired by the following written declaration of Edith, addressed, apparently, to her sister Iola, viz:

"Edith Eifert

"March 3.

"The convent not for me

"let's tell a bad lie on them they go to the jail and make them suffer boys banana pole

"Edith R. Eifert,

"3067-5th Ave."

On the bottom of the paper written in lead pencil, is the following: "I have important news to ask you. Iola Eifert."

With reference to this writing, the attorneys for appellant aptly say: "The purpose of the introduction of this written declaration being to establish a motive and a purpose formed to make a false accusation against the defendant and his wife. This motive being stimulated perhaps from an apprehension growing out of repeated threats of Mr. and Mrs. Briggs to send the girls to a convent, and stimulated partly from feelings of resentment toward Mr. and Mrs. Briggs because of scoldings and punishments previously received."

Edith denied that this document was in her handwriting, but testified that the words written at the bottom thereof in pencil, to wit, "I have important news to ask you," was in the handwriting of her sister Iola.

There were, however, presented and allowed in evidence numerous writings admittedly those of the witness Edith for comparison with the disputed writing above set forth, and we have had the original exhibits produced in this court and have carefully compared and studied the handwriting of Edith Eifert, and if called upon to express our opinion as to whether or not the disputed document is in her handwriting, we would unhesitatingly say that it is.

[2] After the case had been closed by both sides, the district attorney was permitted, over the strenuous objection of appellant, to reopen the case and have the complaining witness write, in the presence of the jury, in an attempt to corroborate her testimony that she did not write the above-mentioned note. This, we think, was prejudicial error.

The rule is well settled that a witness is not permitted to write his signature in the presence of the jury for the purpose of having the same compared with a signature purporting to be his, the genuineness of which he denies.

It would open wide the door for fraud if a witness were permitted to corroborate his own testimony by the preparation of specimens of his own handwriting for the purpose of comparison. *Hickory v. U. S.*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

In *U. S. v. Jones* (C. C.) 10 F. 469, 470, the defendant was accused of having used the mails to further a scheme to defraud. The evidence adduced by the prosecution was a letter alleged to have been written by the defendant and mailed by him to one Bates. At the trial, the defendant sought to introduce a copy of this letter written by him in the presence of the jury for comparison with the original, the purpose being to disprove the defendant's authorship of this letter. The offer was refused, the court saying: "In this there was no error. It is not allowable, upon an issue as to handwriting, to put in evidence papers, otherwise irrelevant, merely for the purpose of enabling the jury to institute a comparison of the writing. * * * It has never been permitted to introduce writings for the mere purpose of enabling the jury to institute a comparison of writings. To permit the practice here sought to be established would be to permit the defendant to make evidence for himself." See, also, *Williams v. State*, 61 Ala. at page 40.

In this last case, the court said: "There are cases in which a witness denies his signature, and may on cross-examination be compelled in the presence of the court to write his name for the purposes of comparison. This may fall within the latitude of cross-examination, and whenever permitted, of that examination, the signature so written becomes a part. But it would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony, by a preparation of specimens of his writing for the purposes of comparison. By design a correspondence with, or a departure from the disputed writing could be fabricated; and whether there was such design, is an inquiry with which the jury should not be embarrassed."

We deem it unnecessary to discuss the other contentions made for a reversal of the judgment.

If the story told by these two girls is true, it imputes to defendant an unthinkable depravity and ungovernable sexual passion, and attributes to Mrs. Briggs, the wife of defendant, a tolerance of acts and depravity and infidelity on the part of her husband, utterly opposed to every known human impulse of womankind, and not only stamps them both as perjurers, but brands as false every other

fact and circumstance admitted in evidence on the part of defendant. The record does not admit of any such conclusion.

[3] We are not unmindful of the rule that the weight and sufficiency of the evidence were questions to be determined by the jury, but the circumstances surrounding the lewd and lascivious conduct, as detailed by Edith Eifert, as having taken place in the bed at the time occupied by defendant and his wife and her sister, is so incompatible with human conduct, and the whole story told by both girls is so inherently improbable, we think, after a careful examination of all the evidence, that the erroneous admission of the testimony above mentioned, and the other errors complained of, resulted in a miscarriage of justice, and the judgment and the order denying a new trial should be reversed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

118 Cal.App. 11
McCARTY et al. v. MELLINKOFF et al.
Civ. 6996.

District Court of Appeal, Second District,
Division 2, California.
Oct. 29, 1931.

1. Bills and notes $\S$ 425.

Payee could refuse to accept payment prior to maturity of principal except in installments expressly provided for by note.

2. Bills and notes $\S$ 425.

Makers had no right to extinguish obligation except in manner authorized by note.

3. Usury $\S$ 16.

That payee, in accepting payment of unmatured note calling for 12 per cent. interest, demanded payment of interest until maturity, did not render transaction usurious (Usury Law [St. 1919, p. lxxxiii] $\S$ 1).

The transaction was not usurious under Usury Law (St. 1919, p. lxxxiii), $\S$ 1, since the payment and cancellation of the note was a matter of new agreement, and the payee's statement of the sum he would accept as consideration for cancellation was an offer which makers could accept or not as they pleased. The new agreement did not involve matter of interest on an agreement on a loan of forbearance of money, but partook rather in nature of a sale or accord and satisfaction.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Van Leah McCarty and others against Albert Mellinkoff and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Seccombe & Bledsoe, of Hollywood, for appellants.

Bailie, Turner & Lake, of Los Angeles, for respondent Mellinkoff.

FRICKE, Justice pro tem.

The trial court sustained the demurrer to the complaint without leave to amend, and plaintiffs have appealed from the judgment entered in favor of defendants. The complaint alleges that on November 28, 1928, plaintiffs borrowed from defendant Albert Mellinkoff the sum of \$7,500, giving their promissory note therefor. By this note the makers promised to pay the principal sum "with interest from date hereof on unpaid principal at the rate of twelve (12) per cent per annum; principal and interest payable in installments of one hundred (\$100) dollars on the 10th day of each month beginning on the 10th day of January, 1929, and continuing up to and including June 10, 1929; \$150 on July 10, 1929, and \$150 on the 10th of each succeeding month thereafter up to and including November 10, 1929, and on December 10, 1929, the balance of said principal and interest then remaining unpaid shall be due and payable." The complaint further alleges that plaintiffs paid sums of \$100 each on the 10th days of January, February, March, and April, 1929, and on April 23, 1929, "paid to the defendant the amount then due upon said note, to-wit: the sum of seven thousand four hundred and twenty-nine and 34/100 (\$7,429.34) dollars, and the defendant did then and there further demand and on said date received from plaintiffs interest on said amount from April 23, 1929, to December 10, 1929." The complaint demands judgment for three times the amount of interest paid, a total of \$2,726.25; it being appellants' contention that the transaction of April 23, 1929, constituted a violation of the usury law.

[1-3] It is evident that the note as executed was not in violation of section 1 of the Usury Law (St. 1919, p. lxxxiii), since that law provides that it shall be competent for parties to contract for the payment and receipt of a rate of interest not exceeding 12 per cent. per annum where such rate is clearly expressed in writing.

When appellants, the borrowers, came to respondent, the lender, on April 23, 1929, and desired to terminate their obligations under the note, the lender possessed certain rights in addition to his right to repayment of the loan with interest. He had the right

to refuse to accept payment prior to maturity of the principal except in the installments expressly provided for by the note. The borrowers, on the other hand, had no right to extinguish their obligation except in the manner authorized by the terms of the note. The payment and cancellation of the note was a matter of new agreement. The lender's statement of the sum he would accept as consideration for cancellation and release from the obligations of the note was an offer which the borrowers could accept or not as they pleased. The situation was no different than if respondent had sold the note to some third person for a like amount. The new agreement did not involve the matter of interest upon an agreement "upon a loan of forbearance of money," but partook rather in the nature of a sale or accord and satisfaction and did not come within the terms of the Usury Law.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

117 Cal.App. 713

CLEVELAND et al. v. GLASSELL et al.

Civ. 4275.

District Court of Appeal, Third District, California.

Oct. 28, 1931.

Brokers $\text{\textcircled{C}}$ 71.

Owner *held* entitled to \$3,000 per acre above costs and expenses, including commissions paid, before selling agents were entitled to further commission.

The contract between owner of tract of land and agents employed to carry out subdivision and sale of lots therein on a 20 per cent. commission provided for first payment of 15 per cent. commission to agents and certain other expenses out of purchasers' payments on lots, and that all payments thereafter made should be retained by owner until all of land should be paid for "on a net basis of" \$3,000 per acre, and that, after all such sums, including said \$3,000, were paid, then owner should pay to agents out of receipts by him the balance of 5 per cent. commission to which agents were entitled.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by E. T. Cleveland and another, as copartners operating under the firm name of Cleveland-Blair Realty Company, against

William M. Glassell and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Arthur G. Baker, Joseph Hansen, and Amend & Amend, all of Los Angeles, for appellants.

E. A. Lane, of Los Angeles, for respondents.

Mr. Justice pro tem, BURROUGHS delivered the opinion of the court.

This is an action to recover the sum of \$12,383.31, alleged to be due plaintiffs as commissions on the sale of real estate. Judgment went for defendants, and plaintiffs appealed.

April 13, 1923, Andrew Glassell was the owner of 58 acres of land near the city of Los Angeles, and, desiring to subdivide the same into building lots, entered into a contract with E. T. Cleveland and M. E. Blair, the plaintiffs herein, operating under the firm name of Cleveland-Blair Realty Company, as agents, to carry out the subdivision thereof. Said Glassell died, and his interest in said land and contract passed to William M. Glassell and Andrietta G. Somers, the defendants. The differences between the parties concern the proper construction to be given to certain provisions of said contract. The Cleveland-Blair Realty Company, hereinafter called the agents, brought this action to recover from the defendants the sum of \$12,383.31, claimed to be due them for commissions on sales of lots in said tract of land.

For a clear understanding of the controversy, it is necessary to state at some length the terms of said contract. By its terms the agents assumed the managerial charge of platting and improvement work provided for, and were to act as selling agents of the land when subdivided. A schedule of prices for the lots was agreed upon by the parties. Among other things, paragraph 12 of the contract provides that the agent shall receive a commission of 20 per cent., to be paid as set forth in paragraphs 1 to 11, inclusive, of said contract. The paragraphs above referred to provide that all moneys received from the sales of the land shall belong to the owner of the land, and shall be deposited by him in a "trust fund"; that out of said "trust fund" the owner may repay himself the expenses of surveying and platting the land, and also such sums of money as he may have put into said "trust fund" from outside sources, as advancement for the improvement work; also for the cost of a water-distributing system; that at the time of the sales of the lots a first payment of 20 per cent. must be made by the purchaser; that, as soon as 20 per cent. of the principal purchase price has been paid into the said "trust fund," the owner shall pay the agents, as part of their commissions, 10 per cent. of such principal purchase price, and thereafter the owner shall pay from said "trust fund" to said

agents one-half of all subsequent payments made on each lot, until said agents have received a total of 15 per cent. of the principal total purchase price. Provision is then made for the payment from said "trust fund," and, as a part of the expenses, such sums of money as would be required to pay for certain designated street improvements that were required to be made by the owner of the land as a condition precedent to filing the map of said tract of land with the legal custodian thereof. There is a further provision: "After the payments have been made from said 'trust fund,' as hereinbefore provided, the owner shall have and retain all payments until all said land has been paid for, on a net basis of three thousand dollars (\$3,000) per acre. After all sums hereinbefore provided for, including said three thousand dollars (\$3,000) per acre, have been paid, then the owner shall pay to the agents out of receipts by him hereunder the balance of the commission to which the agents are entitled, that is to say, the total commission of the agents is to be twenty per cent. (20%) of the principal purchase price of each respective lot, fifteen per cent. (15%) thereof being payable as hereinbefore provided and the remaining five per cent. (5%) thereof being payable upon each respective lot as the principal payments (exclusive of interest payments) come in upon each lot after the costs of said platting and improvements and said three thousand dollars (\$3,000) per acre have been paid and it is understood that said \$3,000 per acre shall be figured net over and above all said costs and exclusive of all interest upon deferred payments, and all payments shall be deemed deferred payments until actually paid, whether the same be outstanding under contracts of purchase or under trust deeds given after delivery of deeds of conveyance." From the foregoing provision of the contract, it is perfectly clear that there shall be paid from the said "trust fund" the cost of surveying, platting, improvements, the water system, the street paving, and 15 per cent. commission to the agents; that, after the aforesaid payments have been made, then the owner is entitled to retain all payments until he has received \$3,000 net per acre for the entire fifty-eight acres.

However, it is claimed by the appellant that the contract is uncertain, in that in the latter part of the provision of the contract above quoted it is provided that the remaining 5 per cent. commissions is to be paid "after the costs of said platting and improvements and said three thousand dollars (\$3,000) per acre have been paid. * * *" But, in answer to this claim, the first portion of the paragraph above cited is clear that all payments, after the expenses and the 15 per cent. commissions already paid have been made, are to be retained by the owner until he has received his \$3,000 per acre net for

the entire tract of land, and it will be further observed that said \$3,000 per acre referred to is a net payment to the owner. In 5 Words and Phrases, First Series, page 4781, it is said: "The net proceeds of a sale of land is what remains of the gross proceeds after paying the expenses of the sale." The word "net" is defined as "clear of anything extraneous with all deductions (such as charges, expenses, discounts, commissions, taxes, etc.) made." 3 Bouv. Law Dict. 2332; Cyclopedic Law Dict.; Black's Law Dict.

Notwithstanding the fact that, in providing for the payment of the remaining 5 per cent. of the commission to the agents, each item of cost or expense is not enumerated and the 15 per cent. of commissions already paid is not especially mentioned, the entire contract, including the paragraph above quoted, must be read together. The contract provides in express terms for the payment of the 15 per cent. commission and other expenses, and that all payments thereafter made be retained by the owner until he has received the full \$3,000 per acre, as the purchase price of his land, and that, where the term "net" is used in the contract, it means over and above all costs and expenses, including the moneys already paid to the agents as their commissions.

The total amount of money received from the sale of lots aggregates \$248,716.20. The total paid out for the expenses of surveying, platting, and all improvement work aggregates \$61,554.64. The 15 per cent. commission paid to the appellants, as agents, aggregates \$37,359.93. These last two items make a total of \$98,914.57, and, under the contract, constituted a preferred claim against the "trust fund" over and above all other claims. The deduction of the last-named amount from the amount of the total sales left a balance of \$149,801.63. Under the contract, the next sum deductible from the "trust fund" was the purchase price of the land due the owner—said amount being at the rate of \$3,000 per acre for fifty-eight acres of land—a total of \$174,000. This last-named item has been paid to the extent of \$149,801.63, leaving the balance due respondent of \$24,198.37, which must be paid before the agent would have been entitled to any commission. We are satisfied from the foregoing that the contract is not ambiguous, and that the lower court was justified in its holding that there was nothing due the appellants.

The contract also provides that the last 5 per cent. due the agents as commissions was not to be paid except as the principal payment came in upon each lot. There is no showing as to the amount of money which has been paid upon each lot, and a summary of the evidence reveals that the principal payments, if paid in full, upon all lots sold are

insufficient to pay the \$3,000 per acre, and, consequently, there could be no further principal payments to be received to satisfy the final 5 per cent. or any portion thereof of said commission.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

117 Cal.App. 679
SHELTON et al. v. ACKERMAN.
Civ. 4351.

District Court of Appeal, Third District, California.

Oct. 26, 1931.

1. Appeal and error ⇐979(1).

New trial ⇐70.

Where application for new trial depends upon sufficiency of evidence, trial courts have wide discretion in granting or denying same, and order will not be disturbed except for clear abuse of discretion.

2. New trial ⇐70.

Evidence entitled trial court to assume motorist, killed in intersectional collision, exercised due caution, as regards new trial after verdict for defendant.

Evidence was not such that court could, as matter of law, say that deceased, for whose death action was brought, was guilty of contributory negligence for failure to look in direction whence machine could be expected to approach at intersection of streets. Effect of evidence was that deceased could have seen defendant's automobile approaching without turning his head.

3. Evidence ⇐14.

It is common knowledge that person of good eyesight possesses wide sweep of vision without turning head.

4. Death ⇐58(1).

Defendant in death action had burden to prove contributory negligence of motorist killed.

5. Appeal and error ⇐933(4).

Appellate court held required to assume, in support of order granting new trial for insufficiency of evidence to support verdict for defendant, that deceased motorist saw defendant's car approaching at intersection.

6. Automobiles ⇐171(13).

Motorist held entitled to assume automobile approaching intersection was proceeding at lawful speed.

7. Automobiles ⇨243(17).

High speed at which defendant approached intersection could be considered in determining whether deceased was contributorily negligent.

8. Death ⇨58(1).

If there is total absence of evidence whether deceased exercised due caution, presumption of ordinary care may be considered with other evidence in determining question of contributory negligence (Code Civ. Proc. § 1963, par. 4).

Code Civ. Proc. § 1963, par. 4, provides that there is presumption that person takes ordinary care of his own concerns.

Appeal from Superior Court, Tehama County; R. M. Rankin, Judge.

Action by Annie V. Shelton and others against William W. Ackerman, wherein a verdict was rendered in favor of defendant. From an order granting a new trial, the named defendant appeals.

Affirmed.

F. C. Pugh, of Red Bluff, and Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

James T. Matlock, of Red Bluff, and Martin I. Welsh, of Sacramento, for respondent.

R. L. THOMPSON, J.

This is an appeal from an order granting a new trial in an automobile casualty case.

The respondent brought suit for damages for the negligent killing of her husband resulting from a collision of automobiles which occurred at an intersection of streets in Red Bluff. The jury rendered a verdict in favor of the defendant. A new trial was granted on the ground of insufficiency of the evidence to support the verdict and judgment. The negligence of the defendant, which consisted in driving his machine on to the intersection of the streets at a high rate of speed, is not disputed. The sole question involved on this appeal is whether the deceased was guilty of contributory negligence as a matter of law.

The appellant contends the evidence shows without dispute that the deceased failed to look to his right before entering the intersection, and that he was therefore guilty of contributory negligence as a matter of law, so as to preclude the respondent from recovery.

All of the evidence upon this subject, which the record discloses, appears as follows: Mrs. McKay, who was also summoned as a witness for the defendant, testified in behalf of the plaintiff that she was sitting on the front porch of her home, which is situated near the

corner where the accident occurred, and saw both machines just prior to the collision. She said: "Mr. Shelton was driving at a moderate rate of speed." She testified: "Mr. Ackerman's car was coming at a high rate of speed." Another witness testified that the defendant's car "roared by" on its way to the intersection. Mrs. McKay further said, regarding the conduct of the deceased just before he reached the intersection: "I noticed that he did not turn his head one way or the other, so I thought 'well, I will turn my head and look.' And I looked * * * south and Mr. Ackerman's car was coming at a high rate of speed. * * * Mr. Shelton kept on going, he didn't slow down nor did he speed up, he just kept at the same rate, he stayed just that way, sitting at the wheel, both hands on the wheel, looking straight ahead. * * * Mr. Shelton didn't give any signal, never took his hand off the wheel, never turned his head, was going straight ahead. * * * Now, if it were possible for him to see out of the corner of his eye, he might have done that, but he did not turn his head one way or the other."

The appellant himself testified in regard to the conduct of the deceased:

"Q. When that car got into the intersection, what was the conduct of the driver of that car? A. He was looking straight ahead, driving right straight across, * * * I did not see him turn his head either way. * * *

"Q. Up to the very moment of the collision, do you know whether he looked at you or your car? A. I don't know whether he did or not, but I imagine he had seen me the same as I had seen him. Nothing to obstruct the view, broad daylight, and I don't know as I had to turn much to see him; by looking straight ahead I could see him, and I figured he could see me."

[1] A wide discretion is accorded trial courts in granting or denying motions for new trials where the application depends upon the sufficiency of evidence. 2 Cal. Jur. 940, § 554. Under such circumstances, the order of the court will not be disturbed except for a clear abuse of discretion.

[2-6] In the present case, we are unable to say, as a matter of law, the deceased was guilty of contributory negligence for failure to look in the direction whence machines should be expected to approach an intersection of streets. Mr. Shelton rode alone in his Ford machine. He was killed as a result of the accident. He was unable to speak in his own behalf regarding his conduct. It is not a question as to whether he turned his head before he reached the intersection. It is merely a question as to whether he exercised due caution to look in the direction from which he should have anticipated danger. Two witnesses furnish all the evidence which

is disclosed on this subject. One of them says he did not turn his head one way or the other; he looked straight ahead. The fact that he did not turn his head does not foreclose the possibility that he looked to his right. Common knowledge teaches one that a person of good eyesight possesses a wide sweep of vision without turning the head. The burden was on the defendant to prove contributory negligence of the deceased. This same witness who testified that the deceased did not turn his head recognized the truth of the scope of his vision, for she said he might have looked out of the corner of his eye. The defendant truthfully said: "I imagine he had seen me the same as I had seen him. Nothing to obstruct the view, broad daylight. * * * By looking straight ahead I could see him, and I figured he could see me." The evidence, therefore, is to the effect that the deceased could have seen the defendant's car approaching without turning his head. In support of the order granting the new trial, we must assume that the deceased did see the defendant's car approaching. If so, it was unnecessary for him to turn his head. He may have misjudged the rate of speed at which the defendant's car was running. He had a right to assume he was running at a lawful rate of speed. He may have erroneously assumed he would have ample time to pass the intersection before the defendant arrived. Evidently the defendant was running at an unusually rapid rate of speed. One may easily be deceived as to the rate of speed of another car. At least the court had a right to assume from the evidence that the deceased exercised due caution. The order granting a new trial may therefore not be disturbed.

[7] In the case of *Oberholzer v. Hubbell*, 36 Cal. App. 16, 171 P. 436, a judgment against the driver of an automobile for colliding with a horse and buggy at an intersection of streets was sustained, although the driver of the buggy admitted she looked straight ahead and did not look to her right upon approaching the intersection, and did not see the automobile. It was contended she was guilty of contributory negligence. The court says: "It was developed upon the cross-examination of the plaintiff that there was nothing to obstruct her view * * * of the approach of the defendant's automobile; that neither she nor her husband looked to see if other vehicles were approaching; and that if they had looked in the direction from which the defendant's automobile approached they could have seen it and 'would have stopped.'"

In that case, the defendant's machine came suddenly from behind another vehicle and collided with the buggy driven by the plaintiff. It was held the failure of the plaintiff to look for approaching vehicles was not necessarily the proximate cause of the accident. So in the present case, the high rate of speed at which the trial court was warranted in assuming the defendant approached the intersection, may be considered in determining whether the deceased exercised due caution.

[8] The respondent is in error in assuming the presumption which is announced in paragraph 4 of section 1963 of the Code of Civil Procedure, that a person takes ordinary care of his own concerns, may be considered under the circumstances of this case, to raise a conflict of evidence regarding the contributory negligence with which the deceased is charged, unless we assume the evidence, to the effect that the deceased did not turn his head, is not conclusive of the fact that he did not look toward his right. Strictly speaking, the record in this case is devoid of any evidence as to whether the deceased did or did not actually look to his right. If there is a total absence of evidence as to whether the deceased exercised due caution by looking to his right, then the presumption heretofore announced may be considered with all the other evidence in determining whether he was guilty of contributory negligence. Mrs. McKay was called in behalf of the plaintiff, and gave the only evidence upon which the appellant now relies to establish his claim of contributory negligence. The Supreme Court said in the recent case of *Rogers v. Interstate Transit Co.*, 297 P. 884, 886: "When the evidence contrary to the presumption is produced by the adverse party, it is well established in this state that a presumption in favor of a party is entirely dispelled by the testimony of the party himself or of his witnesses." *Smellie v. Southern Pac. Co.* (Cal. Sup.) 299 P. 529.

But it is unnecessary to resort to a technical application of the rule respecting a consideration of the presumption above referred to. It is unnecessary to the determination of this case. There is ample testimony to support the trial court's conclusion that the evidence was insufficient to support the verdict in favor of the defendant. The order granting a new trial should therefore be sustained.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

117 Cal.App. 732

PEOPLE v. McWILLIAMS.

Cr. 221.

District Court of Appeal, Fourth District, California.

Oct. 28, 1931.

1. Criminal law ⇨517(4).

To justify introducing confession, corpus delicti must be proved at some stage of trial.

2. Forgery ⇨34(1).

Where apparent drawer of allegedly forged check is real person, evidence that drawer had not authorized defendant to sign his name thereto is indispensable for conviction (Pen. Code, § 470).

3. Criminal law ⇨551.

In attempting to prove negative, such as nonexistence of ostensible drawer of forged check, slight evidence is sufficient.

4. Criminal law ⇨517(4).

To authorize receiving extrajudicial confession or admission, prosecution need not establish corpus delicti by proof required for conviction; slight proof being sufficient.

5. Criminal law ⇨387.

Directory of city wherein drawee of allegedly forged check was located held admissible in attempt to prove that ostensible drawer was fictitious person.

6. Criminal law ⇨517(4).

In prosecution for forging check, evidence established corpus delicti sufficiently to justify introducing extrajudicial confession.

It appeared that prosecution, on theory that ostensible drawer of check in question was fictitious person, introduced directory of city wherein drawee of check was located to show that name of ostensible drawer did not appear therein, and there was also expert testimony that handwriting on check was that of defendant.

7. Criminal law ⇨404(5).

In prosecution for forging check, another check concededly in defendant's handwriting held competent for purpose of constituting specimen of handwriting.

8. Criminal law ⇨370, 371(5).

In prosecution for forging check, another check on foreign bank held competent to prove guilty knowledge and intent.

9. Criminal law ⇨372(12).

In prosecution for forging check, another check on foreign bank held competent to show similarity of plan or system indicating that offense charged was likewise defendant's act.

10. Criminal law ⇨374.

In prosecution for forging check, extrajudicial confession is insufficient evidence of forgery of another check to justify admitting latter check to show similarity of plan.

11. Criminal law ⇨1036(1).

In prosecution for forging check, objection that proper foundation was not laid for introducing another check, not being made below, could not be first raised on appeal.

12. Criminal law ⇨1169(2).

In prosecution for forging check, error, if any, in admitting protest and notice thereof, held harmless; nonpayment being sufficiently shown by other evidence.

13. Criminal law ⇨771.

Instruction that prosecution must establish corpus delicti by evidence independent of admissions made "out of court" held not misleading, notwithstanding defendant's admissions consisted of testimony at preliminary examination.

Instruction in question was not misleading, notwithstanding fact that admissions of defendant consisted of testimony voluntarily given by him at his preliminary examination before committing magistrate, since the words "out of court" plainly meant outside of the proceedings then being taken in court, and were synonymous with the expression "extrajudicial" used by defendant in one of his rejected instructions.

[Ed. Note.—For other definitions of "Out of Court," see Words and Phrases.]

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Eddie McWilliams was convicted of forgery, and he appeals.

Affirmed.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

JENNINGS, J.

The defendant was charged in the first count of the information with the crime of forgery of a certain check or draft and in the second count thereof with the crime of issuing a check without sufficient funds. The check which is the basis of the charge contained in the second count is the same instrument which is charged to have been forged by the defendant in the first count. Included in the information, is a charge of prior conviction of the crime of grand larceny committed in the state of Louisiana. When arraigned upon the information, the defendant pleaded

not guilty of both offenses charged in the information and confessed the prior conviction. Upon the conclusion of his trial he was found guilty of the crime of forgery "as charged in the first count of the information" and was sentenced to a term of imprisonment at the state prison at Folsom. From the judgment of conviction thus rendered and from the order of the court denying his motion for a new trial, defendant prosecutes this appeal.

[1, 2] The principal contention made by appellant is that the court erred in admitting in evidence a certain extrajudicial confession without sufficient proof of the corpus delicti having been established. It is an elementary principle that at some stage of the proceedings during the trial of a criminal action proof of the corpus delicti must be made to entitle the prosecution to introduce the evidence of a confession. It is not contended that the fact that the admission of the confession was prior to the admission of a portion of the evidence tending to establish the corpus delicti is sufficient to warrant a reversal of the judgment, as it is conceded that the order of proof is a matter within the discretion of the trial court. *People v. Hinshaw*, 40 Cal. App. 672, 182 P. 59; *People v. Rushing*, 130 Cal. 449, 62 P. 742, 80 Am. St. Rep. 141. The point is made, however, and is strenuously insisted upon by appellant, that there was not at any time during the trial of the action sufficient evidence presented aliunde the alleged confession to prove the corpus delicti. The draft of whose forgery the defendant was convicted was drawn upon a bank in the city of Fort Worth, Tex. It purported to be signed by one R. C. Gilbert and was made payable to the order of E. N. Fisher. The evidence is undisputed that appellant was known to the person who cashed the draft as E. N. Fisher. The record indicates that no evidence was introduced by the prosecution tending to show that the drawer of the draft had not authorized appellant to sign his name thereto. This would be fatal under the provisions of section 470 of the Penal Code if it appeared that the apparent drawer was a real person. *People v. Whiteman*, 114 Cal. 338, 46 P. 99. It was, however, the theory of the prosecution that the apparent drawer, R. C. Gilbert, was a fictitious person which, if established, would render it unnecessary for the prosecution to prove lack of authority by appellant. The only evidence tending to show that the apparent drawer was fictitious consists of the testimony of a single witness who stated that he had examined the city directory of the city of Fort Worth, Tex., for the years 1926 and 1930 and that he did not find the name R. C. Gilbert in either volume of said directory, and the production of the city directory of the city of Fort Worth, Tex., for the year 1930, which indicated that the name R. C. Gilbert did not appear therein. This is obviously slight evidence of the fact that the

apparent drawer of the draft was a fictitious person. There was, however, in addition to this evidence, testimony of a handwriting expert who testified that in his opinion the draft in question was written by the same person who wrote certain exemplars of handwriting presented in evidence, which were admitted to be in the handwriting of appellant.

[3-6] The evidence which tended to show that there was no such person as R. C. Gilbert in the city of Fort Worth, Tex., was negative in character, produced by the prosecution in support of the theory that the name signed to the instrument as the purported drawer was the name of a fictitious person. Under the decisions slight evidence is sufficient where an attempt to prove a negative is being made. *People v. Macbeth*, 104 Cal. App. 690, 286 P. 448. Furthermore, it is the rule that to authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of a defendant, it is not required that the prosecution establish the corpus delicti by proof of the clear and convincing character as is required to support a conviction. Slight proof is all that is required. *People v. Wilcox*, 69 Cal. App. 267, 231 P. 377; *People v. Alba*, 52 Cal. App. 603, 199 P. 894; *People v. Vertrees*, 169 Cal. 404, 146 P. 890. The city directory of the city of Fort Worth was evidence competent for the purpose of proving that there was not in the city wherein is located the bank on which the draft was drawn such an individual as the person whose name was signed to the instrument as the apparent drawer. *People v. Eppinger*, 105 Cal. 36, 38 P. 538; *People v. Terrill*, 133 Cal. 120, 65 P. 303; *People v. Roche*, 74 Cal. App. 556, 241 P. 279.

We are of the opinion that this evidence, together with the testimony of the handwriting expert to the effect that in his opinion appellant was the author of the draft, constituted sufficient proof of the corpus delicti to entitle the prosecution to present evidence of appellant's extrajudicial confession.

[7-11] Appellant further complains that the trial court erred in admitting in evidence two checks. One of them, a check drawn on the Bank of America in Los Angeles, made payable to P. W. Goodwin and purporting to be signed by E. L. Gilbert, was offered in evidence as an admitted specimen of appellant's handwriting and was received for this limited purpose. It was competent evidence for the purpose announced, and the court did not err in thus admitting it. The second check which was drawn on a bank in a foreign jurisdiction was offered by the prosecution for the purpose of proving guilty knowledge and intent. It was competent for the purpose for which it was offered. *People v. McGlade*, 139 Cal. 66, 72 P. 600; *People v. Hinshaw*, *supra*; *People v. Martin*, 50 Cal. App. 71, 194 P. 522; *People v. Baba*, 101 Cal. App. 723, 282 P.

403; *People v. Robinson*, 107 Cal. App. 211, 290 P. 470. This evidence was further admissible as tending to show such similarity of plan or system in committing the other act as to indicate that the offense charged was likewise the act of appellant. *People v. Sindici*, 54 Cal. App. 193, 201 P. 975; *People v. Robinson*, supra. Appellant nevertheless contends that, as to this check, the burden rested upon the prosecution to prove that it was a forgery by evidence aliunde the confession, under the authority of *People v. Whiteman*, supra. It is undoubtedly true that the extrajudicial confession of appellant would not alone be sufficient evidence of the forgery of the instrument under consideration to render it admissible in evidence. *People v. Baird*, 105 Cal. 126, 38 P. 633. Conceding that the proper foundation was not laid for the introduction of the check in evidence because, as contended by appellant, there was no sufficient proof other than his extrajudicial admission that it was a forgery, it must nevertheless be observed that no objection to its admission on this ground was made in the court below, and it cannot now for the first time be urged on appeal as ground for reversal. *People v. Baird*, supra.

[12] It is further urged that the court erred in admitting in evidence the protest and notice thereof relating to the draft set out in the information of whose forgery appellant was convicted. Appellant again relies upon *People v. Whiteman*, supra, wherein the Supreme Court said that the admission of such evidence was error, but pointed out that no injury could have resulted therefrom to defendant since its only materiality was that it tended to show that the check was not paid upon presentation, which was not a fact in controversy. Exactly the same situation is here presented. Conceding that the trial court erred in admitting the protest, it is obvious that no harm resulted to appellant therefrom. The fact of nonpayment was sufficiently shown by other evidence produced by the prosecution.

[13] Appellant complains that certain instructions offered by him were not given by the court and that the instructions which the court gave relating to principles of law embodied in his rejected instructions, did not correctly state the law. Particular exception is taken to the court's refusal to give two instructions which in effect defined the phrase "corpus delicti" and stated that its various elements must be established by evidence independent of any purported confession of the

accused and that such purported confession could not be used to establish or to supply any of the elements making up the corpus delicti. The instructions given by the court covering this feature of the case properly and fully advised the jury that it was incumbent upon the prosecution to establish the corpus delicti beyond a reasonable doubt by evidence other than and independent of the oral admissions or confessions of the accused made out of court and that after the corpus delicti had been thus established oral admissions or confessions made out of court by the accused could be used to support or corroborate any element of the corpus delicti. It is obvious that the instructions actually given declare in effect the exact principles covered by the requested and rejected instructions of appellant. It is urged that since the evidence of the admissions of appellant consisted of testimony voluntarily given by him at his preliminary examination before the committing magistrate, the jury may have been misled by the expression "out of court" used in the instructions that were given and may have received the impression that they could properly consider such evidence in attempting to discover whether or not the corpus delicti had been established. It may be conceded that voluntary admissions made by appellant under oath during his preliminary examination stand on the same footing as unsworn extrajudicial statements (*People v. Kelley*, 47 Cal. 125; *People v. Thourwald*, 46 Cal. App. 261, 189 P. 124), but it does not follow that the jury were misled by the use of the expression "out of court" qualifying the language relating to confessions in the trial court's instructions. The plain meaning of the expression "out of court," as used in the instruction, is outside of the proceedings then being taken in court. It conveys the same meaning as the expression "extrajudicial" used by appellant in one of the rejected instructions.

Examination of the record herein discloses that the instructions taken as a whole were full and correct and that they properly announced the various principles of law necessary for the guidance of the jury. It is equally clear that appellant received a fair trial and suffered no prejudice which would entitle him to a reversal of the judgment during the course of the proceedings that resulted in his conviction.

The judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

117 Cal.App. 692

ANGLO CALIFORNIA TRUST CO. v. KELLEY et al.

Civ. 7865.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1931.

1. Pleading Ⓒ34(7).

On appeal from judgment on pleadings, in determining whether answer stated defense, every affirmative allegation of answer must be deemed true.

2. Pleading Ⓒ34(7).

On appeal from judgment on pleading, in determining whether answer stated defense, consideration could not be given to matters outside of allegations of answer.

3. Pleading Ⓒ207.

Formal defects in answer could be reached only by special demurrer.

4. Judgment Ⓒ405.

Equity will relieve injured party from effect of judgment procured by extrinsic fraud, mistake, or excusable neglect not result of negligence or laches on part of complainant.

5. Judgment Ⓒ443(1).

Courts may, in equitable proceeding, inquire whether judgment valid on face was obtained by fraud.

6. Judgment Ⓒ588.

Denial of motion to vacate default decree of foreclosure by trial court held not bar to defense pleaded in action to quiet title that foreclosure decree was obtained by fraud (Code Civ. Proc. § 473).

7. Pleading Ⓒ129(1).

Answer, by failure to deny, admitted allegations in complaint.

8. Limitation of actions Ⓒ177(3).

Where four years elapsed after alleged fraud whereby foreclosure decree was obtained, defendants, alleging nothing concerning discovery of fraud, held not entitled to relief (Code Civ. Proc. § 338).

The period of limitation in which defendants could seek relief from decree on ground of fraud or mistake was three years from discovery of fraud or mistake under Code Civ. Proc. § 338, and there was no statement in answer as to time when defendants learned facts constituting fraud or mistake, nor any statement excusing their failure to learn facts within the statutory limitation.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Anglo California Trust Company, as administrator of the estate of F. A. Koetitz, deceased, against Lillian Kelley and others. From the judgment, defendants appeal.

Affirmed.

Siemon & Garber, Alfred Siemon, Paul F. Garber, and Jackson Mahon, all of Bakersfield, for appellants.

Grover O'Connor, of San Francisco, for respondent.

GRAY, Justice pro tem.

[1-3] This appeal from a judgment on the pleadings, quieting respondent's title to certain real property, presents for decision the sole question: Does the answer state a defense? If it does not, the judgment is correct. *Hamman v. Milne*, 179 Cal. 634, 178 P. 523; *White v. Jacobs*, 204 Cal. 334, 267 P. 1087. A brief summary of the essential allegations of the complaint and answer suffices for a determination of this question. The sufficiency of the answer is to be measured in the light of the following rules: Every affirmative allegation of the answer must be deemed true, and, if the answer is sufficient, as against a general demurrer, the judgment cannot stand. *Cuneo v. Lawson*, 203 Cal. 190, 263 P. 530. Consideration cannot be given to matters outside of the allegations of the answer, including its admissions; nor to formal defects in the answer, which can be reached only by a special demurrer. *Elmore v. Tingley*, 78 Cal. App. 460, 248 P. 706.

The complaint alleges that in a prior action to foreclose a mortgage upon the same property, wherein respondent was plaintiff and appellants were defendants, the Superior Court in and for the city and county of San Francisco, on March 26, 1926, duly and regularly made its decree of foreclosure; that this court, upon appellants' appeal, affirmed that judgment; that, pursuant to the decree, the commissioner therein named, on April 27, 1926, sold the property to respondent, and, on April 28, 1927, deeded it to respondent. Copies of the decree, opinion of this court affirming the judgment (95 Cal. App. 390, 272 P. 1080), and deed are attached as exhibits and incorporated by reference into the complaint.

Appellants' joint answer merely denies that the Superior Court "duly and/or made the decree of foreclosure," and affirmatively alleges that the decree was secured by reason of appellants' mistake and respondent's fraud, whereby appellants were prevented from presenting their defenses. The answer next fully details these defenses, which it is

alleged were also pleaded in the foreclosure action, and which, summarized, consisted of a denial of the debt, lack of consideration for the mortgage note, a counterclaim, which an accounting would establish to be in excess of such note, and the invalidity of the note's assignment to respondent's intestate.

As to appellants' mistake and respondent's fraud, it is alleged that on March 10, 1926, said action was set for trial on March 25, 1926, in department 16 of said Superior Court; that on March 16, 1926, the presiding judge reassigned said action to department 8, of which reassignment appellants notified respondent; that on March 19, 1926, upon appellants' motion, after notice to respondent, said action was set for trial at the foot of the jury calendar; that appellants arranged with the court clerk for notice as to when the case would be reached; that appellants believed the case was transferred, and that they would receive such notice from the clerk, and did not expect or have any intimation from respondent that the case would be called for trial as originally set; that on March 25, 1926, knowing such belief of appellants and their mistake as to the effect of such reassignment and their willingness to have been in court if notified, respondent, for the purpose of defrauding appellants of their defenses, proceeded to trial in department 16, in the absence of appellants and without notice to them and without advising the court of such reassignment, and procured, by default, the decree of foreclosure. The appellants further allege that, upon learning of the entry of the decree and sale, they moved the trial court to vacate the decree, but were refused by an order which became final January, 1929. The answer concludes that respondent, because of its purchase of the property under the decree so obtained, holds title in trust for defendants.

[4-6] The answer is a direct attack upon the decree of foreclosure. *Follette v. Pacific Light & Power Corporation*, 189 Cal. 193, 208 P. 295, 23 A. L. R. 965; *Boyle v. Boyle*, 97 Cal. App. 703, 276 P. 118. "Equity will relieve an injured party from the effect of a judgment procured by extrinsic fraud, mistake, or excusable neglect which were not the result of negligence or laches on the part of the complainant. *Sohler v. Sohler*, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; *Bacon v. Bacon*, 150 Cal. 477, 89 P. 317; *Simonton v. Los Angeles T. & S. Bank*, 192 Cal. 651, 656, 221 P. 368; *Estate of Ross*, 180 Cal. 651, 658, 182 P. 752; *Clavey v. Loney*, 80 Cal. App. 20, 251 P. 232." *Jeffords v. Young*, 98 Cal. App. 400, 404, 277 P. 163, 165. "It is elementary that the courts of this state may, in an equitable proceeding, inquire whether a judgment valid on its face was obtained by fraud. Sometimes such judgments may be set aside, but even in cases where this relief cannot be had a court of equity may—pre-

vent an inequitable advantage being taken of it (the judgment) by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party." *Campbell-Kawannanaka v. Campbell*, 152 Cal. 201, 208, 92 P. 184, 187; *Estate of Walker*, 160 Cal. 547, 117 P. 510, 36 L. R. A. (N. S.) 89." *Title Ins., etc., Co. v. California Dev. Co.*, 171 Cal. 173, 208, 152 P. 542, 557. The denial of appellants' motion to vacate the default decree of foreclosure under the provisions of section 473 of the Code of Civil Procedure by the trial court, which was affirmed by this court (95 Cal. App. 390), is not a bar to the defense pleaded in their answer. *Estudillo v. Security Loan, etc., Co.*, 149 Cal. 556, 87 P. 19; *Bacon v. Bacon*, supra; *Lake v. Bonyng*, 161 Cal. 120, 118 P. 535; *Carp v. Superior Court*, 76 Cal. App. 481, 245 P. 459.

[7, 8] The period of limitation in which appellants could seek relief from the decree on the ground of fraud or mistake was three years from the discovery of the fraud or mistake. Code Civ. Proc. § 338; *Estudillo v. Security Loan, etc., Co.*, supra; *Davis v. Hibernia Sav., etc., Soc.*, 21 Cal. App. 444, 132 P. 462. The complaint alleges, and the answer, by failure to deny, admits, that the decree of foreclosure was granted on March 26, 1926. From the transcript, it appears that the answer was filed March 22, 1930. Therefore approximately four years elapsed from the commission of the alleged fraud or the happening of the mistake before appellants sought relief. Nowhere in the answer is there any statement as to the time when appellants learned the facts constituting the fraud or mistake, nor any statement excusing their failure to learn the facts within the statutory limitation. The following excerpt from *Osmont v. All Persons, etc.*, 165 Cal. 587, 596, 133 P. 480, 484, is therefore particularly pertinent: "And, finally, it is to be remembered that the decree of distribution was entered in 1901. The cause of action to set this aside for fraud then immediately arose, and was barred in three years from that date. The right of action upon the fraud of Osmont in procuring the decree, to the end that he might be charged as trustee, is itself barred in three years after the discovery of the fraud. The right of a party to invoke the aid of a court of equity for relief against fraud after the expiration of three years from the time when the fraud was committed is an exception to the general statute, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. This can only be done by a showing that he did not discover the facts constituting the fraud until within the three years immediately prior to the commencement of his action. This showing is an essential element of the right of action, and must be affirmatively pleaded in order to authorize the court to entertain the action. *Sublette v. Tinney*, 9 Cal. 423,

Watkins v. Bryant, 91 Cal. 492, 27 P. 775; Castro v. Geil, 110 Cal. 292, 42 P. 804, 52 Am. St. Rep. 84; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. No such showing is here made." See, also, Davis v. Hibernia Sav., etc., Soc., supra.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

118 Cal.App. 1

BARBER v. MASON MFG. CO., Inc.
Civ. 6738.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1931.

1. Landlord and tenant ⇨233(1).

In action to recover rents under lease, findings that lessee acquiesced in repudiation of lease by lessor *held* not inconsistent with finding that lessor was estopped to enforce terms of lease, since findings rested upon estoppel and not rescission.

2. Estoppel ⇨119.

Estoppel is question of fact.

3. Landlord and tenant ⇨231(8).

Evidence *held* sufficient to support finding that lessee acquiesced in repudiation of lease by lessor who was estopped to enforce terms of lease.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Marie G. Barber against the Mason Manufacturing Company, Incorporated. From a judgment for defendant, plaintiff appeals.

Affirmed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Lissner, Roth & Gunter, of Los Angeles, for respondent.

CONREY, P. J.

By her complaint in this action appellant sought to recover the sum of \$1,800 (with interest) claimed to be due as rent for the four months beginning July 1, 1928, under a lease of real property. From the judgment, entered in favor of defendant, the plaintiff appeals.

On the 1st day of June, 1923, and thereafter during the lifetime of George F. Barber, who was appellant's husband, he and appellant were the owners of said real property as joint tenants. On the 13th day of Feb-

ruary, 1928, George F. Barber died. On the 1st day of June, 1923, Mr. Barber entered into a ten-year lease with the defendant, covering said real property, at the rental of \$450 per month, and in said lease provided that defendant should have a five-year option to purchase the property at a stated price. This lease was not signed by appellant, but was executed by the husband alone. During the lifetime of Mr. Barber, appellant knew that her husband had executed a lease of the property, although she did not see the document and did not know that it contained an option to purchase. During that period all of the rents were paid to the husband.

On the 9th day of March, 1928, Mr. G. C. De Garmo, on behalf of appellant, addressed to defendant a letter concerning said lease. It is admitted that Mr. De Garmo was the duly authorized representative of appellant for that purpose. In that letter Mr. De Garmo stated that it had always been the intention of the appellant that this property should be held intact first by her, provided she survived Mr. Barber, and later by the children for their support; that she would therefore have been unalterably opposed to putting the option in the lease, and that now having it called to her attention she was insistent that she would not be bound by it. "I am therefore instructed to advise you that Mrs. Barber will not recognize or be bound by the lease or option in so far as it relates to or affects her interest in the property, either at the time the lease was executed or at the present time, and the payment and acceptance of the rent provided in the lease must be upon that understanding." The letter then suggested that appellant was willing to execute a new lease at the same rental, and for a longer period of time if desired, and upon the same terms and conditions except that the option clause must be omitted.

Defendant's receipt of said letter was followed by negotiations for a new lease, which, however, did not result in the execution of any such lease. Subsequent to March 9th defendant paid the rent for March, April, May, and June; and vacated the premises on the 30th day of June, pursuant to a notice of termination of tenancy, which notice was given by defendant to appellant on the 24th day of May, 1928. In the latter part of March, according to the testimony of Mr. Mason, president of defendant company, Mr. De Garmo said to him: "You have no lease and you are renting from month to month."

The premises covered by the lease were used by the defendant in the business of manufacturing furniture. The court found that the defendant acquiesced in appellant's repudiation of the lease, and accordingly purchased other property for the purposes of its business and on or about June 30, 1928,

actually removed its business to such other property, and vacated the leased premises.

[1-3] Appellant contends that the court's finding that defendant acquiesced in the repudiation by plaintiff is in effect a finding that the parties by mutual consent rescinded the lease, and that this finding of rescission is inconsistent with other findings to the effect that appellant was estopped to enforce the terms of the lease. We are of the opinion that the findings, properly construed, rest upon the fact of estoppel and not upon rescission. The question of the existence of facts constituting an estoppel was a question of fact to be determined upon the evidence. *Rapp v. F. W. Hauger Motors Co.*, 77 Cal. App. 417, 421, 246 P. 1067. We think that the evidence was sufficient to support the findings.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

117 Cal.App. 739

McGUIGAN et al. v. MILLAR et al.

Civ. 347.

District Court of Appeal, Fourth District,
California.

Oct. 28, 1931.

Rehearing Denied Nov. 24, 1931. Hearing
Denied by Supreme Court Dec. 24, 1931.

1. Mortgages ⇐32(1).

Transfer of interest in property, absolute on face, if intended as security for debt, is deemed "mortgage" (Civ. Code, §§ 2924, 2925).

[Ed. Note.—For other definitions of "Mortgage," see Words and Phrases.]

2. Appeal and error ⇐1010(1).

Appellate court will not disturb trial court's finding, supported by substantial evidence, that deed is mortgage.

3. Mortgages ⇐38(1).

Evidence supported court's finding that debtor's conveyance to creditor who gave back option was mortgage securing indebtedness, time for payment of which was extended (Civ. Code, §§ 2924, 2925).

4. Mortgages ⇐608½.

Where debtor conveyed property to creditor as security for debt in 1916 and creditor sued to quiet title in 1924, debtor's right to set up claim of interest in property held not barred (Code Civ. Proc. § 744).

5. Mortgages ⇐608½.

Interlocutory decree finding plaintiff had mortgage upon property held not erroneous

because not fixing time for paying amount due.

It was ordered that an accounting be had for purpose of ascertaining amount due and a referee was appointed to ascertain such amount and make report to court, and it was then ordered that upon filing and settling of the report the court would make and enter its final decree, so that omitted provision giving debtor reasonable fixed time within which to pay amount due, and that if amount was not paid within that time creditor should have right to have her title to property quieted, could more properly be included in final decree.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Alice McGuigan and another against J. D. Millar and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Haas & Dunnigan, H. C. Johnston, and Howard F. Shepherd, all of Los Angeles, for appellants.

Hewitt, McCormick & Crump and L. B. Stanton, all of Los Angeles, for respondents.

BARNARD, P. J.

This action was brought by the plaintiffs to quiet their title to some 287 lots adjoining Hollywood, in the city of Los Angeles. The entire dispute is between plaintiff and appellant Alice McGuigan and defendant and respondent J. D. Millar and, for convenience, we will hereafter refer to them as if they were the only parties. The plaintiff claims title to these lots under two grant deeds, in both of which a bank formerly holding title to the lots as trustee, is the grantor. One deed covered 191 lots, which will hereafter be referred to as parcel A, and the other deed covered 96 lots, hereafter referred to as parcel B. It is admitted that, about the time plaintiff acquired title to these lots in this manner, she gave to the defendant a so-called option to purchase the lots. It is defendant's contention that this so-called option was and is in fact a mortgage representing an extension of a previous debt owed by him to the plaintiff, while plaintiff maintains that the instrument in question was merely an option to purchase, which option was not exercised by the defendant within the time limited, or at all.

Certain facts are not disputed, including the following: In 1911 the defendant borrowed \$5,000 from the husband of plaintiff, deeding the lots referred to as parcel A to a trustee to secure the repayment of the same. After the husband's death, this obligation became the property of the plaintiff. At that time the defendant was the owner of the lots

referred to as parcel B, which were free from incumbrance although, for his own convenience, he had placed the legal title thereto in the same trustee that held the legal title to parcel A. On March 3, 1916, \$4,200 principal, with some interest, was due to the plaintiff on the loan referred to. On that day she wrote to the trustee demanding that foreclosure proceedings be started. The trustee wrote the defendant that, unless the amount due was paid on or before March 13, 1916, foreclosure proceedings would be started. Publication of a notice of sale was commenced on May 6, 1916, and the sale was set for June 22, 1916. On June 21, 1916, on instructions from the defendant, the trustee deeded the lots referred to as parcel B to the plaintiff, which deed was recorded. On that same day the plaintiff executed and delivered to the defendant the following instrument:

"Option to Purchase Land.

"In consideration of one dollar (\$1.00) to me in hand paid, the receipt of which is hereby acknowledged, I do hereby give to J. D. Millar, of Los Angeles, California, the option of buying for the sum of five thousand two hundred seventy-nine dollars and eighty-six cents (\$5,279.86) in cash, the following described lots and parcels of land situate in the County of Los Angeles, State of California, and particularly described as follows: (here follows a description of all of the lots referred to as parcel A and parcel B)

"Subject, however, to all state, county and municipal taxes, or special assessments of any kind that may now be a lien upon said land or which may hereafter become a lien upon said land; provided, however, that if the undersigned shall at any time during the live of this option pay any taxes, or special assessments upon any of said property, that the amount so paid for such tax or special assessment shall be added to the selling price hereinabove mentioned.

"Said J. D. Millar shall have the right to close this option at any time within six months from the date hereof, and I agree to execute to him, or to any one named by him, a deed in form sufficient to pass the title to the property. Upon the execution of said deed, I am to be paid the further sum of five thousand two hundred seventy-eight dollars and eighty-six cents (\$5,278.86) in cash, and any amounts which I may have paid for taxes, or special assessments, in payment of the purchase price of said land, but if said option is not closed within six months from date hereof, I may retain the said sum of one dollar (\$1.00) so paid as aforesaid, as liquidated damages. If said option is closed within six months from the date hereof the amount paid as aforesaid is to be applied towards the purchase price.

"Time is of the essence of this contract. and should said option be not accepted and

closed by twelve o'clock noon, Friday, December 22, 1916, the same shall be void and ineffective for any purpose whatsoever, and the undersigned shall be forever released from any liability hereunder, and the same shall in no wise, constitute any lien or encumbrance whatever upon the real estate hereinabove described.

"This option shall not be recorded or placed of record.

"In witness whereof, I have hereunto set my hand and seal this 21st day of June, 1916.

"Alice McGuigan."

On June 22, 1916, the trustee completed the sale of the lots referred to as parcel A in accordance with the notice of sale. These lots were bought in in the name of the plaintiff for the exact amount then due on the debt, and the trustee executed and delivered to the plaintiff a deed to the lots, which deed was recorded. The defendant did not pay the amount named in the option within six months from its date, and this action to quiet title was filed on August 18, 1924. In his answer, the defendant sets up an agreement for an extension of his loan from the plaintiff, that the lots referred to as parcel B were conveyed to the plaintiff in consideration of such an extension and as additional security, and that the entire transaction constitutes a mortgage. The defendant prays that the court find that the transaction constituted a mortgage to secure his indebtedness to the plaintiff, with interest; that it be found that he has an equity of redemption in the property; that it be found that the plaintiff has no title or interest in the property other than a lien for an unexpired mortgage; that the plaintiff be required to give an account as to the amount of moneys expended by her on taxes or assessments; that a reasonable time be set for the payment to the plaintiff by the defendant of any and all moneys found to be due her; and that, upon the payment of said sum to her or into court for her benefit, the plaintiff be required to convey the real property in question to the defendant. After a trial upon the issues thus joined, the court found in favor of the defendant, and an interlocutory decree was entered, from which judgment this appeal is taken.

[1] The law is well settled that a transfer of an interest in property, although absolute on its face, if in fact intended only as security for a debt, is to be deemed a mortgage. Civ. Code, §§ 2924 and 2925. In 3 Pomeroy Eq. Jur. (4th Ed.) p. 2824, § 1192, the principle is thus expressed: "The fundamental principle of equity is, that whenever a conveyance of land is given for the purpose of securing payment of an existing debt, it is a mortgage."

In *Hodgkins v. Wright*, 127 Cal. 688, 60 P. 431, 432, the court said: "The question was whether they were given to secure the performance of an obligation; that is, to se-

cure the payment of a debt. If they were given for that purpose, they were mortgages, no matter how expressly the parties agreed that they should not be so deemed. They cannot, by agreeing to call or to consider an instrument which hypothecates real estate for the payment of a debt something other than a mortgage, avoid the necessity of foreclosure, or deprive the debtor of his right to redeem. If in fact and in law the instrument is a mortgage, it does not matter that the parties intend and stipulate that it shall be something else, and that, in case of a failure to pay, the title of the mortgagee shall be absolute."

So strong is the equitable principle involved, that the court said in *Montgomery v. Spect*, 55 Cal. 352: "The fact of a subsisting debt, to secure the payment of which a deed of real property may be given, must be proved like any other fact in a case. 'But,' as Mr. Justice Gaston says in *McDonald v. McLeod*, 1 Ired Eq. [36 N. C.] 227, 'in examining transactions between borrowers and lenders, and between necessitous men and their creditors, courts of equity, aware of the unequal relation of the parties, and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains to get at the substance of what was done or intended to be done by them.'"

[2] No extended citation of authorities is necessary, and in fact the briefs in this case show little dispute between the parties as to the law upon this point; the main reliance of appellant being that certain facts are controlling under the evidence, in spite of contrary findings made by the trial court. The rule of law controlling in such a situation is thus expressed by the court in *Couts v. Winston*, 153 Cal. 686, 96 P. 357, 358: "But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court. [Citing cases.] In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. *Sherman v. Sandell*, 106 Cal. 373, 39 P. 797. If therefore the evidence offered by plaintiffs, taken by itself, was sufficiently 'clear, satisfactory and convincing' to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect. As was said in *Wadleigh v. Phelps*, 149 Cal. 627, 637, 87 P. 93, 98, the appellate court 'will not dis-

turb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.'"

As expressed by appellant, the main question to be decided is whether or not a debt from the respondent to the appellant existed after June 22, 1916. The trial court found as a fact that the appellant agreed to give to the respondent an extension of time within which to pay his debt, and that in consideration therefor the respondent gave to the appellant additional security in the form of a deed covering the lots referred to as parcel B, and that the respondent, as a part of the transaction, agreed to pay said indebtedness with interest to the appellant. The real question before us is whether or not the evidence sustains these findings. In considering this question, it will be necessary to refer to certain other evidence introduced. The so-called option, in form, merely gives to the respondent the right to buy the real property described for the sum of \$5,279.86, but it is conceded that, at the time it was delivered, the appellant signed and delivered to the respondent a letter dated June 21, 1916, addressed to respondent, reading as follows: "In reference to that certain option of even date herewith, I do hereby agree that I will receive as full payment for said property the sum of \$4,981.00 with interest thereon at the rate of 1% per month up to the date upon which you make payment of the said sum of \$4,981.00. It being understood that the sum of \$5,279.86 mentioned in said option includes interest at 1% per month for six months from date." (Here follows a statement by the appellant that she has also received a deed to the lots described in parcel B; the description being set out in full and the letter being signed by the appellant.)

It will be observed that this letter sets forth that the price named in the option is in reality the price of \$4,981, plus interest up to the expiration of the option, and that the price to be paid by the respondent is not necessarily to be the price named in the option, but is to be this sum of \$4,981, plus interest up to the date he makes payment.

It also appears from the evidence that the amount named in the letter, \$4,981, is the exact amount owed by the respondent to the appellant on the previous indebtedness up to that date. The original memorandum made out at that time by the attorney for appellant showing how that figure was arrived at, and that it is the amount then due to the appellant, was introduced in evidence. It is undisputed that on June 21, 1916, the day the option and the letter referred to were signed, the respondent caused the trustee to deed to the appellant the lots referred to as parcel B,

in which she was not previously interested. It further appears that this deed to appellant was executed by the trustee upon the authority of a letter dated June 21, 1916, and stamped by the trustee as received on that date, which letter reads as follows:

"Hellman Commercial Trust & Savings Bank
"Los Angeles, Cal.

"Received Jun 21 1916 Trust Dept. C. H. Randall

"Los Angeles, Calif., June 21st, 1916.

"Hellman Commercial Trust & Savings Bank,
Los Angeles, California.

"Gentlemen: Mrs. Alice McGuigan has today given me a further extension upon payment of certain monies mentioned in that certain Trust held by you, upon the following consideration:

"First: That I will put no obstacle in the way of your transferring title to her to those certain lots now held by you under deed from Oil & Metals Bank & Trust Company, under date of May 22nd, 1913, and recorded on August 2nd, 1913, in Book 5548, at page 276 of Deeds.

"Second: That in consideration of the said extension, and as security for the interest therein at the rate of 1% per month, I will cause to be deeded to her the following described real property: (here follows legal description of the lots referred to as parcel B).

"Third: That Mrs. McGuigan will release by proper conveyance from her lien those three certain lots described as Lot 411 in Tract 798, and Lots 92 and 517 in Tract 865; said three lots in tracts being within said County of Los Angeles.

"As I greatly desire to obtain this extension of time within which to refinance these properties, I would ask that you kindly convey same to Mrs. Alice McGuigan, as further security for the payment of the total amount of her obligation, as it may at present appear, together with interest at 12% per annum. You by grant deed without warranty and without consideration to yourselves for such deed.

"Yours respectfully,

"J. D. Millar."

It is not disputed that this letter was written by the respondent and signed by him in the office of the bank, which was the trustee referred to, in the presence of the appellant and her attorney, after a discretion of the transaction in question, and that the letter was retained by the trustee. It will be observed that this authorization to the bank, which resulted in the appellant receiving a deed conveying to her the lots referred to as parcel B, is an important part of the transaction in question, and that it throws considerable light upon the question before us. In this letter the respondent prefaces his direction to the trustee to convey the additional

lots to the appellant with a statement that the appellant had that day given him a further extension for the payment of the indebtedness for which that same trustee held as security the legal title to the other lots, referred to as parcel A, which lots were noticed for sale under foreclosure on the following day. The respondent also states that he will put no obstacle in the way of the trustee transferring title to the lots referred to as parcel A to the appellant, and further that, in consideration of the extension of time and as security for the interest, he will cause to be deeded to the appellant the other property referred to as parcel B, which he then goes ahead to direct the trustee to convey to the appellant. It will be observed that, as originally drawn, the order to the bank to convey the property asked them to convey the same to the appellant "as further security for the payment of the total amount of her obligation, as it may at present appear, together with interest at 12% per annum." The respondent testified that the language above quoted was struck from the order to convey, at the request of the trustee, because said trustee wanted an unqualified order to convey. However, the substance thereof was left in the preliminary statement contained in the letter, and is significant, not only as showing the intent of the respondent at the time, but also as tending to show the intent of the appellant at that time, since it was signed in her presence and in the presence of her attorney at the office of the bank when the entire transaction was discussed. Taken in consideration with the other evidence, written and oral, this letter is enlightening as to the intent of the parties at the time. It will be remembered that on that same day, June 21, the trustee executed the order by conveying the lots referred to as parcel B to the appellant. On the next day, June 22, the sale of the lots referred to as parcel A, which had been noticed for that day, was held, and the property bid in by the appellant for the exact amount of her debt. The respondent testified that the trustee insisted upon completing that sale in order to keep its records clear. This finds some corroboration in the fact that the lots referred to as parcel B were conveyed to the appellant on June 21, and on that same day, in the authorization for that deed, the respondent states that he will put no obstacle in the way of the transfer to the appellant of the lots referred to as parcel A, which transfer was in fact accomplished on the succeeding day.

Some of the circumstances leading up to the transaction of June 21 are of interest. During April and May, 1916, following the appellant's request of the trustee that foreclosure proceedings be started, the respondent made several efforts to get an extension of time from the appellant. However, publication of the notice of sale was commenced on

May 6, 1916, and the sale was set for June 22. Respondent testified that the appellant agreed to give him an extension of time for the payment of his loan, if he would get the matter in proper form and give her further security. On June 13, respondent sent a letter to appellant's financial adviser, also mailing a copy to appellant, in which he set forth that the appellant had suggested a compromise on the mortgage, that she did not wish him to lose the property, that all she wanted was the money she had loaned, with interest, and in which he suggested as a compromise that, if appellant would pay up certain back taxes on the property, he would give to her a new mortgage and would assign to her certain commissions which were due to him, as additional security. Later, the appellant phoned him that she would not accept the additional security offered, whereupon the respondent offered to give her the lots referred to as parcel B in place of the additional security offered in the letter of June 13. Respondent testified that appellant told him she would accept the lots as further security and that she would see her attorney and arrange the extension of the loan. It further appears that on June 20, 1916, the appellant, the respondent, and their respective attorneys, conferred on the matter during the whole forenoon, and that on the afternoon of June 21, 1916, all of said parties met at the banking office of the trustee, and the papers referred to were executed and delivered.

As an additional circumstance, it may be stated that the court found upon undisputed evidence that on June 21, 1916, and also at the time this action was commenced, the lots described as parcel A were of the value of \$58,000 and the lots described as parcel B were of the value of \$13,000. It is not disputed that the respondent paid all the water bills connected with the lots in question up to December, 1917, about a year after the so-called option had expired. There is also evidence that up to the close of the year 1917, with the knowledge of the appellant, the respondent kept the streets on the property in question in repair, repaired water pipes, repaired a water tank at a cost of several hundred dollars, and spent some money on a pumping plant. There is no evidence that the appellant did anything in connection with the property except that she paid that portion of the delinquent taxes which she had agreed to pay in the transaction of June 21, 1916. The evidence shows that the respondent was absent from the state during 1918 and 1919, and that on his return in 1920 he called the appellant several times on the telephone and tried to ascertain the amount due her, including what she had paid for taxes, and told her that he was ready to pay her in full. At that time she told him that the property was worth more money and that she

would not discuss the proposition. There is evidence that he went to see her and that she shut the door in his face, and also that he tried to see her in 1922 and 1923. There is no evidence that during this time she informed the respondent of any claim of ownership on her part, and the record shows nothing further done by her until this action was begun in 1924.

A number of things in the testimony of the appellant are of some significance. In connection with her testimony that the so-called option and all other papers were executed after the sale on June 22, 1916, she testified as follows: "Q. How do you account for the instructions being dated the 21st if they are drawn on the 22nd of June? A. I cannot account for it. When my deposition was taken I stated that I considered it the only weak point in my case, and cannot understand it."

She also testified that, after the foreclosure sale was finished on June 22, 1916, she had a conversation with the respondent in which he thanked her for her forbearance and said he thought he would be able to take care of the amount of money he owed, in six months. She further testified that in 1922 or 1923 the respondent told her that he was prepared to take back the property and pay her what was due under the original indebtedness, with interest and all that she had expended for taxes, and that all she said in reply was: "What about the increase in values of property in Hollywood, Mr. Millar? That was my answer to him. I didn't say yes or no." She testified as follows: "Q. Now, prior to your receiving this option or giving this option, as you call it, to Mr. Millar, in June, 1916, you told him, did you not, that all you wanted was your money; you did not want to take anybody's property from them? A. Yes, I said that."

It also appears that, when her deposition was taken, in answer to a question as to whether the respondent had not told her he would give her the extra lots as additional security, the appellant replied: "He might have said so. I am not saying he did not. I am saying I have no recollection."

[3] While the appellant testified that nothing was done in connection with the so-called option until after the sale was completed on June 22, 1916, the evidence shows that she is mistaken in this important matter. It seems to us equally clear that she is mistaken in her testimony that she granted no extension to the respondent. All of the written instruments of June 21, 1916, were a part of one transaction and should be considered together. We think they are sufficient in themselves to show that the respondent caused these additional lots to be conveyed to the appellant in consideration of an extension of time in which to pay his indebtedness, and that there remained a subsisting debt upon

which he was to pay interest. This is corroborated by the oral testimony, by the surrounding circumstances, and by the subsequent conduct of the parties. While the means adopted took the form of an option, under the well-established rules of law, the facts shown by the evidence are sufficient to support the finding of the court that the transaction was in truth and in fact a mortgage securing an indebtedness, the time for the payment of which had been extended.

[4] The appellant urges that the right of the respondent to set up a claim of interest in the property is barred by laches and the statute of limitations. The trial court found, and we think correctly, to the contrary. It was stipulated at the trial that the appellant was not at any time in possession of the property and that no question of adverse or other possession was involved in the case. It fully appears that any delay was as much or more the fault of the appellant as of the respondent, and no reason appears why the respondent was called upon to take any action as long as the appellant was satisfied. *Secret Valley Land Co. v. Perry*, 187 Cal. 420, 202 P. 449; *Chapman v. Hicks*, 41 Cal. App. 158, 182 P. 336; *Baker v. Fireman's Fund Ins. Co.*, 19 Cal. 34, 21 P. 357; Code Civ. Proc. § 744.

[5] Appellant also attacks the form of the interlocutory decree entered by the court. By this decree it was found that the appellant has no interest in the real property in question except that she is the owner and holder of a mortgage upon the same, as security for the payment by the respondent of \$5,279.86 with interest from December 22, 1916, and for the amount expended by her for taxes and assessments upon and upkeep of the property "as the same shall hereafter be ascertained." It was then found that the instruments under which appellant claims title constitute a mortgage securing said indebtedness, that the respondent is the owner of the property subject to said mortgage, and that he is entitled to redeem the property from said mortgage. It is then ordered that an accounting be had for the purpose of ascertaining the amount due from the respondent to the appellant, and a referee is appointed to ascertain said amount and to make his report and file the same with the court. It is then ordered that upon the filing and settling of the report the court will make and enter its final decree. Objection is made that the interlocutory decree contained no provision giving the respondent a reasonable fixed time within which to pay the amount due, and providing that, if the amount was not paid within that time, the appellant should have the right to have her title to the property quieted as against the respondent. Under the circumstances shown by the record, the accounting provided for was necessary

and proper. And the interlocutory decree, after providing for the same, provides that, when the same is made and settled, the court will make its final decree. The court thus retained jurisdiction to complete the matter and to enter a final decree when the facts shall be before it. The matters complained of as having been omitted from the interlocutory decree can be and more properly should be included in the final decree, and we have no doubt will there be properly taken care of.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

118 Cal.App. 50

BURT v. PHILADELPHIA SHOE CO.

Civ. 7786.

District Court of Appeal, First District, Division 1, California.

Oct. 30, 1931.

Rehearing Denied Nov. 28, 1931.

1. Evidence §543(4).

Knowledge of condition of shoe stock on part of store manager, who testified to difference of value of stock on hand and of same had it been in accordance with samples purchased, held to have been sufficiently shown.

Objection was made to evidence on ground that proper foundation had not been laid, it not being shown that witness had examined all the shoes in stock, but evidence disclosed that a certain percentage of the shoes purchased had proved defective, and that the conclusion of the witness was based upon the purchaser's books, the charges made against defects, and adjustments with customers and merchandise returned.

2. Appeal and error §994(3).

Court who saw and heard witnesses was sole judge of their credibility (Code Civ. Proc. § 1847).

3. Appeal and error §1011(1).

Where evidence concerning two counterclaims was conflicting, findings of trial court cannot be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by H. Burt against the Philadelphia Shoe Company. From a judgment that plaintiff take nothing upon one claim but

recover balance of another claim, plaintiff appeals.

Affirmed.

William H. Hollander, of Oakland, for appellant.

Norman A. Eisner, of San Francisco, for respondent.

PER CURIAM.

The above action was upon two counts for shoes sold and delivered to defendant and which were assigned to plaintiff. The first was for a balance of \$1,195.18, alleged to be due to Arch-Aid Shoe Company, a corporation, and the second for \$153.77, claimed by the Menihan Company, also a corporation.

After the suit was brought, defendant paid to Arch-Aid Shoe Company \$500, which was accepted and credited upon its claim at the time of the trial. As against the balance of this account defendant set up two counterclaims; one for damages in the sum of \$750, alleged to be due to the fact that certain shoes sold by sample were defective and not equal to the sample; the other for a sum alleged to be due under a contract between defendant and the shoe company by which the latter agreed to pay one-half of the cost of erecting and maintaining an electric sign, advertising its shoes. Defendant further alleged that \$87.47 had been paid upon the claim of the Menihan Company.

The court found that Arch-Aid Shoe Company sold and delivered to defendant certain shoes for an agreed price, of which at the time of the assignment the sum of \$695.18 was unpaid; but it further found that the allegations of defendant's counterclaims against this assignor were true, and that payment upon the claim of Menihan Company was made as alleged. Judgment was accordingly entered, adjudging in effect that plaintiff take nothing upon the claim of Arch-Aid Shoe Company, but should recover the balance of the claim of the Menihan Company, namely, \$73.62.

Plaintiff moved for a new trial, which was denied, and has appealed from the judgment; the grounds therefor being that the findings are not supported, and errors in the admission of evidence.

[1] It was testified that for a period of about ten years defendant was the agent for the Arch-Aid shoes in San Francisco, the custom being to select and purchase shoes from samples. A certain percentage of the

shoes shipped would prove defective, but the defects were not usually discoverable until the same were sold and worn by the customers. It accordingly became the practice for the shoe company to give credit to the defendant for refunds to customers and repairs to defective shoes. In July, 1929, the shoe company terminated the agency, at which time defendant had in stock Arch-Aid shoes of the value of approximately \$10,000, upon which no allowance for defects had been made. It was also testified that between January, 1929, and March, 1930, the returns of defective shoes from this stock were \$628.34; for repairs \$106.60, and allowances to customers \$29.50. According to the manager of defendant's store, who was shown to be experienced in the business, the difference in the value of the stock on hand and of the same had it been in accordance with the samples was \$750. Plaintiff objected to this evidence on the ground that the proper foundation had not been laid, it not being shown that the witness had examined all the shoes in stock. We think, in view of the evidence of the defects which appeared during the period mentioned and the testimony of the witness that his conclusion was based upon defendant's books, the charges made against defects, adjustments with customers, and merchandise returned, that his knowledge of the condition of the stock was sufficiently shown.

Plaintiff argues that certain letters written by defendant tend to show that its counterclaim was an afterthought, and that the testimony of certain witnesses was not credible.

[2, 3] The court saw and heard these witnesses and was the sole judge of their credibility (Code Civ. Proc., § 1847); and their testimony contains nothing inherently improbable. The evidence concerning this counterclaim was conflicting, and the same is true of the second counterclaim for part of the cost of constructing and maintaining the electric sign. Under such circumstances the findings of the trial court cannot be disturbed. *Aronson & Co. v. Pearson*, 199 Cal. 295, 249 P. 191.

The finding of part payment of the claim of Menihan Company is not attacked.

The evidence was sufficient to support the conclusions of the trial court, and no error is shown which would justify a reversal of the judgment.

The judgment is affirmed.

117 Cal.App. 699

BOYNTON v. RICHFIELD OIL CO. et al.

Civ. 6808.

District Court of Appeal, Second District, Division 1, California.

Oct. 28, 1931.

Rehearing Denied Nov. 18, 1931. Hearing Denied by Supreme Court Dec. 24, 1931.

1. Trial ⇨139(1).

Court, although justified in granting new trial, is not necessarily justified in directing verdict on same evidence.

2. Trial ⇨178.

Right to direct verdict is same as right to grant nonsuit, and exists only when, disregarding conflicting evidence and giving full value to plaintiff's evidence, evidence would not support verdict for plaintiff.

3. Automobiles ⇨245(91).

Evidence that driver of truck drawing trailer with which automobile collided had last clear chance to avoid accident *held* sufficient for jury.

Evidence showed that driver of truck in question saw automobile coming for over an eighth of a mile and judged its speed when 100 feet away at between 40 and 50 miles an hour; that truck could then have been stopped within one foot; and that act of truck driver in proceeding across street placed driver of automobile in predicament from which he was unable to extricate himself.

4. Automobiles ⇨227(3).

That truck driver negligently failed to use last clear chance to avoid collision would justify motorist's recovery.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Henry H. Boynton against the Richfield Oil Company and another. From a judgment on a directed verdict for defendants, plaintiff appeals.

Reversed.

Praeger & Biddle and Arnold Praeger, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

[1, 2] "Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict on the same evidence. Estate of Caspar, 172 Cal. 147, 155

P. 631. The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given." Hunt v. United Bank & Trust Co. (1930) 210 Cal. 108, 117, 291 P. 184, 188. Applying the test thus prescribed to the evidence before the trial court, we are persuaded that the motion for a directed verdict should not have been granted.

[3, 4] Plaintiff sought to recover damages growing out of the collision of his automobile with the trailer attached to a truck of the defendant. Without doing violence to reason, the jury could have found from the evidence facts, with logical inferences, which would have supported the conclusion that defendants had, and negligently failed to avail themselves of, the last clear chance to avoid the accident. The jury was told that the defendants saw plaintiff coming for over an eighth of a mile, and judged his speed, when he was one hundred feet away, at between forty and fifty miles an hour. At this moment, when plaintiff was just within the hundred foot distance and coming at the rate defendants realized, defendants' truck was not so far advanced across plaintiff's path but that, if defendants stopped it within one foot, as they could have done, plaintiff would have had room to pass safely in front; but it was so far advanced that if they continued on their course across the street plaintiff would be unable to extricate himself from the predicament into which his rapid approach had plainly placed him. The precautionary measure of stopping, defendants did not take, and as a result the accident was not avoided. This, we find, the evidence would have warranted the jury in adopting as the facts of the case, and on the facts so found judgment should go for the plaintiff. Palmer v. Tschudy, (1923) 191 Cal. 696, 700, 218 P. 36. The motion for a directed verdict should not have been granted, therefore, even though the trial court would, in all probability, have felt it his duty to grant a new trial had the jury reached a verdict for the plaintiff.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

118 Cal.App. 4

TURNER v. AMERICAN HOSPITAL ASS'N.

Civ. 6770.

District Court of Appeal, Second District, Division 1, California.

Oct. 29, 1931.

Corporations ¶82.

Provision for repurchase of stock in employment contract, *held* limited to termination of probationary period as opposed to subsequent cancellation.

The contract, providing for employment of plaintiff as manager for corporation and sale of stock to him, provided for repurchase of stock by employer at end of probationary period if contract was then terminated, and that written notice would be given of cancellation if contract had not been previously terminated at end of probationary period.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. H. Turner against the American Hospital Association. Judgment for plaintiff, and defendant appeals.

Modified.

Louis, Quillian & Pool, of Los Angeles, for appellant.

Hoye & Boehler, of Los Angeles, for respondent.

CONREY, P. J.

This is an appeal by defendant from a money judgment rendered upon a complaint for damages for breach of a contract of employment, which included a contract to repurchase stock in the defendant corporation, as stated in the first count.

Judgment was rendered in favor of the plaintiff on the first cause of action for the sum of \$2,500, with interest, and on the third cause of action for the sum of \$215.15. Appellant concedes that the judgment as to said third count is correct.

The contract in question was a contract which provided for the employment of the plaintiff as manager of the Huntington Park Hospital of the defendant corporation, and the salary to be paid was set out in full therein. There is no dispute regarding the salary or the payment or nonpayment of the same. In addition to the contract of employment and payment of a salary therefor, the contract contained the following clause:

"I hereby acknowledge receipt of your check for \$2500.00 and hand you herewith stock certificate for 2500 shares of stock in the American Hospital Association, Incorporated,

par value \$1.00 (estimate book value \$2.15 per share). It being understood that if at the expiration of three months from the above date, your services are not satisfactory to the American Hospital Association, Incorporated, or for any reason you wish to tender your resignation, we will purchase your stock at a price not less than \$2500.00 plus seven per cent (7%) interest from date of this contract. We agree to give you thirty days' written notice if it is decided to cancel the terms of this contract after three months from date and shall expect the same amount of notice from you, if at any time after the three months, you decide to terminate it.

"If, after the expiration of three months from date, it is mutually agreed to continue under the terms of this contract, then the same shall be considered as in full force and binding upon both parties."

Plaintiff performed services under this contract for approximately one year, or until October 6, 1927. The contract was terminated by letter addressed to the defendant corporation, signed by plaintiff, dated September 6, 1927. Plaintiff received 2500 shares of stock of defendant corporation, as required by the terms of the contract. The plaintiff did not tender the stock to the defendant corporation. At the time of the trial and at the time of the execution of the contract, the defendant corporation had creditors, and was indebted in a sum in excess of the assets of said corporation. Upon a refusal of the defendant corporation to repurchase the stock owned by plaintiff and to pay a small balance due the plaintiff for services rendered, this action was commenced.

The first point presented by appellant is, that to enable plaintiff to enforce the contract, plaintiff should have tendered his resignation and should have demanded compliance with the terms of the contract to repurchase the stock within three months after the date of the execution of the contract. On reading the terms of the contract, as hereinabove set forth, it clearly appears that the agreement divides itself into two parts. The first part looks to a probationary period of three months, within which the parties are to determine whether they will be satisfied to put the contract on a more permanent basis. In contemplation of that period of trial or experiment, it was provided that if, at the expiration of three months from the date of the contract, either party was not satisfied to go on with it, the corporation would purchase plaintiff's stock at the stated price. At that time and under those conditions the contract, under its terms, would be terminated (not canceled) forthwith. The subsequent provisions relating to a thirty-day notice had nothing to do with termination of the contract under such temporary arrangement.

The second part of the contract assumes that the temporary or probationary period has been successful, and that the parties have continued under the terms of the contract without terminating it at the end of the first three months. Under those conditions, it was agreed that if either party decided to cancel or terminate the agreement after three months from date, a thirty-day notice would be given. But there is nothing in the contract whereby under such subsequent termination of the agreement the corporation agreed to purchase the plaintiff's stock.

It is also very clear and plain that the time limit of three months in relation to the agreement to purchase the stock, was "of the essence" of the contract. This is an action at law. At common law, time is of the essence of a contract. *Bennett v. Hyde*, 92 Cal. 131, 134, 28 P. 104; *Glock v. Howard, etc., Co.*, 123 Cal. 1, at page 9, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; see, also, 6 R. C. L., p. 898, and R. C. L. Permanent Suppl., p. 1853.

In view of the foregoing interpretation of the contract, it is not necessary to consider the other grounds of appeal stated in appellant's brief.

The judgment is hereby modified by reducing the amount of plaintiff's recovery from \$3,167.35 to the sum of \$215.15. As thus modified, the judgment is affirmed. Costs of the appeal are allowed to appellant.

I concur: HOUSER, J.

I dissent: YORK, J.

117 Cal.App. 674

CLENDENIN et al. v. BENSON et al.
Civ. 7567.

District Court of Appeal, First District, Division 1, California.

Oct. 26, 1931.

1. Appeal and error ⇨994(3).

Witness' credibility *held* for trial court, where evidence as to automobile's speed and distances testified to was conflicting; scene of accident not conclusively showing testimony untrue (Code Civ. Proc. § 1847).

2. Automobiles ⇨194(3).

Garage's or its employee's negligence while testing automobile left at garage for repairs *held* not imputable to automobile owner; garage being independent contractor.

3. Automobiles ⇨201(8).

Where two or more are charged with negligence causing automobile accident, one de-

fendant cannot complain that codefendant's negligence contributed to injury.

4. Appeal and error ⇨1011(1).

Trial court's finding as to negligence, where evidence is conflicting, cannot be disturbed.

5. Automobiles ⇨172(6).

Truck driver's failure to signal before stopping, and his not leaving unobstructed 15 feet of main highway, both in violation of statute, constituted negligence (St. 1923, p. 561, § 136, and p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a).

Such omission on the part of the truck driver, contrary to St. 1923, p. 561, § 136, and p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a, constituted negligence, in view of the rule that violation of statute which is a proximate cause of damage to another constitutes negligence.

[Ed. Note.—For other definitions of "Negligence," see Words and Phrases.]

6. Insurance ⇨606(5).

In insurer's action for damages from automobile collision based on subrogation to insured's rights, evidence *held* to support finding that automobile collision policy was issued (Code Civ. Proc. §§ 956a, 1027; Const. art. 6, § 4¾).

Appeal from Superior Court, Santa Clara County; C. J. Luttrell, Judge.

Action by E. C. Clendenin and another against Robert F. Benson and others. From the judgment in favor of plaintiff insurance company against defendant Blase Bros. & Co., and in favor of defendants Benson, Weaver & Wheeler as to both plaintiffs, defendant Blase Bros. & Co. appeal.

Judgment affirmed.

Carlton D. Dethlefsen, of San Francisco, Ray Wilkins, of San Jose, and A. Dal Thomson, of San Francisco, for appellant.

Louis Oneal and C. E. Luckhardt, both of San Jose, for respondents.

PER CURIAM.

This action was brought to recover damages alleged to have been suffered by plaintiff Clendenin by reason of injuries to his automobile, it being alleged that the damage was caused by the negligence of defendants Blase Bros. & Co., a corporation; Robert F. Benson and Chester N. Weaver, individually and as copartners, and Noble Wheeler.

Plaintiff Hartford Fire Insurance Company alleged a cause of action under the theory of subrogation, claiming to have been the

insurance carrier of plaintiff Clendenin, and to have paid him the sum of \$1,625 under the terms of his policy.

A jury having been waived, the action was tried before the court, and, upon its findings, judgment was entered in favor of the insurance company and against Blase Bros. & Co. for \$1,125, which amount the court found was the extent of the damage; further, that neither plaintiff take anything against defendants Benson, Weaver or Wheeler.

Defendant, Blase Bros. & Co. filed a notice of appeal from the whole judgment, and alleged that the finding that the damage was caused by its negligence is unsupported, and that the court erred in admitting certain evidence over objection.

Plaintiff Clendenin, the owner of the automobile, placed it in the possession of defendants Benson and Weaver at San Jose for repairs. After certain work had been done, defendant Wheeler, who was in the employ of the defendants last named, in order to test the work, drove the car north along the public highway to a point near Alviso. Two trucks belonging to appellant were upon the same highway in that vicinity, one proceeding south and the other north, the latter preceding Clendenin's automobile, which collided with the rear end of the north-bound truck. The trucks had passed each other shortly before the collision, and it was testified that as they passed the driver of the south-bound truck signaled the driver of the other truck, and that the latter suddenly stopped, whereupon the accident happened.

Defendant Wheeler testified that he was driving about 35 miles an hour; the distance between the automobile and the truck when the latter was in motion being between 200 and 300 feet. He further testified that the truck driver gave no warning signal, and that, when he realized that the truck had stopped, he applied his brakes, turned the automobile to the left, and that the two vehicles were about 60 feet apart when the truck came to a standstill; further that he was unable to turn the automobile sufficiently to avoid the collision, and consequently the right rear door of the automobile came into contact with the left rear corner of the truck, causing damage to the automobile. The latter vehicle overturned and came to rest at a point between 35 and 50 feet from the place of the collision. The untraveled portion of the highway was 16 feet in width. Photographs taken after the accident show that the truck when stopped occupied at least a third of the main traveled portion, and that there was ample space on both sides of this portion of the highway for the parking of vehicles.

[1] The evidence was conflicting as to the speed of the automobile and the distances testified to by Wheeler; but, contrary to appellant's claim, there is nothing in the evidence of the physical conditions at the scene of the accident or otherwise which conclusively shows that his testimony was untrue. The question of his credibility and that of the other witnesses was for the trial court (Code Civ. Proc. § 1847), and we cannot say that its conclusions in these respects were unsupported.

[2-4] Defendants Benson and Weaver were independent contractors, whose negligence, if any, or that of Wheeler, their employee, could not be imputed to plaintiffs (Segler v. Callister, 167 Cal. 377, 139 P. 819, 51 L. R. A. [N. S.] 772); nor, where two or more are charged with negligence, can one defendant complain that the negligence of his codefendant contributed to the injury (Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 P. 24; Blackwell v. American Film Co., 48 Cal. App. 684, 192 P. 189); and the question of negligence was one for the trial court, whose findings, where the evidence is conflicting, cannot be disturbed (Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393).

[5] It was the duty of the truck driver to signal if about to stop (section 130(a), California Vehicle Act, as amended by St. 1925, p. 412, § 15a), and section 136 of the same act provided that no vehicle should be parked or left standing, whether attended or unattended, upon any public highway, unless a clear and unobstructed width not less than 15 feet upon the main-traveled portion of the highway be left for the free passage of other vehicles thereon. And it is a general rule of the law of negligence that the violation of a statute which is a proximate cause of damage to another constitutes negligence. Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045.

The evidence was sufficient to support the finding that appellant's employee was negligent, and that his negligence was a proximate cause of the damage complained of.

[6] The complaint alleged in paragraph VII thereof "that on the 26th day of January, 1927, said plaintiff, Hartford Fire Insurance Company executed and delivered to the said E. C. Clendenin a policy of automobile insurance, No. B7856, said insurance commencing on the 26th day of January, 1927, and terminating on the 26th day of January, 1928, wherein and whereby the said plaintiff Hartford Fire Insurance Company, during the whole of said period insured the said E. C. Clendenin against such damage as might be caused to his automobile by collision for the full amount of said automobile"; and the court found the above allegations to be true. At the trial, evidence of the

contents of the policy was introduced over objection that there was no preliminary proof sufficient to authorize the introduction of secondary evidence; and it was contended as one of the grounds for the appeal that there was no competent evidence supporting the above finding. While there was testimony at the trial of some search for the policy, the diligence in that respect which the law requires was not shown; and, in order to determine the fact of its loss, this court, under the authority of section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure, caused additional evidence to be taken before a referee appointed by it. This evidence shows that a diligent and bona fide but unsuccessful search for the document was made at the place where it was most likely to be found; further, the contents of the policy were sufficiently shown by the testimony of employees of the insurer and by its records. We therefore find that all the allegations of paragraph VII of the complaint are true. This and the other findings being fully sustained, the judgment is affirmed.

It is further ordered that appellant Blase Bros. & Co. recover its costs on appeal. Code Civ. Proc. § 1027.

118 Cal.App. 53

PEASE et al. v. THORNBURG et al.
Civ. 6772.

District Court of Appeal, Second District, Division 1, California.
Oct. 30, 1931.

1. Fraud ☞11(1).

Representations of broker as to value of property covered by trust deed *held* not actionable since constituting mere matters of opinion.

2. Brokers ☞106.

In action for money received in exchange of property, judgment against owner for misrepresentations of broker *held* unauthorized.

Judgment was unauthorized, since it was not alleged nor found that representations were made by any one except broker, there was no allegation that other defendants had knowledge of misrepresentations, and no allegation of such agency as would bind principal, and plaintiffs had agreed in agreement for exchange that principals to agreement had investigated respective properties, and that agent or broker was released from all responsibility regarding valuation of properties.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Bert E. Pease and another against Harvey D. Thornburg and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Howard B. Henshey and Mart Coles, both of Los Angeles, for appellants.

Roland W. Schoettler, of Los Angeles, for respondents.

YORK, J.

Judgment was rendered for the plaintiffs against "the defendant, Harvey D. Thornburg, James C. Powell and Mae Christine Powell, for the sum of \$4,000.00, together with interest on same at the rate of 7% per annum from the 1st day of August, 1927."

The action was brought by plaintiffs against defendants for money had and received; the alleged cause of action arising out of a real estate transaction negotiated by defendant Powell, and involving an exchange of properties between the plaintiffs and the defendant Thornburg. By the terms of the exchange agreement, plaintiffs deeded to Thornburg an orange grove, subject to incumbrances thereon, and the defendant Thornburg deeded to plaintiffs property in Los Angeles county, and assigned to plaintiffs a promissory note for \$4,000, executed by Frank W. Hurd and wife to one J. F. Denney, secured by a deed of trust on property located in Los Angeles county. This note and deed of trust was a third incumbrance, subject to two prior incumbrances, one for \$8,000 and the other for \$3,750. It is alleged that, in order to induce the plaintiffs to effect the exchange of the properties, the defendant Powell stated to them that the note and trust deed were guaranteed by the Harold G. Ferguson Corporation, and that the property was worth the amount of the three incumbrances on it. It is alleged that the trust deed was subsequently foreclosed, without the knowledge of the plaintiffs.

[1, 2] There is nothing in the complaint that states a cause of action of any kind against the defendant Mae Christine Powell, the wife of James C. Powell. The cause of action attempted to be stated against said James C. Powell is predicated upon the allegation in the complaint that he represented that the note and trust deed were guaranteed by the Harold G. Ferguson Corporation, and that the property was worth the amount of the three incumbrances upon it. The representations as to the value of the property covered by the trust deed were matters of opinion, for which the agent could not be held to be responsible. It is not alleged, nor

found, that these representations were made by any one excepting defendant James C. Powell. It is not alleged that the other defendants had any knowledge of any misrepresentation made by the said Powell. There is no allegation of such an agency on behalf of Powell that would bind the defendant Thornburg. There is no finding by the court that the representations made by Powell were made when he did not believe them to be true. Plaintiffs agreed in the agreement for exchange: "It is also presumed and understood that all principals to this agreement have investigated the respective properties, and the agent or broker is hereby released from all responsibility regarding valuation of same." Further the record shows that in fact the deed by which the property covered by the trust deed was conveyed to the Ferguson Corporation referred to the several trust deeds subject to which the conveyance was made, and declared that "the grantee assumes each of the encumbrances above set out."

Therefore, there being no basis for the judgment against any of the defendants, the judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

117 Cal.App. 687

LAYKIN v. KARSH.

Civ. 8020.

District Court of Appeal, Second District, Division 2, California.

Oct. 27, 1931.

1. Appeal and error ⇨628(1).

Motion to dismiss appeal from amended judgment for delay in filing transcript due to respondent's motion to amend judgment *held* properly denied.

Facts disclosed that appellant had given notice of appeal from original judgment entered by court, that immediately thereafter respondent moved to amend conclusion of law and enter a different judgment, and after motion was granted appellant gave immediate notice of appeal and made arrangements with reporter for preparation of the transcript.

2. Appeal and error ⇨628(1).

Appeal *held* not dismissible for appellant's failure to obtain transcript, where respondent instituted no proceedings in trial court for termination of proceedings for procuring transcript.

Appeal from Superior Court of Los Angeles County; Emmett H. Wilson, Judge.

Action by Robert Laykin against Charles Karsh. From judgments against him, defendant appeals. Plaintiff moves to dismiss the appeal.

Motion denied.

Hiram T. Kellogg, of Los Angeles, for appellant.

Arthur Rosenblum and Willebrandt, Horowitz & McCloskey, all of Los Angeles, for respondent.

CRAIG, J.

The respondent has filed a motion to dismiss the appeal in this action, upon the ground that the transcript was not filed within the time required.

From the certificate of the clerk of the superior court it appears that judgment in favor of the plaintiff was entered on December 4, 1930, from which judgment the defendant appealed on the 8th day of said month and filed a notice requesting preparation of the transcript in accordance with the provisions of section 953a of the Code of Civil Procedure. Subsequently and on motion of the plaintiff the conclusions of law were modified and a different judgment was entered, a motion for a new trial was interposed, which was denied, and on March 19, 1931, the defendant appealed from the judgment last mentioned, and the transcript was filed July 2, 1931. The instant proceeding is based upon an order of the trial court which recites, in part, as follows: "No undertaking to secure payment of the cost of the transcript was ever given as required by section 953b, Code of Civil Procedure, either following the notice to prepare transcript which was filed on December 8, 1930, or following notice of March 19, 1931, or at all, and, according to statements of counsel for defendant, no arrangements were made with the stenographic reporter for his compensation until some time in May, 1931. * * * For the reasons above set forth, the court is without jurisdiction to settle and approve the transcript on appeal, and therefore declines and refuses so to do." However, the official reporter makes affidavit as to facts within his knowledge and obviously not previously disclosed to the court below, that on March 19, 1931, he had by appellant's counsel been employed to transcribe and file the record; "that affiant informed said Hiram T. Kellogg that such arrangements would be satisfactory; that due to press of business in his office affiant would be unable to commence the transcription of the transcript for some little time, and that he would not delay the transcription, but would commence the same. * * * Affiant further states that in truth and in fact the preparation of the

transcript was commenced prior to the receipt of payment therefor and was delayed in preparation by the press of other work. That said transcript was duly prepared in due course of affiant's business."

Thus it appears that appeals were taken from the judgment entered December 4, 1930, and from "another and different judgment" entered January 26, 1931. In the meantime respondent's motion under sections 663 and 663a of the Code of Civil Procedure to amend the conclusions of law and enter said other and different judgment was interposed, presented, and granted. We must assume that the trial court had jurisdiction to make and enter the judgment on January 26th. *Israel v. Bryan*, 52 Cal. App. 66, 197 P. 121. An appeal from the original judgment was taken four days after its entry, and notice of appeal from the second judgment was served and filed on the day of its entry. From perusal of the record in this proceeding it appears that respondent and the trial court assumed a dual application of the provisions of sections 663 and 663a, *supra*, as the intention of the Legislature, in that a successful party might by invoking them enjoy the benefit of such a motion and of an incidental delay attributable thereto. Section 663 of said code reads as follows:

"A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, *upon motion of the party aggrieved*, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

"1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected.

"2. A judgment or decree not consistent with or not supported by the special verdict."

[1] A motion by the defendant and appellant to amend the conclusions of law and to enter another and different judgment would have constituted a more speedy and summary method for attacking the judgment—a cumulative remedy not superseding his remedy by appeal. *Modoc Co-Operative Ass'n v. Porter*, 11 Cal. App. 270, 104 P. 710. For aught that may appear to the contrary, transcription of the record immediately following the entry of the first judgment was suspended, through no fault of appellant, pending determination of the motion of the plaintiff and respondent to amend the conclusions of law and to set aside such judgment and enter another and different one. We are able to see no valid reason for the suggestion, nor is it seriously contended that the appellant must be held to have forfeited his right of appeal through any delay incidental to the respondent's said

motion. Satisfactory arrangements between counsel and the reporter having been made, the jurisdictional basis for perfection of appeals was in that respect sufficient. *Wrynn v. Superior Court*, 197 Cal. 591, 241 P. 849; *Crocker v. Crocker*, 76 Cal. App. 606, 245 P. 438, 439. As stated in the case last cited: "Section 953a specifies that it is the duty of the stenographic reporter to transcribe fully a report of the trial and file the same within 20 days after the notice to prepare a transcript has been filed with the clerk. This provision has been held to be merely directory, and a failure of the reporter to file the transcript within the time allowed is not jurisdictional, and, as said in 2 Cal. Jur. 623: 'Neither by statute nor rule of the appellate courts is there any provision prescribing a limit to the time within which the transcript is to be prepared, nor any penalty for the failure of the reporter to file the transcript within 20 days.'"

[2] Following appeals from both judgments, and the refusal of the trial court after entering the second judgment to approve the transcript, the instant proceeding was instituted by the respondent to "dismiss the appeal from the judgment in the above-entitled cause, on the ground that no transcript or other record on appeal has been made or filed within the time prescribed by rule I of the Rules of the Supreme Court and District Courts of Appeal." It is not contended that the rules of court require more than does the statute which, as observed, is satisfied by compliance with its jurisdictional mandates. If for no other reason appellant's transcript were offered for authentication and filing upon the authority of *Engstrom v. Atkins*, 102 Cal. App. 393, 283 P. 79, 80, we think the facts sufficiently analogous to require its favorable consideration. We need but quote therefrom:

"In this connection the law is well established that when, as here, an appellant complies with the jurisdictional requirement of section 953a of the Code of Civil Procedure by filing the notice provided by that section and there is unreasonable delay in procuring the transcript, either on account of a lack of diligence on the part of the officers of the court to prepare the same or for other reasons, the remedy for such delay is by way of motion in the trial court to terminate the proceedings for procuring the transcript; and that until such remedy is exercised and the trial court has determined the matter, the reviewing court will not dismiss the appeal. *Crocker v. Crocker*, 76 Cal. App. 606, 245 P. 438, 439, and authorities therein cited; *Mill Valley v. Massachusetts Bonding & Ins. Co.*, *supra* [189 Cal. 52, 207 P. 253]. Admittedly, in the present case respondent has not exercised such remedy, and consequently upon that ground his motion to dismiss the appeal should be denied.

"Aside from that matter, however, it is apparent from the undisputed facts appearing in the record before us that the delay in procuring the transcript herein has not been due to any lack of diligence on the part of appellant, but was incident to a matter over which the trial court had control; and, moreover, that the delay has not been of great duration. Therefore, as held in *Crocker v. Crocker*, supra, 'this court ought not to order a dismissal of an appeal where jurisdiction is not shown to be wanting and the alleged delays are only in matters of procedure, which are in no wise fatal to a hearing of the cause upon its merits.'"

The defendant promptly appealed from the original judgment and from the subsequent "other and different judgment," and in each instance requested the preparation of the transcript. Within two days after notice of the first appeal, a motion to set aside the judgment was interposed by the plaintiff, and at his instance a new judgment was thereafter given and entered, from which the defendant also appealed. No valid ground is suggested, nor does any authority of which we are aware reveal the necessity for a duplication of transcripts, or for any conceivable prejudice that could arise from the intervening delay in presenting the transcript for approval pending final determination of the issues in the trial court.

The motion to dismiss the appeal is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

McAFEE v. LOS ANGELES GAS & ELECTRIC CORPORATION et al. *

Civ. 6613.

District Court of Appeal, Second District, Division 1, California

Oct. 29, 1931.

Rehearing Denied Nov. 27, 1931. Hearing Granted by Supreme Court Dec. 28, 1931.

Malicious prosecution ☞71(2).

In action against corporation and employee for malicious prosecution, whether there was want of probable cause held for jury under evidence.

Case should have been submitted to jury, since fact that plaintiff was acquitted of charges in criminal complaint, evidence that part of statement contained in complaint was not strictly true, evidence as to what defendant employee said and did, and conflict in testimony as to what search of defendant company's records was made by employee, made it necessary to submit to jury question as to whether those facts

existed which would establish want of probable cause.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by John G. McAfee against the Los Angeles Gas & Electric Corporation and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Porter C. Blackburn and Marion P. Betty, both of Los Angeles, for appellant.

Paul Overton, S. W. Guthrie, and Neil G. Locke, all of Los Angeles, for respondents.

YORK, J.

This is an appeal by the plaintiff from a judgment of nonsuit, granted at the conclusion of the plaintiff's introduction of his evidence before a jury, on a cause of action for malicious prosecution. The motion for nonsuit was made upon the ground that the record failed to disclose evidence of malice either directly or indirectly, and on the ground "that the evidence is insufficient to show, either directly or by inference, any want of probable cause on behalf of either of the defendants."

Evidence was introduced showing the arrest and detention of the plaintiff on a warrant issued upon a complaint sworn to by the defendant Ellensen, who was an employee of defendant Los Angeles Gas & Electric Corporation, and who was an employee of said corporation at the time he discovered the facts which caused him to swear to this complaint. The evidence is sufficient for the jury to find that it was in the course of this employment that he swore to the complaint. Upon trial, the plaintiff was acquitted of the charge in the complaint.

Under the evidence introduced in this case, the question as to whether there was lack of probable cause depended upon questions of fact that should have been left to the jury. The fact that the plaintiff was acquitted of the charges in the criminal complaint, and the fact that there was evidence that part of the statement contained in the complaint was not strictly true; and the evidence as to what defendant Ellensen said and did, and the conflict in the testimony as to what search of the defendant company's records was made by defendant Ellensen, made it necessary to submit to the jury the question as to whether or not those facts existed which (under appropriate instructions of the court) would establish that there was a want of probable cause on behalf of either or both of the defendants.

The judgment of nonsuit in favor of defendants and against the plaintiff is reversed.

We concur: CONREY, P. J.; HOUSER, J.

NEEDHAM v. ABBOT KINNEY CO.*

Civ. 6753.

District Court of Appeal, Second District,
Division 1, California.

Oct. 29, 1931.

Rehearing Denied Nov. 27, 1931. Hearing
Granted by Supreme Court Dec. 28, 1931.Brokers' ~~49~~(1).

Where promise to pay commission was conditioned upon sale to designated persons, broker was not entitled to commission for sale to others, though introduced by him.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Paul A. Needham against the Abbot Kinney Company. Judgment for plaintiff, and defendant appeals.

Reversed.

R. C. Gortner and Asa V. Call, both of Los Angeles, for appellant.

Arthur G. Baker and Joseph Hansen, both of Los Angeles, for respondent.

YORK, J.

This is an action to recover a real estate broker's commission, based upon the following instrument in writing:

"29 Windward Ave., Venice, California,
"August 19, 1925.

"Mr. Paul A. Needham,
Los Angeles, California:

"Dear Sir: The properties owned by the Abbot Kinney Company are not on the market, and are not for sale. However, in consideration of the overtures you have made and the representation that you believe Mr. Adolph Ramish, Mr. Leo Harvey and Mr. Joshua Marks may be interested in considering the purchase of some of our holdings, we would be willing to allow them to enter into negotiations looking toward a deal.

"In any deal satisfactory to us we would expect to pay the usual Realty Board Commission.

"Yours very truly,

"Abbot Kinney Company

"[Sgd.] Thornton Kinney, President."

The facts show that the plaintiff was not able to interest any of the men named in the letter in defendant's properties, but that he did interest Oliver and Carver in a certain portion of the properties; that negotiations for the sale of these properties were commenced, the purchase price named being around \$600,000; however, no sale resulted from these negotiations, and on July 1, 1926, the defendant company and Messrs. Oliver and Carver made an agency contract under which the latter were to take over the sale of a subdivision composed of the properties of defendant which had been offered for sale,

and, under this contract, said Oliver and Carver made sales of lots in the aggregate sum of \$420,300.

Plaintiff's original complaint asked for a straight 5 per cent. commission on the sum of \$600,000, the price at which defendant held the land. After the trial, which commenced on January 25, 1928, had progressed for some time, evidence was introduced showing that it was customary to allow an agent in a deal of the sort here involved a commission upon the total sales of lots in such subdivision, and thereupon the plaintiff obtained leave of court to file, and he did file, an amended complaint under date of March 27, 1928, alleging that the gross sum involved in the deal to subdivide and sell the defendant's land amounted to \$1,182,800, and sought a judgment for the reasonable value of his services in consummating said deal, alleging that said deal was eminently satisfactory to the defendant. Trial on the issues raised by defendant's answer to the amended complaint was had on January 22, 1929, after which the court made findings of fact and conclusions of law, and gave judgment to plaintiff for the sum of \$24,324.25, which sum is made up as follows: \$21,015, which is 5 per cent. of \$420,300 (the aggregate amount of money received from sales of lots in the subdivision), and \$3,309.25, which was the interest at 7 per cent. per annum on the commission from the date on which each of the respective sales was made.

It is from this judgment that defendant prosecutes this appeal.

Appellant maintains that the letter, quoted in full at the beginning of this opinion, authorized plaintiff to negotiate a deal with only the named persons as purchasers, and that the court erred in holding that it authorized plaintiff to negotiate and consummate any deal with respect to any or all of its properties; that the court erred in holding that retail sales of lots in a subdivision, made by Oliver and Carver, constituted sales by plaintiff under the letter of August 19, 1925; and that the court erred in the measure of damages.

The instrument in writing, quoted herein, by its express terms is limited to a deal that might be made with Mr. Adolph Ramish, Mr. Leo Harvey, and Mr. Joshua Marks. If the right of the plaintiff to recover is limited to the instrument in writing hereinbefore quoted in full, it would appear that the trial court was in error in rendering a judgment in favor of the plaintiff. This instrument did not purport to employ the plaintiff to render any other services, excepting only to negotiate a deal with certain proposed purchasers, whom he had suggested. It did not authorize him to find other agents, or other subdividers, or to assist any such subdividers. If we are cor-

rect in our interpretation of the written instrument, there is no need for further discussion of the points raised upon appeal.

The judgment is reversed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

117 Cal.App. 696

BRUTON v. TEARLE.

Civ. 7802.

District Court of Appeal, First District, Division 2, California.

Oct. 28, 1931.

Rehearing Denied Nov. 27, 1931. Hearing Denied by Supreme Court Dec. 24, 1931.

1. Divorce ☞331.

New York court cannot annul or modify its alimony order as to accrued and unpaid installments, which represent vested right enforceable like any final judgment as respects effect in another state.

2. Divorce ☞331.

As to accrued and unpaid installments, New York alimony judgment held "final judgment" within full faith and credit clause (Const. U. S. art. 4, § 1).

[Ed Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by Josephine Park Tearle, also known as Josephine H. Park, against Conway Tearle. Judgment for plaintiff, and defendant appealed. Pending the appeal, plaintiff died, and Martin P. Bruton, as administrator with the will annexed, was substituted as party plaintiff.

Affirmed.

John G. Jury and William J. Brennan, both of San Francisco, for appellant.

Marcel E. Cerf and Henry Robinson, both of San Francisco, for respondent.

NOURSE, P. J.

This is a suit by Josephine Park Tearle for the sum of \$9,932.50 admitted to be unpaid alimony awarded her under a decree of divorce in New York.

The cause was tried by the court sitting without a jury upon an agreed statement of facts. Judgment was ordered for the plain-

tiff, and defendant appeals upon typewritten transcripts. Pending the appeal, Mrs. Tearle died, and her administrator has been duly substituted in her stead. We may continue to refer to her herein as the plaintiff in the action. Plaintiff obtained a decree of divorce from defendant in the state of New York on November 21, 1912, wherein plaintiff was awarded alimony in the sum of \$25 each week thereafter; on May 9, 1921 plaintiff obtained a second judgment in the form of a modification of the decree wherein she was awarded \$75 each week thereafter; on March 21, 1928, plaintiff obtained a third judgment in the same form in which she was awarded the sum of \$100 each week thereafter. The record discloses no modification and no proceeding to modify any one of these judgments. The trial court found that "there is now accrued, due, owing and unpaid" under said judgments \$9,932.50, and that under the laws of the state of New York such judgments were not subject to modification as to accrued and past-due installments.

[1] Defendant and appellant contends that the judgments are not final under the laws of New York as to accrued and unpaid payments thereunder because the court which rendered those judgments had the power to modify them at any time, and that only a final judgment is within the full faith and credit clause of the federal Constitution.

Upon the first point the New York law as interpreted by the courts of that state is not in accord with appellant's contention. In *Krauss v. Krauss*, 127 App. Div. 740, 111 N. Y. S. 788, 789, the Appellate Division held that the statutory power conferred upon the trial court to annul, vary, or modify an order for the payment of alimony did not carry jurisdiction to deprive one of that portion of such an award which was due and payable, but that, as to such portion, a vested right was created which might be enforced the same as any final judgment. This is the settled rule of the authorities of that court down to *Crawford v. Crawford*, 129 Misc. Rep. 683, 221 N. Y. S. 551, and we find no authorities to the contrary. The statutes of New York interpreted in these decisions are of the same general purport as section 139 of our Civil Code, which authorizes the Superior Court to annul or modify its alimony orders from time to time. Interpreting this section, our appellate courts have held that a judgment for alimony is not subject to modification as to the sums already accrued and past due. *Soule v. Soule*, 4 Cal. App. 97, 105, 87 P. 205; *Cummings v. Cummings*, 97 Cal. App. 144, 147, 275 P. 245; *Rinkenberger v. Rinkenberger*, 99 Cal. App. 45, 52, 277 P. 1096. We find the same rule in *Sistare v. Sistare*, 218 U. S. 1, 22, 24, 30 S. Ct. 682, 54

L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, where the United States Supreme Court gave this interpretation to the statutes of New York.

[2] Upon the second point, that a judgment of this character is not a final judgment within the full faith and credit clause of the Federal Constitution, the rule contra is equally well settled, first in *Sistare v. Sistare*, supra, 218 U. S. page 17, 30 S. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; *Caples v. Caples* (C. C. A.) 47 F.(2d) 225, 226; *Cummings v. Cummings*, supra, 97 Cal. App. page 151, 275 P. 245; *Rinkenberger v. Rinkenberger*, supra, 99 Cal. App. page 48 et seq., 277 P. 1096.

We find no error in the record. The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.

214 Cal. 238

DUDNEY v. STATE BAR OF CALIFORNIA.

L. A. 13038.

Supreme Court of California.

Nov. 2, 1931.

1. Attorney and client ☞38.

Misconduct in reference to one's duties and obligations as attorney—conduct contrary to justice, honesty, modesty, or good morals—constitutes "moral turpitude."

[Ed. Note.—For other definitions of "Moral Turpitude," see Words and Phrases.]

2. Attorney and client ☞38.

Whether or not violation of rules of professional conduct involves moral turpitude, or is merely characterized as unethical, such violation may be penalized.

3. Attorney and client ☞58.

Public reprimand only given attorney, in view of youth and inexperience, for violating rules of professional conduct and statutes in handling of actions for personal injuries wherein he appeared as attorney of record for plaintiffs (Code Civ. Proc. § 287, subds. 3, 4).

In Bank.

Proceeding by W. E. Dudney to review an order of the Board of Governors of the State Bar of California recommending that petitioner be suspended from the practice of law for a period of six months. Recommendation of the local administrative committee that petitioner be given a public reprimand only accepted in lieu of the recommendation of the Board of Governors of the State Bar of California.

William E. Dudney, of Los Angeles, in pro. per.

Robert B. Jackson and Philbrick McCoy, both of Los Angeles, for respondent.

PRESTON, J.

Proceeding to review an order of the board of governors of the state bar of California recommending that petitioner be suspended from the practice of law in this state for a period of six months.

The local administrative committee, after a hearing upon charges duly preferred against petitioner, found him guilty of violation of rules 2, 3, and 10 of the Rules of Professional Conduct of the State Bar of California and of subdivisions 3 and 4 of section 287 of the Code of Civil Procedure. As the evidence shows unquestionably and without conflict a violation of said rules and statute by petitioner, and supports the findings in every respect,

it will not be reviewed here. It is sufficient to say that petitioner entered the employ of one Schultz, who, through two fictitiously named adjustment organizations, was engaged in the business familiarly characterized as "ambulance chasing," and petitioner's misconduct occurred in connection with the handling of some seventy-nine actions for personal injuries wherein he appeared as attorney of record for the plaintiffs. Many similar infractions have been recently passed upon by this court. *Townsend v. State Bar*, 210 Cal. 362, 291 P. 837; *Smith v. State Bar*, 211 Cal. 249, 294 P. 1057, 73 A. L. R. 393; *Shaw v. State Bar*, 297 P. 532; *Smallberg v. State Bar*, 297 P. 916; *Howe v. State Bar*, 298 P. 25; *Irving v. State Bar*, 1 P.(2d) 2, and *Dahl v. State Bar*, 1 P.(2d) 977.

The local administrative committee continued its hearing of the matter over a period of several months, at the termination of which time petitioner reported that he had given substitutions of attorney in all of said cases except two, and that he was endeavoring to effect substitutions in them also. The committee thereupon made its findings as aforesaid, and recommended that petitioner be given a public reprimand only. Thereafter, however, petitioner failed to exercise the privilege given him of appearing before the board of governors for oral argument to show why his punishment should not be increased, and that body therefore recommended a punishment of six months' suspension.

Petitioner's plea is directed mainly toward avoiding an order of suspension by this court. He cites his voluntary cessation of activity in the cases complained of, his utter good faith at all times, and his belief that his violation of the rules, if any, was unintentional and merely technical. He further suggests that the Rules of Professional Conduct are "based primarily upon whether or not a violation of the rule complained of involves an act of moral turpitude," contending that, if moral turpitude is involved, then suspension should not be complained of, but to suspend an attorney upon a technical violation seems unjust.

[1, 2] To our mind, the record shows that petitioner's misconduct consisted of more than a technical violation of said rules and statute. The cases cited by him are not in point, being either from outside jurisdictions or from this court prior to passage of the State Bar Act (St. 1927, p. 38). Furthermore, misconduct in reference to one's duties and obligations as an attorney—conduct contrary to justice, honesty, modesty, or good morals—constitutes moral turpitude. *Marsh v. State Bar*, 210 Cal. 303, 307, 291 P. 583, and cases therein cited. Whether or not a violation of the Rules of Professional Conduct involves any or all of these elements or is merely

characterized as unethical, such violation may be penalized, as is well established by the recent cases hereinabove cited and by other decisions of this court.

In view of petitioner's youth and inexperience and other mitigating circumstances, however, we are inclined to lend ear to his plea for leniency. Petitioner testified that he was 25 years of age, admitted to practice April 4, 1929. But seven months later, to wit, on November 11, 1929, he first accepted employment from said Schultz, and this proceeding was instituted shortly thereafter—in June, 1930. Petitioner earnestly insisted that any misconduct on his part was unintentional, and he made a distinct effort toward effecting a speedy termination of the activities complained of.

[3] We are of the opinion that the recommendation of a penalty of suspension for the period of six months, made by the board of governors, was too severe in this case, and we therefore accept, in lieu of said recommendation, the recommendation of the local administrative committee that petitioner, W. E. Dudney, be given a public reprimand only, and this opinion shall constitute such a reprimand.

We concur: WASTE, C. J., LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

214 Cal. 177
PEOPLE v. PINCHES et al.
Sac. 4468.
Supreme Court of California.
Oct. 29, 1931.
As Modified Nov. 9, 1931.

1. Venue ☞3.

Statutes giving controller authority to commence actions to collect highway transportation taxes in Sacramento county do not determine place of trial (Pol. Code, § 3669c, subd. 4, and § 433, subd. 16; Code Civ. Proc. § 392 et seq.).

2. Venue ☞3.

Statutory amendment respecting venue of actions to collect highway transportation taxes did not apply where venue was ordered changed before enactment (St. 1931, p. 1304).

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by the People of the State of California against Samuel Pinches and others. From

an order granting defendants' motion for a change of venue, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for the People.

Chas. Kasch, of Ukiah, for respondents.

CURTIS, J.

This is an appeal by the people of the state of California from an order of the superior court of the county of Sacramento granting the motion of the defendants for a change of the place of trial from the superior court of the county of Sacramento to the superior court of the county of Mendocino. Said motion was made upon the ground that the defendants were residents of said county of Mendocino.

[1] The action was instituted by the state to recover delinquent taxes assessed by the State Board of Equalization against defendants pursuant to the provisions of section 15, article 13, of the Constitution, adopted November 2, 1926, which provides that all companies engaged in the business of transportation of persons or property as common carriers for compensation over any public highway in this state between fixed termini or over regular routes shall pay taxes exclusively for highway purposes. Section 3664aa of the Political Code (Stats. 1927, p. 17) was adopted by the Legislature pursuant to the constitutional mandate to assist in carrying into effect the provisions of said section of the Constitution. This section adopts and makes applicable to highway transportation taxes the provisions of section 3669c of the Political Code. Subdivision 4 of said last-named section provides that the controller shall bring an action to recover the tax due the state "in a court of competent jurisdiction in the county of Sacramento in the name of the people of the state of California, to collect any delinquent taxes, together with any penalties, or costs, which have not been paid in accordance with the provisions of this code and appearing delinquent upon the record of assessments for state taxes hereinbefore mentioned." In addition to the foregoing, subdivision 16 of section 433 of the Political Code requires the state controller "to direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state; of which suits the courts of Sacramento county have jurisdiction, without regard to the residence of the defendants."

This last-mentioned section has been construed by the District Court of Appeal in the case of *State v. Campbell*, 3 Cal. App. 602, 86 P. 840, 841. It was there held that while under the terms of said section the courts of Sacramento county had jurisdiction over actions of the class mentioned, nevertheless the defendant therein was entitled to have the place of trial changed to the county of his residence. The distinction was clearly pointed out in the opinion in that case between the jurisdiction of the courts and the right to have the action tried in the county of the defendant's residence. On this subject the court said: "The distinction between the jurisdiction of courts, and the right to have the action tried in the county of defendant's residence, is exemplified in a number of cases, where it was held that, although the court where the action was commenced undoubtedly had jurisdiction, the defendant was nevertheless entitled to have the place of trial changed."

Probably the most familiar example of this class of cases are actions for divorce. Under section 123 of the Civil Code the superior court of the county in which the plaintiff resides is not only given jurisdiction of such an action, but its jurisdiction is exclusive. Nevertheless, it has been held and it is now the settled rule in this state that the defendant in a divorce action is entitled to a change of venue in said action and to have the same tried in the county of his residence. *Warner v. Warner*, 100 Cal. 11, 34 P. 523.

The appellant asks that the case of *State v. Campbell* be overruled, and calls our attention to the fact that although the case was decided over twenty-five years ago, it has never been cited in any subsequent reported case. While that statement appears to be true, yet this argument may be met by the further statement that that case has stood as the law of this state since its rendition and has never been criticized or overruled by any of the appellate courts of the state. We are unable to perceive any great merit in this argument. Besides, the principle enunciated in the case of *State v. Campbell*, *supra*, has been established and approved in many other cases where similar questions were involved. *Hancock v. Burton*, 61 Cal. 70; *Duffy v. Duffy*, 104 Cal. 602, 38 P. 443; *Staaeke v. Bell*, 125 Cal. 309, 57 P. 1012; *Warner v. Warner*, 100 Cal. 11, 34 P. 523; *Security Loan, etc., Co. v. Kauffman*, 108 Cal. 214, 41 P. 467; *Brown v. Happy Valley Fruit Growers*, 206 Cal. 515, 274 P. 977.

Appellant cites the case of *State v. Jones*, 34 Idaho, 83, 199 P. 645. In that case a somewhat similar statute as that involved in this action was construed by the Supreme Court of that state. The court held that "jurisdiction as used in the statute refers to the venue," and expressly refused to follow *State v. Campbell*. It distinguished the case then

before it from the case of *State v. Campbell* in that the state of Idaho has no section of the code or statute similar to section 4481 of the Political Code of this state. By an examination of the opinion in *State v. Campbell* it will be observed that the court was largely influenced in its conclusion in that case by the provisions of said section of the Political Code. This section is as follows: "If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." The court therefore held (page 605 of 3 Cal. App., 86 P. 840, 841) that if there was any conflict between the section of the Political Code and that of the Code of Civil Procedure, "then the former controls as to the duties of the Controller, and the latter as to the place of trial of civil actions." With this difference in the statutory laws of the two states, the decision of the Supreme Court of Idaho can have but little persuasive effect in construing the laws of our own state.

If the provision of subdivision 16 of section 433 of the Political Code above quoted does not control the place of trial of actions instituted by the controller, then we think subdivision 4 of section 3669c of the Political Code can have no different effect. The phraseology of the two sections is quite similar. If there is any difference in the language of the two sections, we would say that the provision of section 433 is much more favorable to appellant's contention than that of section 3669c. Neither of these sections, however, can be construed as fixing the place of trial of actions instituted by the controller. They simply give that officer authority to commence these actions in a court of competent jurisdiction in Sacramento county, leaving the place of trial of such actions to be determined by the provisions of the Code of Civil Procedure (section 392 et seq.).

The Attorney General calls our attention to the fact that over 5,000 cases similar to the present one are filed in the courts of the county of Sacramento and in addition thereto more than 2,000 cases are pending in the courts of that county for the collection of delinquent corporation taxes. The defendant in each of these cases, the Attorney General asserts, will be entitled to have the cases against him tried in the county of his residence if the order granting a change of venue in this case is affirmed. Therefore, the Attorney General argues that had the court in 1906, when the case of *State v. Campbell* was decided, been confronted with this situation, its interpretation of this section of the Code would have been in accordance with the present contention of the Attorney General. As to what the appellate court would have done under such circumstances we, of course, can only conjecture. Having interpreted the

various statutes governing the case, according to their context and in accordance with the accepted rules of statutory construction, it would seem that such interpretation should stand, irrespective of any peculiar or unusual situation which might confront the court on subsequent occasions.

[2] This is a matter exclusively for the Legislature, and is governed by the statutes in force at the time the order of the trial court was made. In 1931 the Legislature amended subdivision 4 of section 3669c of the Political Code by the addition thereto of the following sentence: "And such actions shall be tried in the county of Sacramento unless the court, with the consent of the attorney general, order a change of place of trial," Statutes of 1931, p. 1304. Whatever may be the force and effect of said amendment, it can have no bearing upon the merits of this appeal, as the order appealed from was made long prior to the enactment of the amendment.

The order granting the motion for a change of venue is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

cumulative, and defendant not having established claim of surprise.

In Bank.

Appeal from Superior Court, Sonoma County; Percy S. King, Judge.

Action by Charles I. Proctor against Jakob Smith. Judgment for the plaintiff, and defendant appeals.

Modified, and, as so modified, affirmed.

Barrett & McConnell, of Santa Rosa, for appellant.

J. T. Coffman, of Healdsburg, and J. L. Royle, of Oakland, for respondent.

PER CURIAM.

Defendant prosecutes this appeal from the judgments in two actions (consolidated for the purposes of trial and brought up on appeal on one transcript) brought by plaintiff for an accounting for sums alleged to be due plaintiff from defendant under the terms of a logging contract. In addition to the main dispute as to the amount of lumber actually sold by defendant under the terms of this contract, both parties likewise asked for certain incidental damages alleged to be due the respective parties.

After a trial before the court without a jury, plaintiff received judgment against defendant in action numbered 15077 on the files of the superior court in and for the county of Sonoma, in the sum of \$4,535.57, and in the second action, numbered 15503 on the files of said court, received judgment in the sum of \$2,144.43. In denying motions for new trials in each of said actions, the trial court filed an "amended" judgment, in which \$500 was deducted from the first judgment, and \$338.68 was deducted from the second judgment.

The first point urged by appellant is that the trial court was without power thus to amend its judgment in this fashion. In order to understand this contention, the facts in reference to the entire controversy must be briefly set forth.

As already stated, plaintiff instituted these actions to secure an accounting for timber alleged to have been cut by defendant from the premises of plaintiff and sold by defendant under the terms of a logging contract. The plaintiff asked, in these two actions, for an accounting for the period January 20, 1923, the date of the contract, to April 1, 1926. It appears from the record that there was a third action pending between the parties for an accounting under the contract for the period subsequent to April 1, 1926. For reasons not pertinent here, this third action was not consolidated for trial with the first two actions.

214 Cal. 227

PROCTOR v. SMITH.
S. F. 13502.

Supreme Court of California.
Oct. 30, 1931.

1. Judgment ☞329.

Where error in computation appeared in judgment, findings of fact, and conclusions of law, amended judgment correcting error *held* not supported by findings or conclusions.

2. Appeal and error ☞1122(2).

Where findings, conclusions, and judgment, in action for accounting on logging contract, erroneously included agreed quantity not involved in action, Supreme Court could make proper findings (Code Civ. Proc. § 956a).

The Supreme Court could make additional findings, since making proper findings was simple matter of computation.

3. Appeal and error ☞1010(1).

Findings supported by substantial evidence could not be disturbed on appeal.

4. New trial ☞99.

Denying new trial for newly discovered evidence *held* proper, evidence being merely

The contract between the parties was pleaded as an exhibit to plaintiff's complaints. It provided in part that: " * * * The said party of the second part agrees to pay to the party of the first part for the aforesaid timber at the rate of five dollars per thousand feet for all merchantable lumber cut therefrom, payment to be made as lumber is sold and figures taken from shipping book."

It appears that defendant started performance under the contract, and that for a short while an amicable relationship existed between the parties. Some time in 1924, however, this amicable relationship was broken, and since that time a very bitter feeling has existed between the contracting parties, which has resulted in considerable litigation.

There is no dispute that, according to the shipping books kept by defendant, he sold, during the period covered by these actions, 655,723 feet of lumber under this contract. Plaintiff alleged, and the trial court, on conflicting evidence, found that the shipping books of defendant did not correctly show the amount of lumber sold by defendant, but that the true amount was far in excess of that shown by said books. At the trial, plaintiff did not impeach these books by showing that defendant had in fact made other sales than those recorded therein, but did so in the following fashion. He called defendant as his first witness and elicited from him the information that he had sold all the lumber cut, except the quantity still on the premises, and except a quantity in the two lumber yards of defendant. Plaintiff then proceeded, by competent evidence, to show the amount of timber cut, and fixed the amount on the premises and in the two lumber yards of defendant as of January 14, 1927. He then proved the amount that had been sold by defendant between April 1, 1926, and January 14, 1927, and by expert testimony proved the amount of lumber that would be produced from the amount of timber cut. The uncontradicted evidence shows that from April 1, 1926, to January 14, 1927, defendant sold 167,735 feet of lumber. Obviously this quantity should have been deducted from the total footage cut and sold, for the reason that this quantity was sold by defendant during a period not covered by these actions. The trial court, however, erroneously based its findings, conclusions, and judgments on conditions as they existed on January 14, 1927. When this fact was called to the attention of the trial court on motion for a new trial, it filed an amendment to the judgment, which reads as follows: "In above entitled causes the judgment in No. 15077 is amended by reducing the amount of the judgment by \$500.00 and the judgment in No. 15503 by \$338.68, these amounts having been allowed to plaintiff due to an erroneous computation and having been so amended, the motion for new trial in each action is denied."

[1] Appellant contends that, in the absence of a proper application under sections 473 or 663 of the Code of Civil Procedure, the trial court was without power thus to amend its judgment. It should here be noted that the judgments involved herein were rendered in 1928 before section 662, Code of Civil Procedure, was added to that Code (added by St. 1929, p. 842, § 7). Appellant concedes that if the trial court had gone through the formality of having the plaintiff consent to a remission, the judgment as amended would be proper in all respects. We are of the opinion that the amendment to the judgment was not properly made by the trial court, not for the reasons urged by appellant, but because the error in computation in failing to deduct the item involved not only appears in the judgment as originally made, but likewise appears in the findings of fact and conclusions of law. Nowhere in the findings of fact does the quantity of lumber sold from April 1, 1926, to January 14, 1927, appear. It is obvious, therefore, that the amended judgment cannot be sustained, for the reason that it finds no support in the findings or conclusions.

[2] However, the fact that the original judgment is not supported by the evidence, for the reason that it admittedly includes items for which plaintiff was not entitled to relief, and the fact that the so-called amended judgment is not supported by the findings and conclusions, does not necessarily mean that the appellant is entitled to a reversal. As already pointed out, the amount of lumber sold by the defendant during the period April 1, 1926, to January 14, 1927, stands uncontradicted in the record as 167,735 feet (erroneously stated by appellant to be 158,420 feet). At \$5 a thousand feet, it is obvious that there should be deducted from the judgments as rendered the total sum of \$838.67. Such a record presents, in our opinion, a proper case for the exercise of the power conferred on this court by the provisions of section 956a, Code of Civil Procedure. That section, as interpreted in *Kirk v. Culley*, 202 Cal. 501, 261 P. 994; *Tupman v. Haberkern*, 208 Cal. 256, 280 P. 970; *Davis v. Chipman*, 210 Cal. 609, 293 P. 40, and *Isenberg v. Sherman* (Cal. Sup.) 298 P. 1004, confers on the appellate courts the power to make new findings contrary to or in addition to those made by the trial court in proper cases, to the end that, as expressly stated in the Code section, "wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." Under the facts of this case, the making of the proper findings is a simple matter of computation.

The findings of the trial court, where the error first appears, are findings V and VI.

Acting under the power conferred by the above Code section, this court amends those findings to read as follows:

Finding V.

That the true amount of redwood timber cut from plaintiff's aforesaid lands and sold by defendant during the periods of time embraced in the said actions No. 15077 and No. 15503 is not recorded or shown in defendant's said shipping book, but that the true amount of redwood lumber so cut and sold by defendant from timber taken from plaintiff's said lands during the entire period of time embraced in the two actions aforesaid and up until January 14, 1927, is 1,444,687 feet; that during the period from April 1, 1926, to January 14, 1927, defendant cut and sold 167,735 feet of lumber under said contract; that during the period covered by said actions defendant cut and sold under said contract 1,276,952 feet of timber, whereof 900,000 feet were sold during the period embraced in the action No. 15077 and 376,952 feet thereof were sold during the period embraced in action No. 15503.

Finding VI.

That plaintiff is entitled to payment for all of said lumber so cut and sold as in finding No. V specified, at the rate of \$5 per thousand feet; that is to say, plaintiff is entitled to be paid for redwood lumber made from timber taken from plaintiff's lands and embraced in action No. 15077, the sum of \$4,500; that he is entitled to be paid for redwood lumber made from timber taken from plaintiff's lands and embraced in action No. 15503, the sum of \$1,884.76.

Following its above-numbered findings, the trial court made certain other findings in which certain deductions were allowed to defendant. Necessarily the court repeated the error found in findings V and VI. It is therefore ordered that findings VII, VIII, XXII, and XXIII be amended, and that there be inserted therein the figures above set forth, and that, as so amended, the same are adopted as the findings of this court. It is also ordered that the conclusions of law be amended so as to provide that the plaintiff is entitled to judgment in action No. 15077 in the sum of \$4,035.57, and is entitled to judgment in action numbered 15503 in the sum of \$1,804.76, and that the judgment of the trial court be amended in the same fashion. As so amended, the conclusions of law and judgment are adopted as the conclusions and judgment of this court.

It is to be noted that, as thus corrected, the judgments are reduced in the total sum of \$839.67 instead of \$838.68, as corrected by the trial court. This difference occurs because of a miscalculation of 99 cents occurring in the trial court's figures.

[3] Appellant next contends that, even if the findings be corrected as above set forth,

they are not supported by the evidence. We have read the record, and are of the opinion that the findings, as corrected, are supported by the evidence. There was presented in the trial court a mass of conflicting factual and expert testimony. The trial court saw fit to base its findings on the evidence produced by plaintiff. There being substantial evidence to support these findings, this court has no alternative but to affirm the judgment as modified.

Appellant also attacks the sufficiency of certain findings in reference to certain matters set forth in his cross-complaint. Although not as complete as might be desired, we are of the opinion that said findings are sufficient.

[4] Appellant's last contention is that the trial court abused its discretion in denying defendant's motion for a new trial on the ground of newly discovered evidence. This contention is based on the following facts: At the trial, plaintiff first introduced evidence as to the amount of timber cut. These figures were expressed in timber scale; that is, according to the figures of the timber cutters. He then introduced competent evidence that not over 10 per cent. should be deducted from the timber scale for rot and breakage, and then introduced expert testimony that to this figure must be added at least 20 per cent. to determine the lumber measure. In other words, plaintiff's witnesses testified that after deducting 10 per cent. for rot and breakage, in manufacturing the timber into lumber, there would be produced 20 per cent. more lumber than shown by the timber scale. Defendant's experts testified that lumber scale was 30 to 40 per cent. less than timber scale. The trial court chose to believe plaintiff's experts on this issue.

In support of his motion for a new trial, defendant filed the affidavits of five reputable mill operators that lumber scale runs 30 to 35 per cent. less than "full" timber scale. Appellant seeks to excuse his failure to produce this evidence at the time of trial by affidavits of himself and his attorney, to the effect that they were taken by surprise at the time of trial; that up until the time plaintiff introduced rebuttal testimony they were of the opinion that the amount of lumber for which defendant was to be held liable would be determined by the shipping books of defendant, unless said books could be impeached by direct evidence of other scales. An examination of the record shows that defendant should have been aware of the method plaintiff intended to use in impeaching the books from the time plaintiff called his first witness. The defendant's claim of surprise lacks merit.

In the second place, the affidavits of defendant's experts are all based on the assumption that if timber be scaled "full scale," then lumber scale will be 30 to 35 per cent. less. In reading the testimony of plaintiff's ex-

perts, it does not appear that in making their estimate they used the so-called full scale; it affirmatively appearing that they used a different scale.

In the third place, plaintiff and defendant both introduced experts who testified positively as to the proper deduction or addition that must be made in translating timber scale into lumber scale. Obviously, in such a situation, even if the testimony of defendant's experts was admitted, it would be merely cumulative. The proffered testimony is not of such a nature that it necessarily would have caused a different result had it been admitted.

We are therefore of the opinion that the trial court did not abuse its discretion in denying the motion for a new trial upon the grounds last above stated.

For the foregoing reasons, the judgments appealed from, as hereinbefore modified, are affirmed. Inasmuch as respondent has conceded at all times that the judgments should be modified as above set forth, we are of the opinion that respondent is entitled to his costs on this appeal.

It is so ordered.

214 Cal. 269

FLEMING et al. v. DOLFIN et al.
L. A. 12878.

Supreme Court of California,
Nov. 2, 1931.

1. Brokers ⇨43(2).

Allowing title to stand upon record in agent's name estopped landowner to plead statute against action for breach of brokerage contract made with agent, notwithstanding agent had no written authorization (Civ. Code, § 2309, and § 1624, subd. 6).

2. Brokers ⇨46.

Brokers, although not procuring purchaser, could recover agreed commission where exclusive agency contract was breached by sale by another.

3. Principal and agent ⇨145(4).

Right to require plaintiff to elect between agent and undisclosed principal was waived, election not being demanded.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by R. C. Fleming and another, doing business as Fleming & Davidson, against Jessie Dolfin and G. C. De Garmo. From that part of the judgment in favor of G. C. De Garmo, plaintiffs appeal.

Reversed, with directions, as to G. C. De Garmo. Superseding opinion in 295 P. 73, which superseded the opinion in 293 P. 874.

D. A. Knapp, of Los Angeles, for appellants.

M. W. Crane and H. B. Cornell, both of Los Angeles, for respondent.

G. C. De Garmo, in pro. per.

LANGDON, J.

This is an action to recover commission for services as a real estate agent. During all of the transactions hereinafter discussed the property in question stood in the name of defendant Jessie Dolfin. She gave plaintiffs an exclusive agency to sell, with a provision for cancellation upon twenty days' notice. She gave notice of termination, but, prior to the expiration of the specified period, entered into an escrow agreement which eventually resulted in a sale of the property through an agent named Pair. Pair had been employed by defendant De Garmo. It later appeared that De Garmo and Annie Smith were the actual owners of the property, and that defendant Dolfin merely held the title as their agent or trustee. Plaintiff brought suit for the breach of their contract, against Miss Dolfin as agent and De Garmo as undisclosed principal. The judgment below went against the agent, but was in favor of the principal. The judgment against the agent has become final, and plaintiffs appeal from that portion of the decree which absolves the principal.

[1] The ground upon which defendant De Garmo seeks to avoid liability is that he never gave any authorization in writing to Miss Dolfin to sell the property, and that the lack of such written authorization constitutes a defense under the statute of frauds. Cal. Civ. Code, § 2309, and section 1624, subd. 6. This defense would, of course, be perfectly sound under ordinary circumstances, but it is well settled that a party may by his conduct be estopped to set up the bar of the statute. Such was the holding in *Seymour v. Oelrichs*, 156 Cal. 783, 106 P. 88, 134 Am. St. Rep. 154. In the instant case, it appears that the owners of the property, of whom defendant De Garmo was one, let the title stand upon the records in the name of defendant Dolfin, thus clothing her with the indicia of ownership, and permitting her to mislead innocent third parties as to her right to deal with it. Plaintiffs, in reliance upon her apparent ownership, entered upon the performance of their agency with full written authority from her. As against such persons, we think it clear that

STONE et al. v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.

L. A. 12853.

Supreme Court of California.

Nov. 2, 1931.

Rehearing Denied Nov. 30, 1931.

1. Attachment $\S$ 537.

Plaintiff, alleging fraud in purchase of corporate stock and seeking rescission, held not entitled to attachment (Code Civ. Proc. $\S$ 537).

2. Attachment $\S$ 537.

That second count was in form of common count for money had did not entitle plaintiff to attachment, where first count showed that plaintiff's only cause of action was one founded on alleged fraud in inducing purchase of corporate stock (Code Civ. Proc. $\S$ 537).

LANGDON, SEAWELL, and PRESTON, JJ., dissenting.

In Bank.

Application for writ of mandate by Wallace E. C. Stone and another against the Superior Court in and for Los Angeles County, and L. E. Lampton, Clerk thereof.

Writ granted.

Rehearing denied; LANGDON, SEAWELL, and PRESTON, JJ., dissenting.

Henry Merton, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and A. G. Ritter, all of Los Angeles, for respondents.

RICHARDS, J.

The petitioners apply for a writ of mandamus to compel the superior court in and for the county of Los Angeles, respondent herein, to make and enter its order granting the motion of the petitioners to discharge an attachment issued in an action pending in said court, entitled Grace Thorndike, Plaintiff, v. Wallace E. C. Stone and Joseph Wright, Defendants.

The complaint of the plaintiff in said action was in two counts, in the first count of which she alleged that she had been induced to purchase certain shares of stock from said defendants by certain alleged false and fraudulent misrepresentations, made by said defendants with intent to cheat, deceive, and defraud said plaintiff; that said stock was of no value; that upon discovery of the fraud she had given notice of rescission and had offered to return said stock, and had demanded back the consideration, which defendants refused to return.

The second count in plaintiff's said complaint was in the form of an action for mon-

defendant De Garmo is estopped to raise the defense of the statute of frauds. See *Shirey v. All Night and Day Bank*, 166 Cal. 50, 134 P. 1001; *Conklin v. Benson*, 159 Cal. 785, 116 P. 34, 36 L. R. A. (N. S.) 537. Although the record is silent as to the participation of Mrs. Smith, she stands in the same position as De Garmo with respect to permitting title to stand in the name of Miss Dolfin. Likewise it appears that he had authority to manage the property and therefore to act for her, and it must also be presumed that she accepted the benefits of the resulting sale of the property through Pair. However, it does not appear that Mrs. Smith was ever served with summons in the action, and her rights are consequently not involved.

[2] It is further contended that, irrespective of any fault of defendant, plaintiffs cannot recover in the absence of a showing that they had a purchaser ready, able, and willing to buy. This assumes, of course, that the action was brought to recover an earned commission. Such was not the nature of this action, which seeks damages for breach of an exclusive agency contract. Plaintiffs were entitled to the exclusive right to contract for the sale of the property during the period specified, and the sale by Pair before the conclusion of that period destroyed that right and made performance by them impossible. Upon this breach by defendant, plaintiffs were entitled to sue for the benefits they might have received under it; namely, the agreed commission. See *Justy v. Erro*, 16 Cal. App. 519, 531, 117 P. 575; *Kimmell v. Skelly*, 130 Cal. 555, 62 P. 1067; *Gregory v. Bonney*, 135 Cal. 589, 67 P. 1038; 9 C. J. 622.

[3] One other point raised by defendant De Garmo requires brief mention. It is contended that where suit is brought against an agent, and the undisclosed principal is joined, the plaintiff must, prior to the judgment, elect to hold one or the other. This is undoubtedly the rule, and it is fully discussed in the recent case of *Klinger v. Modesto Fruit Co.*, 107 Cal. App. 97, 290 P. 127; but it was there held also that the principal who desires to take advantage of the rule must raise the point in the trial court by demurrer, motion, or otherwise; and that a failure to demand such an election in the lower court constitutes a waiver of the right. There is no evidence in the record of such a demand, and the point is therefore not well taken.

The judgment as to the defendant De Garmo is reversed, with directions to the trial court to enter judgment against him and in favor of plaintiffs in the sum prayed for, namely, \$750, together with interest and costs.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.

ey had and received. It is conceded, however, that the cause of action set forth in each of said counts is the same.

Upon the filing of the complaint in said action, the plaintiff therein sought and obtained a writ of attachment, and caused the same to be levied upon the property of the defendant Stone, whereupon the defendant appeared in said action and moved the court, upon due and proper notice, for an order discharging said writ of attachment. Accompanying the notice of motion was the affidavit of said Stone to the effect that said writ of attachment was not based upon any contract, express or implied, existing between the plaintiff and said defendants, for the direct payment of money, either made or payable in the state of California or otherwise or at all, as required by section 537 of the Code of Civil Procedure.

The trial court denied the defendants' said motion, whereupon defendants have applied to this court for a writ of mandate to compel the trial court to make its order granting their motion to discharge.

We are of the opinion that this is a proper case for the issuance of said writ.

[1] The first count in the plaintiff's complaint in said action clearly and unmistakably set forth a cause of action for equitable relief arising out of a transaction which she had been induced to enter into by certain false and fraudulent misrepresentations of the defendants in said action, which are set forth with much detail in the first count of her complaint, and upon which she based the exercise of her right of rescission and her right to a recovery of the money or property with which she had parted as a result of said false and fraudulent misrepresentations.

The cause of action thus set forth was essentially an action sounding in fraud and deceit, and based upon her rescission of the transaction between herself and said defendants, undertaken by her upon the discovery of said fraud and deceit. Had the plaintiff's complaint contained this first count only, it would seem to be beyond question that the plaintiff would not have been entitled to the issuance of a writ of attachment thereon.

In the case of *Hallidie, etc., v. Enginger*, 175 Cal. 505, 166 P. 1, it was held by this court that, under the provisions of section 537 of the Code of Civil Procedure, which limits writs of attachment to actions arising on contracts express or implied for the recovery of money only, the attachment cannot be issued in an action brought by plaintiff as trustee for the stockholders of a corporation which had forfeited its charter, to recover from the defendant the sums of money derived from proceeds of sales of stock through false representation, since the action would be an action *ex delicto* for fraud, and not an action upon an implied contract for the di-

rect payment of money. The court in that case indulged in an exhaustive review of the cases involving the distinction between actions *ex contractu* and *ex delicto*, and cites as authority for its holding certain earlier decisions of this court to the same effect. *Babcock v. Briggs*, 52 Cal. 502; *Walker v. McCusker*, 65 Cal. 360, 4 P. 206; *Mudge v. Steinbart*, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17; *Bechtel v. Chase*, 156 Cal. 711, 106 P. 81.

[2] The fact that the plaintiff's complaint in the case of *Thorndike v. Stone et al.*, contained two counts, and that the second count therein was in the form of a common count for money had and received, cannot be held to change the situation or to entitle the plaintiff to the issuance of a writ of attachment in said action, since her cause of action is admittedly the same in each count, and is founded upon the facts set forth in detail in the first count of her complaint, from which it clearly appears that her only cause of action is one founded upon the defendants' alleged fraud and deceit.

The case of *San Francisco Iron & Metal Company v. Abraham et al.*, 211 Cal. 552, 296 P. 82, would seem to be precisely in point as applied to the above situation. The plaintiff's complaint in that action was in two counts. The first count specifically pleaded a cause of action based upon fraud and deceit. The second count pleaded a cause of action for moneys had and received. The defendants applied for and received an order discharging an attachment, which the plaintiff had caused to be issued. The plaintiff appealed from said order, but without avail. This court affirmed said order upon the authority of the case of *Hallidie v. Enginger*, *supra*, and upon the foregoing line of authorities, upon which that decision was based.

The fact that the plaintiff in the *Abraham Case* did not seek to rescind the contract alleged to have been fraudulently obtained is an immaterial circumstance not affecting the cause of action upon which the plaintiff sought to recover in two counts, but which, as the court aptly pointed out, were but different methods of pleading one transaction.

The case of *Powers v. Freeland* (Cal. App.) 299 P. 736, 737, is also precisely in point. In that case also the plaintiff's complaint contained several counts, one of which was in the form of an action for money had and received. With respect to that phase of the case, the appellate court, in affirming the order dissolving the attachment, said: " * * * Where a cause of action for money had and received is joined to other causes of action which sound in tort, and there can be no doubt that they are identical arising out of the same transaction, the nature of the action is to be determined, not by the general allegations of the count for money had and

received, but by the more specific allegations contained in the other counts wherein the real character of the action appears with greater certainty."

From the foregoing review of the authorities, it would seem to be clear that the plaintiff's real cause of action in the case of *Thorn-dike v. Stone*, was an action sounding in fraud and deceit, and that to such a cause of action the provisions of section 537 of the Code of Civil Procedure, providing for the issuance of writs of attachment in proper cases, can be given no application.

It follows that the petitioners herein are entitled to the issuance of a writ of mandate to compel the superior court, respondent herein, to discharge the writ of attachment illegally issued by it in said action.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.

LANGDON, J.

I dissent. The effect of the majority opinion is to disregard settled principles of law, and to overrule many well-considered cases. It has been held on numerous occasions by this court, as well as by the District Court of Appeal, that rescission is complete upon the giving of notice and the offer to restore the consideration received. The decisions are reviewed in *McNeese v. McNeese*, 190 Cal. 402, page 404, 213 P. 36, 37, where Mr. Justice Lennon says: "The interposition of a court of equity to set the contract aside was not necessary to rescission. A contract may be rescinded by the act of the party entitled and desiring to rescind. It is well recognized that sections 1688, 1689, and 1691 of the Civil Code provide for rescission effected by the act of the parties." To the same effect, see *Ito v. Watanabe* (Cal. Sup.) 2 P.(2d) 799; *Hull v. Ray*, 211 Cal. 164, 294 P. 700; *Hogberg v. Landfield*, 99 Cal. App. 360, 278 P. 907; *House v. Piercy*, 181 Cal. 247, 251, 183 P. 807; *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723, 732, 209 P. 995; *Swanston v. Clark*, 153 Cal. 300, 303, 95 P. 1117; *Lemle v. Barry*, 181 Cal. 1, 5, 183 P. 150; *American Type Founders' Co. v. Packer*, 180 Cal. 459, 62 P. 744; *Winkler v. Jerrue*, 20 Cal. App. 555, 561, 129 P. 804; *Loaiza v. Superior Court*, 85 Cal. 11, 31, 24 P. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. It is likewise well settled that, upon such rescission, there is an obligation implied by law to return the money paid. See, in addition to the above cases, *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198, 188 P. 1023; *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 172, 133 P. 978; *Orton v. Privett*, 202 Cal. 754, 262 P. 713; *Macowsky v. Irvine*, 71 Cal. App. 77, 234 P. 839. The majority opinion apparently holds that the mere pleading of facts showing fraud

in the inducement of the agreement avoids the effect of these doctrines, and in so holding it directly contradicts express language in those cases as well as in the cases chiefly relied upon in the opinion, namely, *San Francisco Iron & Metal Company v. Abraham*, 211 Cal. 552, 296 P. 82, and *Powers v. Freeland* (Cal. App.) 299 P. 736. Furthermore, it repudiates the principles set forth in the leading case of *Willett & Burr v. Alpert*, 181 Cal. 652, 185 P. 976.

There is no uncertainty in the principles which apply to the situation presented by this case. The complaint alleges that plaintiff entered into a contract with defendant, for the transfer of certain property. It also alleges two distinct grounds for rescission: Fraudulent misrepresentations, and total failure of consideration. Cal. Civ. Code, § 1689. Plaintiff might have elected to sue for damages for the deceit, but instead contented himself with rescission, and suit for recovery of the money paid. These alternative remedies have always been recognized by the courts of this state. See *Paolini v. Sulprizio*, 201 Cal. 683, 258 P. 380; *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198, 188 P. 1023. Our statutes, indeed, make specific provision for them. Fraud which induces the execution of a contract gives rise to an action in tort for deceit in which damages are recoverable (Cal. Civ. Code, § 1709), but it also prevents the necessary mutual assent, and is ground for rescission (Cal. Civ. Code, § 1689). The complaint in the instant case leaves no doubt as to which remedy was chosen. Plaintiff alleges facts showing that the foundation was laid for rescission by notice and offer to restore the stock; and she seeks the return of the money she paid. It is impossible to construe this as anything but an action to recover money paid under a contract, based upon a rescission of the contract. It is not, as the majority opinion states, an action for "equitable relief," nor is it an action "sounding in fraud and deceit." Regardless of which count is viewed, it is an action on implied contract.

The cases cited in the majority opinion are in complete harmony with this view. *Hallidie v. Enginger*, 175 Cal. 505, page 509, 166 P. 1, 3, was, as the court described it: "an action ex delicto for fraud. At common law it would have been an action of trespass on the case for damages for deceit * * * That it is such an action no doubt can be entertained." There was no allegation of a prior rescission of the contract, and the suit was not brought to rescind. Obviously, there could not in such a case be an implied contract to constitute the basis for an attachment. The decisions relied upon in the *Hallidie* case, and cited in the majority opinion, are likewise inapplicable. In *Babcock v. Briggs*, 52 Cal. 502, plaintiffs intrusted money to their clerk, and he lost it at cards to the defend-

ants. The court summarily held that no attachment could lie on these facts, apparently because the action was in tort, for conversion. There was no contract, and the attempt to "waive the tort" was not a valid means of securing the benefits of the attachment statute. This principle is reaffirmed in *San Francisco Iron & Metal Co. v. Abraham*, supra, but it has nothing to do with a situation where, as here, the remedy in tort is not waived, but the alternative remedy of rescission and recovery of consideration on implied contract is selected. *Walker v. McCusker*, 65 Cal. 360, 4 P. 206, held that the liability of a tenant in possession of real estate, to the purchaser at a foreclosure sale, "is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract express or implied. * * * Plainly, such a liability will not authorize an attachment. But the liability of the defendant to pay money obtained under a contract, after rescission by the plaintiff, has been repeatedly held to be a liability in implied contract. *Mudge v. Steinhart*, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17, was concerned with an action for damages for fraud and deceit. It was admittedly not based upon a contract, express or implied, and the main question was whether it was sufficient to obtain jurisdiction over a nonresident by attachment of property within this state. In *Bechtel v. Chase*, 156 Cal. 707, 106 P. 81, the plaintiff's cause of action was based upon fraud. The court pointed out that he had alternative remedies (page 711 of 156 Cal., 106 P. 81, 82): "The plaintiff might proceed in any one of various ways to seek relief for the fraud practiced upon him in inducing him to exchange his notes for worthless stock. *He might rescind the transaction and recover the notes which he had been induced to turn over; he might perhaps, treating the transfer of the notes as void, recover them or their value without rescission.* *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 411, 95 P. 1030. He might bring an action for the deceit practiced upon him and *recover such damage as he could show to have been suffered by him.*" But the plaintiff did not elect to rescind; his pleading showed an affirmation of the contract. The court therefore held that he had no cause of action in implied contract (page 712 of 156 Cal., 106 P. 81, 83): "No contract will be implied by the law as against an express contract *not disavowed* by either party. *So long as plaintiff treats the transfer of the notes to Foster as valid*, his only remedy for the fraud alleged by him is by means of an action in tort to recover damages therefor." (Italics ours.)

The same distinction, which is the essential point in the instant case, is made in the case declared by the majority to be precisely in point, namely, *San Francisco Iron & Metal Co. v. Abraham*, supra. The court there said

(page 553 of 211 Cal., 296 P. 82, 83): "It nowhere appears that the plaintiff rescinded the partnership contract, offered to rescind it, nor, even at this time, offers to place the defendant in statu quo."

In this connection it must be remembered that failure of consideration is one of the statutory grounds for rescission; and we might disregard all of the allegations of fraud and the complaint would still state a cause of action based upon rescission, since it alleges that the stock received was of no value. Cal. Civ. Code, § 1689, subds. 2, 4; *Lasher v. Faw*, 209 Cal. 726, 289 P. 821; *Brown v. National Electric Works*, 168 Cal. 336, 143 P. 606; *Field v. Austin*, 131 Cal. 379, 63 P. 692.

Finally, it is well settled that, even though no attempt to rescind is made, upon total failure of consideration an implied promise arises to return the consideration paid by the aggrieved party. *Santa Clara, etc., Fuel Co. v. Tuck*, 53 Cal. 304; *Rose v. Foord*, 96 Cal. 152, 30 P. 1114; *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 P. 766; *Richter v. Union Land, etc., Co.*, 129 Cal. 367, 373, 62 P. 39; *Hogberg v. Landfield*, 99 Cal. App. 360, 278 P. 907. That this implied promise furnishes the basis for attachment is obvious, and it was so held in *Santa Clara, etc., Fuel Co. v. Tuck*, supra, where the court said at page 305: "The authorities appear to be uniform to the effect that where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it. On the facts stated in the complaint there was, therefore, an implied contract for the direct payment of money, which brings the case within the very terms of the statute defining the cases in which an attachment may issue." In *powers v. Freeland*, supra, upon which the majority opinion places great reliance, the foregoing case was expressly approved, and the "salutary principle" was conceded to be sound, but was deemed inapplicable because the complaint showed on its face that the plaintiff had received something of value, and therefore that the consideration had not wholly failed.

The whole situation is reviewed and the distinctions clearly made in *Willett & Burr v. Alpert*, 181 Cal. 652, 661, 185 P. 976, 979: "It may be well to point out the distinction between the present and such cases as *S. C. V. Peat Co. v. Tuck*, 53 Cal. 304, cited by appellant, where, upon a failure of consideration, or a breach of contract followed by rescission, the plaintiff sues to recover, not damages, but the money he has paid under the contract. Such an action proceeds upon the theory that the defendant has received money which should be returned by him to the plaintiff and which, therefore, the law implies a promise on his part to return, and the action for its recovery may therefore take the form of indebitatus assumpsit. But where, as in the present case, there is neither

an entire failure of consideration nor a rescission of the contract, so as to entitle the vendee to recover back his money, with the result that he is limited to his remedy of damages, or where there has been an entire failure of consideration and the vendee yet elects not to recover his money, but to recover damages, the action does not proceed upon any theory of the defendant having received money which he should return to plaintiff, and which the law can therefore imply a promise on his part to return, and so indebitatus assumpsit will not lie." (Italics ours.)

The attachment was proper, and the writ of mandate should not issue.

We concur: SEAWELL, J.; PRESTON, J.

214 Cal. 156
WELLS FARGO BANK & UNION TRUST CO.
v. BANK OF ITALY et al.
S. F. 14149.
Supreme Court of California.
Oct. 26, 1931.
As Amended Nov. 13, 1931.

1. Banks and banking ⇨145.

Bills and notes ⇨15.

Check is bill of exchange, and certification is equivalent to acceptance (Civ. Code, § 3265a).

2. Bills and notes ⇨338.

Presentation of check to drawee for payment is not "negotiation," and involves no warranties, since drawee is not "holder" or "holder in due course" (Civ. Code, §§ 3133, 3266).

[Ed. Note.—For other definitions of "Holder," "Holder in Due Course," and "Negotiate," see Words and Phrases.]

3. Bills and notes ⇨296.

Warranties of general indorser are based upon transfer of title, and run only to holders in due course (Civ. Code, § 3147).

4. Bills and notes ⇨440.

Drawee who paid instrument is not transferee of title, since last holder's indorsement does not transfer check, but converts it into voucher.

5. Bills and notes ⇨434.

Payment ⇨80.

Liability to refund rests upon quasi contractual duty to return money received under

mistake, not upon warranty, and action therefor is not founded upon instrument drawee has paid.

6. Bills and notes ⇨434.

To establish obligation to reimburse, drawee who paid money on forged instrument must allege and prove benefit to innocent defendant.

7. Bills and notes ⇨434.

In drawee's action against indorsers for reimbursement on forged check, evidence held to show indorser received no benefit, thus precluding recovery.

8. Bills and notes ⇨74.

Under Negotiable Instruments Law, bill or check is enforceable, in favor of holder in due course against acceptor, according to tenor at time of acceptance or certification (Civ. Code, § 3143).

Civ. Code, § 3143, provides that the acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits (1) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to indorse.

9. Banks and banking ⇨145, 147(2).

Where bank certified check, payee's name having been altered, held it admitted existence of payee then named and capacity to indorse instrument, precluding reimbursement from holders in due course (Civ. Code, § 3143).

Without the consent of the drawer, the name of the payee was erased therefrom and the name of another person substituted; the alteration being made with such skill that it could not be detected by the drawee bank or subsequent indorsers. The drawee bank certified the check, and, after paying the instrument and discovering the fraud, brought an action against the innocent indorser and indorsee bank to whom it had paid the check.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by the Wells Fargo Bank & Union Trust Company against the Bank of Italy and another. From an adverse judgment, plaintiff appeals.

Affirmed.

For opinion of District Court of Appeal herewith adopted, see 292 P. 281.

Heller, Ehrman, White & McAuliffe and Lloyd W. Dinkelspiel, all of San Francisco, for appellant.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondents.

WASTE, C. J.

The plaintiff bank, as drawee, seeks to recover money paid to the defendant bank, a holder in due course, on a check certified by plaintiff in which the name of the payee had been altered prior to certification, and which check had been indorsed and negotiated by the substituted payee. Under the provisions of section 3143 of the Civil Code (section 62, N. I. L.), "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) The existence of the payee and his then capacity to indorse." The sole question involved in this case is whether an acceptor or certifier (certification being the equivalent of acceptance under section 3265c, Civ. Code) is liable on his acceptance or certification, according to the tenor of the instrument as originally drawn or as of the time of his acceptance or certification. In an exhaustive and well-reasoned opinion, the District Court of Appeal, First Appellate District, Division One, affirmed the judgment of the court below and held that, under the provisions of section 3143, *supra*, an acceptor or certifier of a negotiable instrument is liable to a holder in due course according to the tenor of the instrument at the time of acceptance or certification. The case presents a point of first impression in this state, and for this reason we were prompted to take over the cause upon petition for hearing in order that we might more fully examine into the question. Our research and examination of the authorities and various legal periodicals satisfies us as to the correctness of the disposition of the matter by the District Court of Appeal, and, with such observations as will hereinafter appear, we hereby adopt its opinion as and for the decision of this court. It reads:

This action was brought to recover a sum paid upon an altered check which the drawee certified and paid by mistake.

On August 24, 1923, the McCormick Steamship Company, a depositor of the Wells Fargo Nevada National Bank of San Francisco, which was plaintiff's predecessor in interest, drew its check upon that bank for the sum of \$1,425.88, payable to the order of Albert Meyer & Co. Subsequently, without the consent of the drawer, the name of the payee was erased therefrom and the name of Harry W. Behling substituted. The alteration was made with such skill that it could not be de-

tected, and it was not detected by the drawee or by either of the defendants. The check was certified by the drawee, and there was afterwards indorsed thereon the name of Harry W. Behling. This indorsement was not made by the original payee, but by some person unknown. Thereafter the check was indorsed by defendant Popkin and presented to defendant Bank of Italy, which paid the amount thereof. The latter thereafter transmitted it in the usual course through the clearing house to the drawee, which in turn credited or paid the amount of the check to the defendant bank. On or about September 1, 1923, this being the regular date upon which monthly accounts were rendered, the McCormick Steamship Company received from the drawee a statement showing that this check, among others, had been paid, but did not receive the canceled check. It was the custom of the drawee to retain all certified checks and forward to its depositors slips in lieu thereof which indicated by number the checks certified and paid, but not the names of the payees. The steamship company did not discover the alteration until an inquiry was made by the original payee several months after the check had been paid. It notified the drawee of the facts about February 20, 1924, and on the 27th of that month the latter notified the defendants and demanded repayment of the amount of the check.

The facts attending the certification and indorsement of the check, according to the testimony of defendant Popkin, were as follows: Harry W. Behling was at the time in the employ of the steamship company, and Popkin was the manager of a retail clothing concern in San Francisco. They had been acquainted for some years. On August 24, 1923, Behling purchased certain articles of clothing from Popkin, and in the course of the transaction stated that he had a check drawn upon the Wells Fargo Bank and requested Popkin to identify him. The two went to the drawee bank, where Popkin introduced Behling and, by his statements and business card, established his own identity. The check was then presented and certified by the drawee, but, according to his testimony, Popkin did not indorse or examine the check at the time. Behling then requested payment, but it was suggested by an officer of the drawee bank that, Popkin being a depositor of the defendant bank, the check should be cashed by the latter. Later at the banking house of defendant bank Behling was again identified by Popkin, who at this time, at the request of the bank, indorsed the check, and the same was paid to Behling. The indorsement of the name of Behling preceded that of Popkin, but by whom it was made does not appear. Upon these facts judgment was entered for the defendant. The plaintiff, which has appealed, contends

that certain findings are unsupported, and that the court erred in its conclusions that the drawee by its certification admitted the genuineness of the body of the check, that the payee named therein had capacity to indorse, and that the defendant bank was a holder in due course.

[1-7] A check is a bill of exchange (Civ. Code, § 3265a), and, where it is certified by a bank on which it is drawn, the certification is equivalent to an acceptance (Civ. Code, § 3265c). Prior to the enactment of the Uniform Negotiable Instruments Act by the California Legislature in 1917 (St. 1917, p. 1531), the Code provided that "the acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine." Civ. Code 1915, § 3199. According to the new act, Civil Code section 3143, which corresponds to section 62 of the Negotiable Instruments Law as recommended by the commissioners for providing uniformity of legislation, "the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits—(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) The existence of the payee and his then capacity to indorse." Before the adoption of the Negotiable Instruments Law it was held in the majority of cases that the acceptor of a check warranted only that the signature of the drawer was genuine and that he had sufficient funds to pay the check, and it was therefore held that a bank which certified a check after it had been fraudulently altered as to the amount or the name of the payee and afterwards paid it could, other things being equal, recover the amount even against a bona fide purchaser. *Metropolitan National Bank v. Merchants' National Bank*, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180; *Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102; *Espy v. First Nat. Bank of Cincinnati*, 18 Wall. 604, 21 L. Ed. 947; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Marine National Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305; *White v. Continental*, 64 N. Y. 316, 21 Am. Rep. 612; *Security Bank v. National Bank*, 67 N. Y. 458, 23 Am. Rep. 129; *City Bank v. First National Bank*, 45 Tex. 203. And the same rule has been followed by the Appellate Division of the Supreme Court of New York since the adoption of the law, namely, in the case of *National Reserve Bank v. Corn Exchange Bank*, 171 App. Div. 195, 157 N. Y. S. 316, 318, where it appeared that the plaintiff by mistake certified a raised check which the defendant afterwards acquired for value and collected. In affirming a judgment recovered by the plaintiff, the court, citing the Negotiable Instruments Law of New York,

which contains a provision identical with section 3143 of the California Civil Code, said: "It is settled by statute, as well as by authority, that a bank in certifying a check in the usual form does no more than to affirm the genuineness of the signature of the drawer, and that he has funds on deposit to meet it, and that the funds will not be permitted to be withdrawn, to the prejudice of the holder of the check. But a bank by its certification does not warrant the genuineness of the body of the check." The courts of Colorado and Missouri, without discussing the effect of section 62 of the Negotiable Instruments Law, have also continued to follow the common-law rule. *Interstate Trust Co. v. United States National Bank*, 67 Colo. 6, 185 P. 260, 10 A. L. R. 705; *McClendon v. Bank of Advance*, 188 Mo. App. 417, 174 S. W. 203; *Central National Bank v. F. W. Drosten, etc., Co.*, 203 Mo. App. 646, 220 S. W. 511.

The interpretation given this section by the Supreme Court of Illinois is contrary, however, to the conclusions reached in the above cases. In *National City Bank of Chicago v. National Bank, etc.*, 300 Ill. 103, 132 N. E. 832, 22 A. L. R. 1153, a bank of St. Louis drew a draft upon the plaintiff payable to a Pittsburgh concern. The draft was stolen from the mails by one Manning, who erased the name of the payee named in the draft, inserted his own, and indorsed the instrument. He tendered the draft in payment for certain jewelry which he purchased, and, its certification having been secured, the jewelry was delivered to him. The jeweler deposited the draft with defendant bank, to which it was paid through the clearing house. The drawee, having discovered the alteration, sought to recover the amount paid. A recovery was had, and the Supreme Court, in reversing the judgment, said: "In its last analysis the question presented for decision is the liability of the acceptor of a negotiable instrument under section 62 of the Negotiable Instruments Law. * * * Section 62 * * * declares that the acceptor by accepting the instrument engages that he will pay the instrument which he has accepted according to the tenor of his acceptance, and admits the existence of the payee and his then capacity to indorse. The instrument which appellee accepted was payable 'to the order of Andrew H. Manning.' By its acceptance it admitted that Andrew H. Manning was in existence and that Andrew H. Manning at the time of acceptance was not suffering any legal disability which would affect his ability to pass title to the instrument accepted by means of indorsement. According to the plain language of this section appellee by its general acceptance bound itself to pay a draft for \$629.80, payable to the order of Andrew H. Manning. After the draft was accepted by appellee the drawer was discharged from liability thereon. When appel-

lant took the draft it was complete and regular upon its face. It had been duly accepted by the drawee. It was taken in good faith and for value, and appellant then had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, and appellant was therefore a holder in due course. It relied upon the general acceptance of appellee, and under the Negotiable Instruments Law was protected by it. This construction of section 62 is in accordance with that sound principle which declares that where one of two innocent parties must suffer a loss the law will leave the loss where it finds it."

The common-law rule had been previously followed in *First National Bank, etc., v. Northwestern National Bank, etc.*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247, and *Metropolitan National Bank, etc., v. Merchants' National Bank, etc.*, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180, which were decided previous to the adoption of the Negotiable Instruments Law. In *State Bank, etc., v. Mid-City Trust etc., Bank*, 295 Ill. 599, 129 N. E. 498, 12 A. L. R. 989, decided after the adoption of the law, the payee's name was forged as an indorsement upon a check after its certification, and the same was paid by the acceptor to the indorsee. The acceptor sought to recover upon the theory that it was liable to the real payee for the amount of the check. It was held that the check had never been delivered to the real payee and had never come into his possession, and that he had acquired no right by reason of the acceptance. Dean Ames contended before the Negotiable Instruments Law was adopted that upon principle an alteration before acceptance of any of the terms of a genuine bill should not affect the liability of the acceptor to an innocent holder. 4 *Harvard Law Review*, p. 297. The editors of the *American Law Reports Annotated*, vol. 22, p. 1162, express the view that the conclusion reached in the Illinois case is more in accord with the language of the Negotiable Instruments Law than the other cases cited, and, as said by Prof. Brannan in his work on the Negotiable Instruments Law (4th Ed.) at page 567: "It is difficult to see how he (the acceptor) can escape liability if any meaning is to be given to the words 'engages that he will pay according to the tenor of his acceptance.' The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and according to its tenor he has engaged that he will pay it." And where, as in the present case, an indorsee without notice has given value upon the faith of a certification and the instrument has been paid by the drawee, the result reached in the Illinois case not only makes for the usefulness and currency of negotiable paper, but, as held in that decision, is in accord with the principle that, where the parties are equally innocent,

the law will leave the loss where they have placed it.

Appellant cites numerous decisions holding that money paid by the acceptor of a check upon the forged indorsement of the payee named therein can be recovered. *Wellington National Bank v. Robbins*, 71 Kan. 748, 81 P. 487, 114 Am. St. Rep. 523; *Andrews v. Sibley*, 220 Mass. 10, 107 N. E. 395; *National Union Fire Ins. Co. v. Mellon National Bank*, 276 Pa. 212, 119 A. 910; *Union Tool Co. v. Farmers', etc., Bank of Los Angeles*, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; *American Exchange, etc., Bank v. Yorkville Bank, etc.*, 122 Misc. Rep. 616, 204 N. Y. S. 621; *Missouri, etc., Trust Co. v. St. Louis National Bank*, 154 Mo. App. 89, 133 S. W. 357; *Gasper v. Security State Bank*, 109 Neb. 495, 191 N. W. 654; *American Express Co. v. Peoples' Savings Bank*, 192 Iowa, 366, 181 N. W. 701; *Charleston, etc., Co. v. Exchange, etc., Co.*, 129 S. C. 290, 123 S. E. 830. The same rule applies to checks altered as to the amount or the name of the payee after certification. *Ozark Savings Bank v. Bank of Bradleyville (Mo. App.)* 204 S. W. 570; *National Bank v. National Mechanics' Bank*, 55 N. Y. 211, 14 Am. Rep. 232; *Rapp v. National Security Bank*, 136 Pa. 426, 20 A. 508. *National Union Fire Ins. Co. v. Mellon National Bank*, supra, is also cited in support of appellant's contention that the acceptor does not, by his acceptance, admit the genuineness of the body of the draft. This action was by the insurance company against the bank to recover the amount paid by the latter and charged to the former's account on drafts on which the payees' indorsements were forged. The drafts were drawn on the insurance company by its agents, and were payable to policy holders for supposed fire losses. The drafts came into the possession of an employee of the agent, who forged the names of the payees upon the back thereof, deposited the same in defendant bank, which forwarded them to the insurance company for acceptance. They were accepted without investigation as to the genuineness of the payees' signatures, were paid by the bank, and the amounts charged to plaintiff's account. A judgment for plaintiff was affirmed on appeal; it being held that by acceptance the plaintiff did not admit the genuineness of the signatures of the payees. This was the question decided, and the case is not authority for the claim that an acceptance is not an admission of the genuineness of the body of the draft. In many of the cases cited by appellant a recovery was allowed upon the theory that the party to whom the drawee paid the check, having indorsed the same, thereby warranted the genuineness of prior indorsements. But, as has been pointed out (Brannan, *The Negotiable Instruments Law* [4th Ed.] p. 618), the presentation of a check to a drawee for payment is not a negotiation and involves no warranties, as the drawee is not a holder in

due course under section 52 of the Negotiable Instruments Law (Cal. Civ. Code, § 3133), nor a holder as defined in section 191 thereof (Cal. Civ. Code, § 3266). And, as held in the following cases, the warranties of a general indorser as provided by section 66 of that law (Cal. Civ. Code, § 3147) are based upon a transfer of title, and run only to holders in due course; consequently a drawee who has paid the instrument is not a transferee of title as the last holder's indorsement does not transfer the check, but converts what was a check into a voucher. *South Boston Trust Co. v. Levin*, 249 Mass. 45, 143 N. E. 816, 817; *National Bank, etc., v. First National Bank etc.*, 141 Mo. App. 719, 125 S. W. 513; *Woodward v. Savings & Trust Co.*, 178 N. C. 184, 100 S. E. 304, 5 A. L. R. 1561; *Bank of Commerce v. Seattle National Bank*, 109 Wash. 312, 187 P. 342; *American Hominy Co. v. Millikin National Bank (D. C.)* 273 F. 550; *Figuers v. Fly*, 137 Tenn. 358, 193 S. W. 117. The liability to refund rests upon the quasi contractual duty to return money received under mistake and not upon warranty, nor is an action therefor founded upon the instrument which the drawee has paid. *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Redington v. Woods*, 45 Cal. 406, 429, 13 Am. Rep. 190; *Brannan, The Negotiable Instruments Law (4th Ed.)* p. 619. The same rules apply to the claim against defendant Popkin. In order to establish any obligation on his part to reimburse the plaintiff, it would be necessary to allege and prove that he received a benefit from the plaintiff (*Woodward, Quasi Contracts*, § 7, p. 9; *Keener, Quasi Contracts*, p. 24), and the testimony shows that any benefit he derived from the transaction was received either from his codefendant or from Behling.

[8, 9] We think the construction placed upon the section by the Illinois court is correct, and that it was not the legislative intent that the obligation of the acceptor should be limited to the tenor of the instrument as drawn by the maker, as was the rule at common law, but that it should be enforceable in favor of a holder in due course against the acceptor according to its tenor at the time of its acceptance or certification.

The foregoing opinion and the Illinois decision which it follows give effect to the literal words of the Negotiable Instruments Law. As stated in the Illinois case, *supra*, page 107 of 300 Ill., 132 N. E. 832, 833: "The court must take the act as it is written, and should give to the words used their natural and common meaning * * * If the language of the act conflicts with statutes or decisions in force before its enactment the courts should not give the act a strained construction in order to make it harmonize with earlier statutes or decisions." The wording of the act suggests that a change in the common law was intended.

A careful reading thereof, independent of any common-law influence, requires that the words "according to the tenor of his acceptance" be construed as referring to the instrument as it was at the time it came into the hands of the acceptor for acceptance, for he accepts no other instrument than the one presented to him—the altered form—and it alone he engages to pay. This conclusion is in harmony with the law of England and the continental countries. 14 *Harvard Law Review*, 241, 243; *Langton v. Lazarus* (1839, Exch.) 5 M. & W. 628; 1 *Pardessus, Cours de Droit Commercial* (6th Ed. 1856) 545. It makes for the usefulness and currency of negotiable paper (31 *Yale Law Journal*, 522, 527) without seriously endangering accepted banking practices, for banking institutions can readily protect themselves against liability on altered instruments either by qualifying their acceptance or certification or by relying on forgery insurance and special paper which will make alterations obvious. All of the arguments advanced against the conclusion herein announced seem highly technical in the face of the practical facts that the drawee bank has authenticated an instrument in a certain form, and that commercial policy favors the protection of any one who, in due course, changes his position on the faith of that authentication.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

118 Cal.App. 148

PEOPLE v. STRAMS.

Cr. 2120.

District Court of Appeal, Second District, Division 1, California.

Nov. 4, 1931.

Criminal law ☞ § 1131(4).

Appeal, if regarded as from probation order, should be dismissed, where, during pendency, court modifies order and releases defendant; questions thus becoming moot.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Frank Strams was convicted of arson, and appeals.

Appeal dismissed.

Wm. Christensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant gave notice of appeal "from the judgment and sentence herein rendered on the 19th day of December 1930." The record shows that no judgment has been pronounced or entered, unless the probation order of December 19th, including the conditions recited in said order, may be construed into a judgment from which an appeal may be taken.

But it further appears that during the pendency of this appeal, and on the 18th day of May, 1931, the trial court modified its order of probation and directed defendant's immediate release from custody. Apparently the questions presented upon the appeal have become moot, even if the order was one from which defendant had a right of appeal.

It is therefore ordered that the appeal be, and the same is, hereby dismissed.

118 Cal.App. 196

DOW et al. v. SOUTHERN PAC. CO. et al.

Civ. 4401.

District Court of Appeal, Third District, California.

Nov. 5, 1931.

Rehearing Denied Dec. 5, 1931. Hearing Denied by Supreme Court Jan. 4, 1932.

Appeal and error ⇨979(2).

Order granting new trial for insufficiency of evidence to support verdict will not be disturbed on conflicting evidence, absent clear and affirmative showing of unmistakable abuse of discretion.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Ada Carline Dow and others against the Southern Pacific Company and others. Judgment for defendants, and from an order granting a new trial, defendants appeal.

Affirmed.

Jerome D. Peters, of Chico, and George F. Jones, of Oroville (W. R. Dunn, of Sacramento, of counsel), for appellants.

J. Oscar Goldstein, of Chico, for respondents.

PRESTON, P. J.

Action for damages for the death of Percy Everett Dow, alleged to have been caused by the negligence of the defendants.

The case was tried before a jury, and resulted in a verdict and judgment in favor of the defendants. A motion for a new trial was made by the plaintiffs based upon all the statutory grounds. The court granted the motion, and, in doing so, used this language: "The Court finds that for certain errors committed at the trial and also in particular, that the evidence is insufficient to support the verdict and that the great weight of the evidence is against the verdict, it is hereby ordered that the verdict and judgment in this case is now set aside and the plaintiffs are granted a new trial."

From this order, the defendants prosecute this appeal.

It is well settled that, where there is a substantial conflict in the evidence, an order granting a new trial upon the ground of the insufficiency of the evidence to support the verdict will not be disturbed on appeal, in the absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion. The authorities supporting this rule are legion, and we need only cite 20 California Jurisprudence, pages 26, 27, and 28, wherein innumerable cases so holding are collected. The evidence in the case at bar is conflicting on some of the vital issues.

This action is a companion case to that of Johnson et al. v. Southern Pacific Company et al., decided by this court on April 22, 1930, and found in volume 105 Cal. App. at page 340, 288 P. 81. The case at bar was also before this court on a former appeal. Dow v. Southern Pacific Company, 105 Cal. App. 378, 288 P. 89.

The facts presented in the instant case are substantially the same as set forth in the opinion in the former appeal, and also as set forth in the Johnson Case. Therefore, we refer to the opinions in those cases for a statement of the facts in this case.

After a careful examination of the entire record, we are fully satisfied that the learned trial court did not abuse its discretion in granting plaintiffs a new trial upon the ground of the insufficiency of the evidence to support the verdict.

In view of this conclusion, it becomes unnecessary for us to discuss the other points raised in the briefs. There is no merit whatever in the appeal.

The order granting a new trial is affirmed.

We concur: **PLUMMER, J.**; **R. L. THOMPSON, J.**

117 Cal.App. 752

BOXWELL v. SYLVIA et al.

Civ. 454.

District Court of Appeal, Fourth District, California.

Oct. 28, 1931.

1. Taxation ☞764(2).

Tax deed describing land as: "Und. ½ int.—Lot 8—sub. of tract 77—13—14—" held sufficiently certain to convey title.

2. Appeal and error ☞909(2).

Complaint in action to quiet title, based on sale for delinquent assessments of irrigation district, being filed over five months after expiration of redemption period, court must presume good deed was delivered, where appeal is on judgment roll (St. 1897, pp. 269-271, §§ 43-48 and amendatory acts).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action to quiet title by William Boxwell against Frank F. Sylvia and others. From a judgment for plaintiff, defendant Porter C. Blackburn appeals.

Affirmed.

Superseding opinion in 2 P.(2d) 577.

Porter C. Blackburn, of Los Angeles, in pro. per.

Frank Birkhauser, of El Centro, for respondents.

MARKS, J.

Respondent commenced his action to quiet title to an undivided one-half interest in lands in Imperial county California, against the defendants and appellant. The defendants B. M. Davis, sued in the action as Robert Davis, and Annabell Davis appeared and answered. The defaults of all of the other defendants were entered; personal service of the summons and complaint being had upon appellant. The answers of B. M. Davis and Annabell Davis were, before trial, stricken from the record with their consent, and their defaults were also entered. Upon evidence taken, the court entered judgment in favor of respondent quieting his title to an undivided one-half interest in the land in controversy against all of the defendants and appellant. From this judgment, appellant has taken this appeal.

Appellant seeks a reversal of the judgment in the court below on the ground that the complaint fails to state a cause of action. He points out that, under certain of the allegations of the complaint, respondent bases his title to his interest in the property in question upon a tax deed, in which the property in controversy is described as follows: "That

certain real property hereinbefore referred to, situate in the County of Imperial, State of California, more particularly described as follows, to wit: Und. ½ int.—Lot 8-sub. of Tract 77—13—14—"

He maintains that this description is so vague and uncertain that no interest in the property was conveyed to respondent by the deed.

[1] The description which we have quoted is quite similar to that involved in the case of Stanton v. Hotchkiss, 157 Cal. 652, 108 P. 864, where the Supreme Court held that it was sufficient to convey title. However, we may assume, but not hold, that the contention of appellant is correct, and that the description in the tax deed is void for uncertainty, and still we find that we must affirm the judgment.

The record contains a certificate of sale of the Imperial irrigation district for unpaid assessments for the year 1925, which certificate bears date September 8, 1926. It is alleged in the complaint that in addition to the tax deed, which we have referred to, respondent claims and deraigns his title through this certificate of sale as well as a second certificate of sale by the Imperial irrigation district dated the 8th day of September, 1927. In the earlier certificate, the property is described as "situate, lying and being in the said Imperial Irrigation District, in the County of Imperial, State of California, and more particularly described as follows: Lot 8, Tract 77, Township 13 South, Range 14 East, S. B. M. (as per map on file in County Recorder's office), containing 25.25 acres." There is no question but that this description is sufficient to convey the title of the property to the grantee under a deed from the Imperial irrigation district.

[2] The case comes before us on the judgment roll alone. We must therefore assume that all necessary and proper evidence was introduced and received in the trial court to sustain its judgment. Under this rule, we must assume that the respondent introduced in evidence a good and sufficient deed from the Imperial irrigation district conveying the title to the property described in the certificate of tax sale to him.

Sections 43 to 48, inclusive, of "The California Irrigation District Act," approved March 31, 1897, St. 1897, pp. 254, 269-271, and the acts amendatory thereof, provide for the sale of property for delinquent irrigation district taxes. It is provided that the collector of the district must sell property for unpaid assessments and costs, and issue a certificate of sale to the purchaser. It is further provided that a redemption of the property sold may be made within three years from the date of the sale, for delinquent assessments, or at any time before a deed has been made

and delivered by the district to a purchaser. It is further provided that, if the property be not redeemed within such period of three years, the district must, upon demand, make a deed conveying the property to the purchaser or his assignee.

The complaint in this action was filed on February 21, 1930, three years, five months, and thirteen days after the date of the first certificate of sale. We must therefore presume that a good and sufficient deed was executed and delivered to respondent by the Imperial irrigation district conveying the property described in the first certificate of sale to him before February 21, 1930. Section 48 of "The California Irrigation District Act" makes such deed prima facie evidence of the regularity of the assessment, sale, and conveyance of the property to the grantee named therein. Such deed would therefore be sufficient to support the judgment of the trial court in favor of respondent. This appeal being upon the judgment roll alone, we must presume that such deed was introduced in evidence.

As more than six months have elapsed since the default of appellant was entered in the court below, without any steps having been taken by him to be relieved from such default, it would seem a useless act to reverse the judgment against him. *Title Insurance Co. v. King*, 162 Cal. 44, 120 P. 1066.

Judgment affirmed.

We concur: JENNINGS, Acting P. J.; ALLISON, Justice pro tem.

118 Cal.App. 55

PFLEGER v. JOHNSON.

Civ. 6781.

District Court of Appeal, Second District, Division 1, California.

Oct. 30, 1931.

1. Corporations ⇨573(3).

Complaint for alleged breach of contract to form new corporation and transfer stock to plaintiff *held* insufficient to allege contract.

There was no direct allegation of facts which would be sufficient to constitute contract for formation of new corporation or for transfer of assets from one corporation to another, or that plaintiff agreed to buy stock in new corporation at any time.

2. Limitation of actions ⇨21(1).

Where breach of alleged contract occurred more than two years before filing complaint, cause of action *held* barred by statute (Code Civ. Proc. § 339).

3. Pleading ⇨225(1).

Sustaining demurrer to complaint without leave to amend *held* not error, absent request for permission to amend or indication that there could be successful amendment.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by G. T. Pfeleger against Carl E. Johnson. From a judgment entered pursuant to an order sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Clay & Handy, of Los Angeles, for appellant.

Lloyd Wright and Charles E. Millikan, both of Los Angeles, for respondent.

CONREY, P. J.

Plaintiff appeals from a judgment entered pursuant to an order sustaining demurrer to complaint without leave to amend complaint. The action was commenced on the 8th day of April, 1929. The essential facts of the case as stated in the complaint are as follows: On the 21st day of July, 1920, the plaintiff and the defendant severally were stockholders of a corporation entitled U. S. Electrical Manufacturing Company. On that day the defendant told the plaintiff that he and one Steele were endeavoring to purchase all of the outstanding stock of the company, with the ultimate object of transferring its assets and business to a new corporation which defendant would cause to be formed; that, if plaintiff would sell his stock to defendant and Steele for the sum of \$2,459.05, at such time as defendant and Steele had purchased the remaining outstanding stock of the old corporation, and as soon as reasonably convenient thereafter, they would form a new corporation and would convey to the new corporation the assets and business of the old corporation, and cause to be issued to themselves stock of the new corporation of a par value to the value of the assets and business; and that upon the completion of said transaction defendant would transfer to plaintiff, or cause to be transferred to plaintiff, of the stock issued for the transfer of said business and assets, an amount which would bear the same relationship to the stock so issued to defendant and Steele as the stock held by the plaintiff in the old corporation would bear to the outstanding stock of the old corporation as of the date of transfer of the assets to the new corporation, and would do the same upon the plaintiff's payment to the defendant of the sum of \$2,459.05. The complaint alleges that, pursuant to the foregoing offer and representations on the part of the defendant, the plain-

tiff transferred to defendant and Steele said shares of stock, and did receive therefor said sum of money; that the defendant and said Steele did finally and with great difficulty accomplish the purchase of all the outstanding stock of the old corporation, and did purchase the last of the stock so purchased on or about May 5, 1926; that in January, 1927, the defendant caused said proposed new corporation to be formed for the purpose of taking over the assets and business of the old corporation, but that such assets and business have not been transferred to the new corporation, and the new corporation has not now, or never has had, any assets; and that no stock in said new corporation has been issued to defendant and Steele or at all, except three qualifying shares, and that defendant has not transferred or caused to be transferred to plaintiff any stock in the said new corporation. The complaint further alleges that on or about the 1st day of August, 1927, the defendant transferred and disposed of all of his stock in the old corporation, and thereby made it impossible for him to perform his engagement herein alleged, and did fully abandon the same; that at the said time, if the assets of the old corporation had been transferred to the new corporation, and there had been issued to plaintiff the amount of stock he would have received, had the defendant performed his engagement herein alleged, the said stock would have been of the value of \$16,153.23. On the foregoing facts plaintiff demanded judgment in the sum of \$13,694.18, damages.

[1] It will be seen that nine years before the commencement of this action the plaintiff sold to defendant and another person plaintiff's stock in the old corporation, at a cash price which presumably was the substantial value thereof. There is no direct allegation of facts which would be sufficient to constitute a contract for the formation of the new corporation or for the transfer of the assets from one corporation to another; or that the plaintiff agreed to buy the stock in the new corporation at any time.

[2] Concerning the representations of defendant as alleged to have been made in July, 1920, the complaint says that the defendant told plaintiff that defendant and Steele "would form a new corporation and would convey to said new corporation the assets and business of the old corporation." It is not alleged or claimed that Steele made any such promise or that defendant had any authority to make such promise on behalf of Steele. The promise, therefore, was one which could not be performed by the promisor alone. There is no allegation that the promise was made in bad faith, or that defendant did not in good faith intend to obtain performance of the thing promised.

On the face of the complaint, notwithstanding the indefiniteness of its allegations, it is apparent that, if defendant committed any breach at all of the alleged contract, such breach occurred more than two years before the filing of the complaint in this action. At least, performance was due in January, 1927, if obligatory at all. Therefore the court did not err in sustaining the demurrer to the complaint upon the ground that the cause of action was barred by the statute of limitations (Code Civ. Proc. § 339) as well as upon the other grounds of demurrer.

[3] The court did not err in sustaining the demurrer without leave to amend complaint, in the absence of any request for permission to amend or any indication that there could be a successful amendment. *Simons v. Pacific Gas & Electric Co.*, 64 Cal. App. 74, 220 P. 425; *Hansen v. Carr*, 73 Cal. App. 511, 238 P. 1048.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J. '

118 Cal.App. 95
LINNEY v. CHALLACOMBE.
Civ. 6938.

District Court of Appeal, Second District,
Division 1, California.
Nov. 2, 1931.

1. Evidence *See* 441(6).

Oral contract, consistent with letters between attorney and client concerning legal services, could be looked to, where writing did not incorporate all terms of contract, or did not purport to supersede it on matters regarding which writing was silent (Civ. Code § 1625; Code Civ. Proc. § 1856).

2. Attorney and client *See* 166(1).

Evidence sustained judgment for attorney suing for legal services.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Robert T. Linney against Robert H. Challacombe. Judgment for plaintiff, and defendant appeals.

Affirmed.

Carl E. Cameron, of Long Beach, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Plaintiff recovered judgment for \$750, based on the finding that he had rendered

services, as an attorney, at the defendant's special instance and request. The defendant's sole contention, but variously expressed, on this, his appeal, is that this finding is not supported by the evidence. With this contention we do not agree.

[1] First of all, defendant insists that the agreement between himself and plaintiff was embodied in several writings, that these express the entire contract, by virtue of the provisions of section 1625, Civil Code, and section 1856, Code of Civil Procedure, and that he has fully discharged his obligations to plaintiff as measured by these contracts. So far as his debt was measured by the writings, the evidence shows that defendant has paid plaintiff in full. The writings, however, do not evidence the complete contract. Plaintiff's first agreement with the defendant was an oral one. By it he agreed to serve defendant as his general advisory counsel in a maze of difficulties in which defendant found himself with previous counsel and with his business associates. Litigation threatened, and it was definitely agreed that the brunt of active court work should be borne by associate counsel, to be employed. Besides whatever fees the associate counsel would divide with him, plaintiff was to be paid by defendant whatever was reasonable. The threatened litigation befell, and Mr. Elliott, first, then Schweitzer and Hutton, were employed as special counsel. From two to three letters were written by each of these special counsel, in which reference was made to legal services to be rendered with respect to certain named actions, pending or to be brought (together with one matter not in litigation), and certain fees fixed for the services so definitely related. Plaintiff joined in these letters, and as to him, as well as the associate counsel, defendant's liability touching the legal services covered by the letters is measured by the letters, and is fully discharged. But the letters neither purport to nor do they cover all the matters with respect to which plaintiff agreed to render legal services, and in which the evidence shows he did render service to defendant. The situation presented is one where a term of an oral contract may be looked to as expressing an agreement of the parties, even though there be a writing, because the writing either does not incorporate all the terms of the oral contract (*Buckner v. Leon & Co.* [1928] 204 Cal. 225, 267 P. 693), or does not purport to supersede it as to those

matters on which the writing is silent. (*Whittier v. Home Savings Bank* [1911] 161 Cal. 311, 119 P. 92; *Greathouse v. Daleno* [1922] 57 Cal. App. 187, 206 P. 1019). The letters are entirely consistent with the oral contract and are not varied in any way by it, so far, at least, as that contract employs plaintiff for general legal services, and promises him a reasonable fee for those services.

[2] Defendant claims that no services were rendered which were not so connected with the court cases, made the subject of the letters; that the fees fixed by the letters are all-inclusive. The evidence warranted the trial court in concluding otherwise. In any event, defendant further urges there were no services, outside those covered by the letters, rendered after July 23, 1927, and plaintiff was fully paid for all services furnished up to that date. Here again, we find ourselves bound by the conclusions which the evidence warranted the trial court in making. The argument that plaintiff had been paid in full to July 23 is predicated on a receipt given by him that day which so recites. But the receipt bears the heading "*Bishop v. Challacombe*," the title of two of the cases in which plaintiff had been active with associate counsel Elliott. On the same date, Elliott gave a receipt in more general terms. Also, at this time, Schweitzer and Hutton took the place of associate counsel Elliott. These facts justify the inference that the receipt covered plaintiff's fees for the special services rendered in association with Elliott, not for his services rendered under his general employment. But if this inference were not drawn, there remains evidence of services rendered after July 23, and outside the matters covered by Schweitzer and Hutton's contract, which would justify a fee of \$750. The firm withdrew from defendant's service in April, 1928, and plaintiff continued his services without an associate, during which time there was a settlement of one suit, the dismissal of others, and a final satisfactory settlement of all matters, including a substantial payment for defendant's benefit. Defendant and his wife would not execute the final papers until plaintiff had passed on them. The evidence is sufficient to support the finding upon which the judgment rests.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

118 Cal.App. 127

PANN v. BARRY et al.
Civ. 8002.

District Court of Appeal, First District,
Division 2, California.
Nov. 3, 1931.

I. Evidence ⇨555.

That witness with citrus fruit experience had not seen oranges involved, *held* not to affect admissibility of testimony relating to market value of oranges.

Testimony was admissible, in suit between grower and marketing broker, as against objection that no proper foundation had been laid therefor, since evidence disclosed that the witness was engaged in business of growing, packing, and selling citrus fruits; that he had shipped a portion of that season's crop for the grower after the broker had shipped the fruit in question; that the witness was generally familiar with the condition of the citrus fruit in that vicinity during the season and with the conditions in the groves surrounding the grower's grove; and that he had heard the broker testify describing the type and character of the oranges which broker had shipped.

2. Factors ⇨6.

Finding, showing that broker breached agreement for sale of orange crop, sustained judgment for grower, since material breach constituted partial failure of consideration entitling grower to rescind (Civ. Code, § 1689).

3. Appeal and error ⇨1151(1).

It being apparent judgment provided for interest from erroneous date, appellate court could correct judgment.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by William P. Pann, doing business under the fictitious name of the Angeles Brokerage Company, against Edmund D. Barry and another, in which the defendants filed a cross-complaint. Judgment for defendants, and plaintiff appeals.

Modified, and, as so modified, affirmed.

George P. Adams and W. W. Orme, both of Los Angeles, for appellant.

Woodruff, Musick & Hartke, of Los Angeles, for respondents.

SPENCE, J.

Plaintiff brought this action to recover damages for the alleged breach of contract by defendants. Defendants cross-complained seeking damages for the alleged breach of the

said contract by plaintiff. From a judgment in favor of defendants and cross-complainants, plaintiff and cross-defendant appeals.

The contract, which was executed by the parties under date of December 3, 1926, read as follows:

"In consideration of an advance of Four Thousand (\$4000.) Dollars, receipt of which is hereby acknowledged, A. Belle Barry and E. D. Barry, of Pasadena, California, places the marketing of her entire crop of oranges on their ninety acres, situated eighty acres on the southeast corner of Workman avenue and Lark Ellen blvd., and ten acres on Arroyo drive, near Puente blvd., West Covina, California, in the hands of the Angeles Brokerage Company to market for their account, and agrees to pay 75¢ per packed box for packing, and 15¢ per packed box for selling.

"If the picking and hauling is done by the Angeles Brokerage Company, they will charge cost and same to be at the expense of the grower.

"It is understood that all of the fruit will be sold on a cash California basis, unless otherwise mutually agreed at time of shipment.

"The Angeles Brokerage Company agrees to render returns on each shipment as soon as sold."

Under this agreement, plaintiff packed and sold twelve carloads of respondents' fruit containing 5,004 boxes. Thereafter defendants, claiming the right to rescind and terminate the agreement, served upon plaintiff a notice of rescission, and refused to permit plaintiff to proceed. In his complaint, plaintiff alleged performance on his part and breach of the agreement by defendants. He sought to recover certain sums alleged to have been paid out on behalf of defendants in addition to his alleged loss of profits on the packing and sale of the remaining fruit. In the answer and cross-complaint, defendants denied any breach on their part, alleged that they had rescinded the agreement because of fraud and failure of consideration based upon plaintiff's breach of the agreement, and sought damages by reason of plaintiff's alleged breach. The trial court found, among other things, that the crops were not sold by plaintiff in compliance with the agreement, in that they were not sold at the "best obtainable or current market price" and were not sold on a "cash California basis"; that plaintiff did not render returns on each shipment as soon as sold, and that the statements when rendered were incorrect and untrue in that they "contained statements showing that said oranges had been sold for a smaller amount than had actually been received by the plaintiff for said oranges, and smaller than the amount for which they had actually been sold"; that defendants refused to permit

plaintiff to proceed further under the contract by reason of the violation of its terms by plaintiff, and served upon plaintiff notice of rescission; that plaintiff packed, shipped, and sold 5,004 boxes of defendants' oranges which should and would have yielded net to defendants the sum of \$12,510 (\$2.50 per box) in the event that plaintiff had sold the same in compliance with the terms of the contract; that the oranges were not so sold, but were sold by plaintiff at a price which yielded defendants \$4,047.15 less than the foregoing amount; that the violation of the agreement by plaintiff resulted in and constituted a failure of consideration, and that the contract was rescinded by defendants by the notice of rescission. The trial court further determined the amount of credits to which plaintiff was entitled, and, after deducting said credits from the amount which it found that defendants had been damaged, gave judgment in favor of defendants for the balance.

[1] Appellant contends that the trial court erred in its ruling upon the admission of evidence. We have considered appellant's numerous specifications of error and have examined the entire record, including the evidence. In our opinion, no prejudicial error was committed. Practically all of the alleged errors to which appellant calls our attention relate to the admissibility of the evidence offered by respondents with respect to the market value of respondents' fruit which was sold by appellant. The average net price credited to respondent by appellant was approximately \$1.67 per box for the 5,004 boxes sold. Respondent sought by several witnesses to show that the market value of the fruit was at least \$2.50 per box net to the grower at that time. Witnesses were called, and, over objection, testified to other sales of fruit in the vicinity at about that time at figures in excess of \$2.50 per box net to the grower; but the only witness for respondent who gave his opinion with respect to the value of respondents' fruit was the witness Damerel. He stated that the average net price to the grower and the price which respondents' fruit should have brought on a cash California basis during the period in question was "Around \$2.60. It would not be less than \$2.50 at any time during that period." In addition to appellant's general objections to the questions propounded, he interposed the objection that no proper foundation had been laid. This latter objection was based upon the fact that the witness had not actually seen the oranges in question and had not actually sold any of

that particular type of oranges on a cash California basis during the months of December and January when appellant sold respondents' fruit. However, it appears from reading the testimony of the witness that he had engaged in the business of growing, packing, and selling citrus fruits, and was so engaged during 1926 and 1927, being the season when the fruit was sold; that he had shipped a portion of that season's crop from respondents' grove after appellant had shipped the fruit in question; that he was generally familiar with the condition of the citrus fruit in that vicinity during that season, and with the conditions in the groves surrounding respondents' grove; that he had heard appellant testify describing the type and character of the oranges which appellant had shipped from respondents' grove. Under these circumstances, a proper foundation was laid, and the court properly admitted his testimony relating to the market value of the fruit. The fact that he had not seen the particular fruit and had not sold any of that particular type on a cash California basis at that time might affect the weight but not the admissibility of the witness' testimony.

[2] Appellant further contends that the evidence was insufficient to support the findings. We deem it unnecessary to discuss the sufficiency of the evidence to support the findings of fraud or other findings upon immaterial issues, as the record discloses that there was ample evidence to support all of the material findings above set forth. These findings were sufficient to sustain the judgment as the material breach of the agreement by appellant constituted a partial failure of consideration within the meaning of section 1689 of the Civil Code entitling respondents to rescind. 6 Cal. Jur. 392, and cases cited.

[3] Appellant calls our attention to the fact that the judgment is in the sum of \$3,586.08, "together with interest on said sum from June 25, 1927, at the rate of seven per cent. (7%) per annum until paid." It is apparent from the findings that the date mentioned should be June 25, 1928, as contended by appellant and conceded by respondents. The judgment is therefore modified by striking out the word and figures "June 25, 1927," and inserting in lieu thereof the word and figures "June 25, 1928," and, as so modified, the judgment is affirmed; respondent to recover costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

118 Cal.App. 124

WELDER et al. v. DIRECTOR et ux.
Civ. 8044.

District Court of Appeal, First District,
Division 2, California.
Nov. 3, 1931.

1. Appeal and error $\hookrightarrow$ 931(4).

On appeal to set aside decree, where no finding was made on purpose of \$4,000 item included in agreement to reconvey mortgaged property, appellate court cannot presume item was for illegal purpose.

2. Appeal and error $\hookrightarrow$ 694(1).

Record disclosing no evidence, appellate court cannot say that trial court's finding that loan was not usurious was unsupported.

3. Mortgages $\hookrightarrow$ 395.

Where mortgagors failed to meet interest and other payments on mortgage to secure loan not usurious, judgment of foreclosure held proper.

4. Usury $\hookrightarrow$ 137.

Damages under Usury Law can be had only where interest at prohibited rate shall have been paid (St. 1919, p. lxxxiii).

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Suit by Joseph Welder and another, husband and wife, against Hyman Director and another, husband and wife, in which defendants filed a cross-complaint, adding Michael Kirouff and another as cross-defendants. From an order denying plaintiffs' motion to set aside decree and enter a new and different decree on the findings, plaintiffs and cross-defendants appeal.

Order affirmed.

Harrah, Louis & Quillian and H. B. Pool, all of Los Angeles, for appellants.

William P. Redmond, of Los Angeles, for respondents.

NOURSE, P. J.

This is an appeal from an order denying plaintiffs' motion to set aside a decree and to enter a new and different decree upon the findings.

Plaintiffs sued to recover the sum of \$4,199.76 as treble the amount of interest which they had paid upon a promissory note which they allege was in the principal sum of \$20,000 and called for \$5,399.92 in interest. The truth of the case is that the promissory note was in the principal sum of \$16,000 and called for interest at 7 per cent., which was all that plaintiffs paid. As a part of the same transaction the parties entered into an agreement

whereby the plaintiffs agreed to and did deed certain real property to defendants subject to two prior mortgages amounting to \$14,000. The obligations of these mortgages were assumed by the defendants and they paid the interest thereon, together with all taxes and assessments against the property. By this agreement the defendants undertook to reconvey to the plaintiffs within the year upon payment to them of \$20,000, plus interest. At the same time the defendants executed to plaintiffs a lease of the property and the latter remained in possession.

The plaintiffs, through an amended complaint, pleaded that the deed of conveyance was an equitable mortgage and prayed that it be so decreed; the defendants then filed a cross-complaint seeking the foreclosure of this mortgage if it be found to be such. The cause was thus cast in equity and upon these pleadings the trial court heard the evidence and found that the deed was a mortgage which defendants were entitled to have foreclosed; that the monthly rentals paid by plaintiffs under the lease were in fact payments of interest due under the loan and reimbursements to defendants for interest paid by them on the two prior mortgages; that the interest actually paid by the plaintiffs was far below that inhibited by the Usury Act (St. 1919, p. lxxxiii); that plaintiffs were indebted to defendants by reason of interest, taxes, and assessments; and that the defendants were entitled to a decree of foreclosure.

[1-3] The decree which followed these findings is the decree which the appellants have asked to have set aside. There is no appeal from the decree and none of the evidence has been brought up. We are therefore limited on this appeal to a consideration of the single question: Do the findings support the decree which was entered? It will be noted that there is no finding on the purpose or the effect of the \$4,000 item which was included in the agreement to reconvey. This may have been the agreed charge for respondents' services in the management of the property, for the assumption of the two prior mortgages, or for any other legitimate purpose. We cannot here presume that it was for an illegal purpose. The trial court apparently deemed this agreement to reconvey to be void and of no effect after finding that the deed from appellants was in fact solely a mortgage to secure the payment of the principal sum of \$16,000. The court found that it was not true that appellants borrowed \$20,000 from respondents, "directly, or in any other manner," and that it was not true that respondents retained the sum of \$4,000 as additional interest. That was the issue which appellants presented. The finding of fact was adverse to them. In addition to this, the trial court made the general finding that the loan was not in violation of the Usury Law. Upon

what evidence this finding was based we do not know. Upon this record we cannot say that the finding is unsupported. With the finding that the loan was not usurious the judgment of foreclosure was the proper, and only, decree which should have been entered.

[4] It is conceded that the sum of \$4,000 was not paid—that no interest in excess of that permitted by the Usury Law was paid. The decisions are unanimous that recovery of damages under the Usury Law can be had only where interest at the prohibited rate shall have been paid. *Haines v. Commercial Mtg. Co.*, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725; *Moore v. Russell* (Cal. App.) 300 P. 479. If appellants were entitled to any other relief, such as the application of the interest paid upon the principal of the loan (*Haines v. Commercial Mtg. Co.*, supra; *Ames v. Occidental Life Ins. Co.*, 210 Cal. 271, 274, 291 P. 182), they have not made a case on the record before us which would warrant a modification of the decree in that respect.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

118 Cal.App. 212

ANDERSON et al. v. PICKENS.

Civ. 4372.

District Court of Appeal, Third District, California.

Nov. 6, 1931.

Rehearing Denied Dec. 5, 1931. Hearing Denied by Supreme Court Jan. 4, 1932.

1. Automobiles ⇨245(87).

In wrongful death action, whether decedent was guilty of contributory negligence in knowingly riding with intoxicated automobile driver, *held* for jury.

2. Appeal and error ⇨1066.

There being no evidence that accident happened after midnight, August 13, 1929, instruction conditioned on "Guest Law," which took effect then, *held* harmless.

3. Trial ⇨295(1).

Court is not required to state all the law applicable to case in single instruction, where instructions as whole state law correctly.

4. Automobiles ⇨246(58).

Instruction that if decedent rode with defendant knowing him intoxicated, he was guilty of contributory negligence providing he had reasonable opportunity to leave car, *held* proper, where question of defendant's drunkenness was for jury.

Such instruction was proper as against contention that it did not meet any issue

of the case because decedent need not have ridden with defendant at all, or could have alighted before the accident, where evidence was contradictory as to whether defendant was drunk when he met decedent at the latter's home, and when stopped by a police officer in decedent's home city, shortly after decedent had gotten in car, to be warned that a third member of the party should not be allowed to drive because too drunk.

5. Trial ⇨260(1).

Court's refusal to give requested instruction covered by given instructions, under which jury could not be misled, *held* proper.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Fern Anderson, Iris Anderson, and Beatrice Anderson, by their Guardian ad Litem, O. I. Ness, against C. J. Pickens. From a judgment for plaintiffs, defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Charles Kasch, of Ukiah, for respondent.

BURROUGHS, Justice pro tem.

The plaintiffs are three minor children of one Harry Anderson, now deceased. They instituted this action by their guardian ad litem, to recover damages for the death of their father, through the alleged negligence of the defendant. The cause was tried by the court with a jury, and a verdict rendered in favor of the plaintiffs in the sum of \$15,000. From the judgment entered in accordance with the said verdict, the defendant has appealed.

[1] The first assignment of error is based upon the claim that the deceased was, as a matter of law, guilty of contributory negligence in riding with an intoxicated driver. The evidence discloses that the defendant C. J. Pickens and one H. L. Rambo left Oakland, Cal., on August 13, 1929, in a De Soto coupé automobile; that they were going on a hunting trip to Mendocino county; that they reached the town of Point Arena in said county about eight o'clock in the evening. They then went to a hotel and had dinner. They stayed at that place for some time, and then went to the house where said Harry Anderson lived and took him with them for the hunting trip. They left Point Arena at about 10:20 p. m. the same evening and went to a place called the Fire Lookout Station on Signal Ridge, and stopped there for a while and talked to the lookout man. They then started for a ranch called "Zinnis Ranch." The road over which they traveled was a very narrow,

twisting, mountainous road. About three miles from the said station, the car, instead of following a turn in the road, traveled straight ahead and ran over the grade and down some three hundred feet, and, apparently, in its descent turned over several times. Harry Anderson was killed, and the other occupants of the car were injured. The accident occurred about twenty minutes before midnight. There was some evidence in the record that Harry Anderson was driving the car, but the clear preponderance thereof shows that it was driven by the defendant U. J. Pickens. Upon the question of the intoxication of the driver Pickens, there is a conflict in the evidence, and the matter was properly submitted to the jury. The main question in dispute is whether or not said Harry Anderson knew or had reason to believe that the defendant Pickens was, by reason of intoxication, unable to drive the automobile. When Pickens and his companion Rambo left Oakland, they had with them a quantity of intoxicating liquor, and both admitted that from time to time on the trip between Oakland and Point Arena they had drunk considerable gin. They also had intoxicating liquor while they were eating their dinner at the hotel in Point Arena. Anderson was not with them until after they had finished their dinner, when, as heretofore stated, Pickens drove to the place where Anderson lived and he then joined the party in the automobile. It is clear from the evidence that Rambo was intoxicated. Leroy Woodhead, the city marshal of Point Arena, testified that he stopped the party while they were all three in the car and told them that Rambo could not drive the car because he was intoxicated. Mr. Anderson assured him that Rambo would not drive, but that Pickens would. Mr. Woodhead, in answer to the following question: "And Mr. Pickens was in such condition that you were content for him to drive?" and he answered: "Yes, I didn't think he was so drunk he could not drive." The defendant Pickens testified that after leaving Point Arena he changed places with Harry Anderson and the latter drove the car. This witness also admitted that he had had a number of drinks, but he thought he was all right. It is claimed that, as a matter of law, Anderson knew that the defendant Pickens was intoxicated, and that even though Anderson was not driving the car, he had an opportunity to alight therefrom, and, failing to do so, he was guilty of contributory negligence. It is clear from all of the evidence that Anderson was not intoxicated, nor, so far as the record discloses, had he been drinking. His mind was therefore clear. Appellant relies upon the case of *Jones v. Pac. Gas & Elec. Co.*, 104 Cal. App. 47, 285 P. 709, in support of the foregoing contention. However, the case cited is readily distinguishable from the case at bar. In the case cited, the evidence preponderates in favor of the fact that the plaintiff knew that Cottrell, the

driver, was drunk. The court so held. On appeal, the judgment was affirmed. There was considerable evidence showing that the driver of the car was intoxicated. The plaintiff herself testified to the drinking and the very erratic manner in which the car was driven. In summing up the evidence in the case cited, the court says: "In the instant case the plaintiff had every reason to know, and we think it is conclusively shown that she did know that the defendant Cottrell was under the influence of intoxicating liquor at all times while driving the automobile after leaving the home of the plaintiff in North Sacramento. The plaintiff's own testimony shows that the party repaired to the home of the plaintiff and her husband for the purpose of drinking 'moonshine' or 'jackass brandy,' and that after the supply at this home was exhausted, the party went to a bootlegging joint situate several miles distant, for the purpose of securing additional drinks. Under such circumstances, the cases which we have cited prohibit recovery on the part of the plaintiff, irrespective of whether the Pacific Gas and Electric Company had or did not have a legal right to maintain its power pole in the position that it occupied on the night of November 13 and morning of November 14, 1926. The testimony shows that the party involved in this proceeding knew of the existence of the pole, and saw the warning light, but notwithstanding this knowledge, the driver was apparently too drunk, and we might add that most of the party was too drunk to know where to drive to avoid the collision." In the instant case, the record discloses that practically all of the drinking by Pickens and Rambo was done before they were joined by Anderson; that when the party was stopped by the city marshal his objection went only to Rambo driving the car; that he considered Pickens sober enough to drive the car. According to the testimony of Pickens, while he had been drinking, "he thought he was all right." We think that the question of whether Anderson knew that Pickens was under the influence of intoxicating liquor, was a question of fact for the jury. By their verdict they determined that question adversely to appellant's claim, and the evidence is sufficient to sustain the implied finding of the jury to that effect. *Shields v. King*, 207 Cal. 275, 277 P. 1043; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513.

[2, 3] A further complaint is made that the court erred in submitting to the jury the issues raised by the third count of the complaint. That count of the complaint is based upon what is commonly referred to as the "Guest Law," which went into effect at midnight on August 13, 1929. Said count alleged intoxication, willful misconduct, and gross negligence. It is claimed that there is no evidence that the accident took place after midnight, and therefore the giving of the follow-

ing instruction was erroneous, and that the effect of the instruction was to inform the jury that proof of defendant's intoxication was enough to permit the plaintiffs to recover, regardless of the contributory negligence of the deceased in riding with an intoxicated driver. The instruction is as follows: "If you find that the accident in question herein occurred on the 14th of August, 1929, that is to say, after midnight of the 13th of August, 1929, and that the deceased was a guest in the automobile of the defendant at the time of the accident, then, and under such circumstances, the plaintiffs are only entitled to recover upon the proof by a preponderance of the evidence that the accident was proximately caused by the intoxication, wilful misconduct or gross negligence of the defendant." It will be observed, however, that the foregoing instruction deals only with the question that the accident happened after midnight of August 13, 1929. There being no proof that the accident happened after the time stated, the giving of the instruction was harmless error and could not have prejudiced the defendant. It has been further held that the trial court is not required to state all of the law applicable to a case in a single instruction, and, if the instructions as a whole correctly state the law, that is a sufficient answer to such a contention. 24 Cal. Jur. 857. The court gave to the jury three instructions on the question of contributory negligence, all of which were submitted by the defendant, and which correctly stated the law of contributory negligence. We think there was no reversible error in giving the instruction complained of.

[4] The court also gave an instruction to the effect that if the jury found from a preponderance of the evidence that the defendant Pickens was actually operating the automobile at the time and place of the accident, and that he was negligently operating it, and, if they further found that prior to the accident Pickens became incompetent to safely operate the automobile by reason of an overindulgence in intoxicating liquor, and that he drank such liquor in the presence of Harry Anderson, and that if the latter knew that he was in such a condition, then it was negligence on the part of Harry Anderson to continue to ride with said Pickens, providing Anderson had a reasonable opportunity to alight from the automobile. The instruction, as originally offered, left out the proviso concerning the opportunity for Anderson to alight from the automobile. This was added to the instruction by the court. It is claimed that, because the evidence conclusively shows that Pickens and his companion Rambo were hilariously under the influence of alcohol during their stay for some hours in Point Arena, the instruction meets no issue in the case, because Anderson need not have traveled with them at all, or could have alighted at the Fire Lookout Station. The evidence does not conclusively show

that defendant Pickens was drunk, as was claimed by defendant's counsel. The evidence of the city marshal of Point Arena, as hereinbefore set forth, raised an issue as to the defendant's condition as to drunkenness, and therefore that question was properly left for the jury to decide.

Furthermore, there is an entire lack of proof that, while Pickens and Rambo were in Point Arena, they were in Anderson's company until they drove to Anderson's house and took him in the automobile when they left Point Arena. If the jury decided that the defendant was under the influence of intoxicating liquor, and that fact was known to Anderson only after he entered the car, then the instruction was perfectly proper, because, under the circumstances, he must have had a reasonable opportunity to alight before he would be chargeable with contributory negligence. Furthermore, in other instructions, the court very carefully instructed the jury on the effect of intoxication upon the rights and duties of the parties.

[5] The third assignment of error is that the court erred in not giving an instruction on damages for pain and suffering sustained by the deceased. The defendant offered the following instruction: "You are hereby instructed that in determining the question of damages, in the event that you should find the plaintiffs entitled to damages at all, you are not to consider the question whether or not the deceased suffered any pain prior to his death. In this action plaintiffs are not entitled to recover, if they may recover at all, for any detriment sustained by the decedent prior to his death." A notation upon the instruction is to the effect that it was not given because covered by other instructions. While it is claimed by the appellant that the subject-matter of the instruction was not given in other instructions, the court gave the jury eight instructions covering the measure of damage in case the jury should find a verdict for the plaintiffs, and they cover every possible phase of the measure of damage, and the jury were instructed frequently that the only damage which could be recovered was the pecuniary loss suffered by the plaintiffs. They were instructed that they could not allow damages for any sentimental value that the plaintiffs attributed to the loss of their father; that they, the jury, were not to be swayed by sympathy, passion, or prejudice or any emotion against either party; that the plaintiffs could not recover any damages because of any grief, mental suffering or sorrow endured by them because of the death of their father; that they were entitled only to such damages as would pecuniarily compensate them for the injuries sustained; that they could make no allowance for exemplary damages, but only actual damages, as the evidence shows to a reasonable certainty they had sustained; that they were not entitled to damages for sorrow

and mental anguish caused them by the death of the deceased; that the purpose of the law was to compensate plaintiffs for the loss of a natural protector through the negligence of another, and not as a solace for their wounded feelings; that, in case a verdict was rendered for the plaintiffs, they could award such damages only as would compensate the plaintiffs for the pecuniary loss suffered in being deprived of the support, care, and comfort and society of their father, not exceeding the amount named in the complaint. We do not see how the jury could be misled in the measure of damages by the failure of the court to give the instruction complained of. We find no reversible error in the record. The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

118 Cal.App. 207
SHULTZ v. O'ROURKE et al.
Civ. 8002.

District Court of Appeal, Second District, Division 1, California.
Nov. 6, 1931.

1. Appeal and error ⇨800.

Motion to dismiss appeal will be denied where record does not show termination of new trial proceedings and transcript was filed before motion to dismiss.

2. Appeal and error ⇨801(4).

Where case is not clearly moot, court will not go into merits on motion to dismiss appeal.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Mabel L. Shultz against L. O'Rourke and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

John J. McMahon and Jesse Gyger, both of Los Angeles, for appellant.

Holland & Holland, of Los Angeles, for respondents.

CONREY, P. J.

Respondents presented a motion for dismissal of the appeal, on the ground that the time for filing transcript had expired and no transcript had been filed at the time of serving and filing the notice of motion; and upon the further ground that the questions raised by appellant had become moot.

[1] After the entry of judgment appellant duly presented a motion for new trial, which motion was denied. The record fails to show that any written notice of the termination of the new trial proceedings has been served, or that such written notice has been waived by writing, or by oral stipulation entered in the minutes. It follows that the time allowed by law for presenting the record on appeal had not expired when the transcripts were filed. *Attkisson v. Reynolds*, 94 Cal. App. 185, 270 P. 686; *Sterling Corporation v. Superior Court*, 207 Cal. 370, 278 P. 859. It should be further noted that the transcripts were on file when the motion was presented in this court.

[2] We are unable to satisfy ourselves that the questions which may be raised by appellant in further prosecution of her appeal are entirely moot. There seems to be at least one phase of the controversy upon which a decision in favor of appellant might be of value to her. We refer to the matters contained in the record which affect the question of default upon which the validity of a sale under a certain trust deed may depend. It is not appropriate that we should now look into the merits of the question, when the case is before us only upon a motion to dismiss the appeal.

The motion to dismiss appeal is denied.

We concur: HOUSER, J.; BISHOP, Justice pro tem.

118 Cal.App. 208
H. D. TAYLOR CO. v. J. H. JONAS & SONS
et al.
Civ. 6984.

District Court of Appeal, Second District, Division 2, California.
Nov. 6, 1931.

1. Appeal and error ⇨1011(1).

Trial court's finding, upon conflicting evidence, regarding date merchandise was ordered, *held* conclusive.

2. Sales ⇨170.

Buyer *held* not liable for price of merchandise delivered about six months after ordered for shipment by express; offer provided by order not being accepted, in view of delay.

3. Appeal and error ⇨1048(4).

Refusing witness use of typewritten order to refresh memory *held* not error, where there was no showing that witness required any refreshing of memory, and witness af-

firmatively testified he remembered incident inquired about.

4. Appeal and error ☞690(3).

Transcript not disclosing nature or materiality of letters, copies of which were allegedly improperly admitted, no prejudice was shown.

5. Evidence ☞185(1).

That defendants asked plaintiff for and were furnished copies of letters received by plaintiff constituted admission that letters were received and in plaintiff's possession.

6. Evidence ☞213(1).

In action for merchandise sold and delivered, evidence relating to compromise of disputed claim *held* inadmissible.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the H. D. Taylor Company against J. H. Jonas & Sons and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

James M. Gammon, of Los Angeles, for appellant.

Henry Cohen, of Los Angeles, for respondents.

FRICKE, Justice pro tem.

Appellant brought action upon a book account for an alleged unpaid balance of \$1,209.47 for merchandise sold and delivered to defendants and included a second cause of action for this amount on the theory of an account stated.

[1] Appellant states, as the facts of the case, that appellant, located at Buffalo, N. Y., received through J. S. Zimmerman, its authorized agent, a verbal order from J. H. Jonas of Los Angeles, on February 23, 1924, for five pieces of mohair to be shipped by express, part at once and the balance in thirty days; that the first shipment arrived about May 24, 1924, and the balance arrived about the middle of June, 1924; that upon receipt of the first shipment respondent wrote appellant that he had never ordered the merchandise and was holding the merchandise subject to appellant's disposition; that at some indefinite time later respondent and Zimmerman had a conversation in which respondent objected to paying the express charges, claimed that there were defects in the merchandise, and offered to take the same at a reduction of 25 cents per yard provided appellant would pay the difference between express and freight charges, which offer was not accepted; that the parties "continued to haggle" until June, 1929, when respondent's plant was destroyed by fire, respondent claiming that the mer-

chandise here involved was totally destroyed; that it did not require more than two or three weeks in the ordinary course of business for a letter to reach Buffalo and merchandise to be shipped back and received by express. Respondent testified that the order was given in the latter part of 1923, and, there being this conflict in the evidence, the finding of the trial court that the order was given in 1923 must prevail.

[2] It is obvious that there was no account stated. The question therefore is, Did the facts raise a liability to pay for the goods sold and delivered? The order was given in the fall of the year 1923. The condition for shipment by express must be given effect as indicating that the delivery must be by the speediest means between Buffalo and Los Angeles, a delivery within two or three weeks from the giving of the order. The first installment of goods was not received until May 24, 1924, roughly about six months after the order was given, or, if we accept appellant's contention as to the date of the order, the goods were not received until three months after the order. Surely so long a delay is not an acceptance of the offer provided by the order, and under the elementary rules of the law of contracts the title remained in appellant and respondent incurred no liability therefor. The delivery of the merchandise by appellant other than in acceptance or pursuance of the order was at appellant's risk. Appellant was notified by Jonas that the latter did not accept them and the merchandise was subject to appellant's disposal. While there ensued various negotiations in an effort to have respondents take the goods, no agreement was ever arrived at, the title to the merchandise never passed, and respondents never incurred liability therefor.

[3] Appellant claims error because the court refused to permit the witness J. S. Zimmerman to use a typewritten order signed by him to refresh his memory. In view of the fact that there was no showing that the witness required any refreshing of his memory and of his affirmatively testifying that he did remember the incident inquired about there was no error.

[4, 5] The contention that certain copies of letters were received in evidence without a previous demand upon appellant to produce the originals is without merit. The references to the transcript do not show the nature or materiality of the correspondence, and hence no prejudice appears. The record does show, however, that respondents asked appellant for copies of the letters received by the appellant and were furnished by appellant with the copies in question, a circumstance amounting to an admission that such letters were received and in the possession of appellant.

[6] Appellant's claim that it was error for the court to restrict the questioning of respondent Jonas concerning his offer to take the goods at a reduction in price is untenable. Counsel's own question about "trying to settle" clearly warranted the court's conclusion that he was inquiring into an offer to compromise and such evidence was inadmissible.

The other points in appellant's brief are either as to immaterial matters which could not affect a determination of the cause or, as is true in most instances, are not sustained by the references to the record.

The statement of facts in appellant's opening brief upon its face shows that the judgment for defendant was clearly warranted.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; Ira F. THOMPSON, J.

118 Cal.App. 115

PEOPLE v. JENKINS.

Cr. 224.

District Court of Appeal, Fourth District, California.

Nov. 2, 1931.

1. Robbery ☞26.

Question of fear, in information charging robbery by defendant putting victim in fear, *held* for jury.

2. Criminal law ☞1175.

Defendant convicted of robbery in second degree cannot complain that evidence supported only robbery in first degree.

3. Criminal law ☞696(3).

Answers of witnesses on cross-examination to questions not relating to matters covered in direct examination were properly stricken by court.

4. Criminal law ☞942(2).

Affidavit of state's witness admitting he did not recognize defendant as robber, conflicting with his testimony at trial, was of impeaching character not entitling defendant to new trial.

5. Criminal law ☞1035(3).

Defendant convicted of robbery cannot complain that court's asking witnesses questions impressed jury of court's belief of defendant's guilt, where no objections were made nor exception taken to such conduct.

6. Witnesses ☞246(1).

Court may ask witnesses questions to make clear any obscure point.

7. Criminal law ☞1130(5).

Assignments unaccompanied by substantial argument or authorities will not be considered.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Lonnie Jenkins was convicted of robbery, and he appeals.

Judgment and order affirmed.

Utley & Nuffer, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Dep. Atty. Gen., for the People.

ALLISON, Justice pro tem.

The defendant in this case is charged by information with the crime of robbery. The jury returned a verdict of guilty of robbery in the second degree. This appeal is from the judgment of conviction, and from an order denying defendant's motion for a new trial.

It appears that on the 12th day of June, 1931, the defendant was running a "Beer Garden" situated about two miles east of the city of Brawley, in the county of Imperial, state of California. The defendant was present in the early part of the evening and was engaged in dealing a gambling game called "Twenty-One." About midnight, the defendant left the place and returned about 12:30 a. m. About 1:30 a. m. or thereabouts, two masked men, armed with shotguns, returned to the premises. One of the armed men was recognized as the defendant. The defendant stuck his shotgun against the back of the complaining witness Abraham, and ordered him to put up his hands. While the defendant held the gun the other masked man took \$50 and some papers from Abraham's pocket. Notwithstanding the disguise that the defendant assumed, he was recognized by five persons who were in and about the defendant's place on the occasion in question. The defense produced an equal number of witnesses who testified that they were there at the time of the robbery, some of whom were victims thereof, and that neither of the two masked men who did the robbing was the defendant.

It is first contended that the court erred by instructing the jury in effect that they might find the defendant guilty of robbery in the second degree, and that the verdict of the jury finding the defendant guilty of robbery in the second degree was and is contrary to the law and the evidence. In support of defendant's contention, he insists that whoever committed the robbery in question committed the crime of first degree robbery, and that there is no dispute that the crime was committed by two men, both of whom were armed with shotguns, which are dangerous and dead-

ly weapons, and that if the defendant participated therein he is guilty of robbery in the first degree and not in the second degree. That therefore there was no evidence to warrant the court in instructing the jury that they might find the defendant guilty of robbery in the second degree.

[1-2] It is conceded that the evidence introduced by and on behalf of the prosecution tended to prove only the commission of the crime of robbery in the first degree. One of the instructions in question is given in the language of the statute defining the crime of robbery and the degrees thereof. The other instruction requires the jury, in the event that they find the defendant guilty, to find the degree of the crime of which he is guilty.

The appellant cites the case of *People v. Kelley*, 24 Cal. App. 54, 140 P. 302, 304, as supporting his contention. In that case, the defendant was charged with the crime of murder, and, upon trial, was convicted of the crime of involuntary manslaughter. The appellate court found, after an exhaustive review of the evidence: "That there is absolutely no element of involuntary manslaughter disclosed by the evidence in this case. In other words, there is not revealed by the evidence any fact or circumstance even remotely tending to establish against the defendant a case of involuntary manslaughter." Nevertheless the trial court in that case instructed the jury upon the question of involuntary manslaughter, of which crime the defendant was convicted. The court held that the giving of the instruction on involuntary manslaughter was not only foreign to the theory upon which the cause was tried, but wholly inapplicable to the evidence or any fact or circumstance developed thereby.

In the instant case, the information charged the defendant with having accomplished the robbery of his victim "by then and there putting the said E. G. Abraham in fear." Whether or not the element of fear entered into the transaction was a question for the jury to determine.

The case of *People v. DeVerre*, 68 Cal. App. 742, 230 P. 197, was a case in many respects similar to the instant case. The trial court in that case gave the Code sections defining robbery in the first and second degrees; also submitted to the jury three forms of verdict, one finding the defendant guilty of robbery in the first degree, one finding him guilty of robbery in the second degree, and the other finding him not guilty. The jury found the defendant guilty of robbery in the second degree. It was urged by the appellant in that case that the instruction was misleading, and that the defendant was either guilty of robbery in the first degree or not guilty; and that the jury would not have returned the verdict they did unless they had been misled by the instructions given by the court. The

appellate court held that the fact that the jurors brought in a verdict lesser in degree than they might have done, and that the case would have sustained a verdict of guilty of robbery in a higher degree, affords no grounds for reversal, and does not authorize this court in concluding that the jury was misled by the instructions of the court. The fact that the jury found the defendant guilty in a lesser degree than the evidence may have warranted, being to his advantage, he is in no position to complain. *People v. North*, 81 Cal. App. 113, 252 P. 1063; *People v. Washburn*, 54 Cal. App. 124, 201 P. 335; *People v. Freithofer*, 103 Cal. App. 165, 284 P. 484. We see no prejudicial error in giving the instruction in question.

[3] It is next contended that the court erred in ordering certain answers, given by the witnesses Wilson and Gilman on cross-examination, stricken from the record. From an examination of the transcript of the testimony of both these witnesses, we are of the opinion that in each instance, when the court struck out certain answers of the witnesses given, the question had no relation or connection with the matters covered in the direct examination of the witnesses, and was therefore properly stricken by the court.

[4] It is next urged that the court erred in denying appellant's motion for a new trial. It appears from certain affidavits filed in support of the motion for a new trial that one Lester Norman, one of the witnesses for the people, five days after the trial of the case, stated to the defendant that he could not recognize the defendant as being the man who participated in the robbery, and further stated that the man who held him up, and whom he had previously attempted to identify as the defendant, was a much larger man than the defendant. This affidavit is corroborated by the affidavits of two persons, who state that they overheard Norman make the admissions in question. The purported evidence presented to the trial court was of an impeaching character, tending to impeach the testimony of Norman.

In the case of *People v. Tallmadge*, 114 Cal. 427, 46 P. 282, 283, quoting from *People v. McGuire*, 2 Hun (N. Y.) 269, the court said: "The affidavit of such a person is not entitled to so much weight as to justify the conclusion that the evidence given by him, and which the jury may have regarded as credible and reliable, was corruptly and willfully false. The conclusion of the jury would rather warrant the presumption that his testimony was truthful, and his affidavit false."

The order refusing to grant a motion for a new trial on the ground of newly discovered evidence is conclusive on the appellate court, in the absence of a clear showing of abuse of discretion. See *People v. Byrne*, 160 Cal. 217, 116 P. 521; *People v. Garvey*, 93 Cal.

App. 497, 269 P. 702; *People v. Tallmadge*, supra; *People v. Hewitt*, 101 Cal. App. 306, 281 P. 666. In our opinion, the trial court was fully justified in denying defendant's motion for a new trial.

[5-6] It is also urged that the trial judge erred in taking an active part in the examination of witnesses, and that in doing so he gave the jury the impression that the court believed in the guilt of the defendant. No objection was made at the time to the court asking questions of the witnesses. No exceptions were taken to the conduct of the court in this respect, and no opportunity given to the court to correct any error, if any there was committed at said time. It is true that the court asked a number of questions of witnesses for the purpose of illustrating and making clear any point that might otherwise have remained obscure. This was held to be proper in the case of *People v. Reid*, 72 Cal. App. 611, 237 P. 824.

[7] Appellant urges other matters as constituting prejudicial and reversible error. The assignments thereof are not accompanied by substantial argument or any citation of authorities. For this reason, the appellate court will decline the burden of assuming further research. See *People v. Zarate*, 54 Cal. App. 372, 201 P. 955; *People v. Titus*, 85 Cal. App. 413, 259 P. 465; *People v. Schlosser*, 99 Cal. App. 593, 278 P. 898.

Taking the record as a whole, we find that there was ample evidence to sustain the verdict and judgment, and that the same is free from prejudicial error.

Judgment and order affirmed.

We concur: BARNARD, P. J.; MARKS, J.

LYNCH v. BOSCH.*
Civ. 7775.

District Court of Appeal, First District, Division 1, California.

Nov. 4, 1931.

Rehearing Granted Dec. 4, 1931.

1. Joint adventures ⇨5(2).

In action on contract involving joint adventure in furring and lathing house, conflicting evidence held to support finding for defendant.

2. Appeal and error ⇨204(1).

In absence of objection to introduction of evidence, appellant cannot complain.

Appeal from Superior Court, City and County of San Francisco; John L. Fleming, Judge.

Action by Hubert T. Lynch against Hermann Bosch. From a judgment for plaintiff for smaller amount than sought, plaintiff appeals.

Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

Coffey & Coffey and John O'Gara, all of San Francisco, for respondent.

TYLER, P. J.

Action to recover profits earned in a joint venture.

Defendant had procured a contract to furnish the materials and perform the labor necessary for the work of furring, lathing, and plastering a certain thirteen-story steel and concrete structure. The amount to be paid defendant for the entire work, unsegregated, was the lump sum of \$43,200, subject to increase or diminution in case of changes in the plans and specifications. After obtaining said contract defendant invited plaintiff, with whom he had former transactions, to join him as a partner in the performance of the part of the contract relating to the furring and lathing, which excluded the plastering. Plaintiff accepted the offer and this portion of the contract was performed by them. The agreement between the parties was not reduced to writing, but no total or fixed sum was ever agreed upon for the work. After the contract was performed a dispute arose between them as to the terms of the agreement relative to their joint adventure. Being unable to adjust their differences, the present action followed.

It was the claim of plaintiff at the trial that defendant had agreed they should be paid a definite sum, to wit, 85 cents a square yard for all furring and lathing and divide the profits, if any, arising from this arrangement equally. Defendant, on the other hand, claimed that no specified price was fixed for yardage, but that on the contrary the parties were merely substituted in place of defendant in that portion of the contract he had procured relating to the furring and lathing and excluding the plastering, and that, this being so, plaintiff was entitled to his share of any reasonable profit that might result from the joint venture, and was liable to share any loss that might be suffered.

Plaintiff and defendant were the only witnesses as to the terms of their agreement. Their testimony was in sharp conflict. The trial court found in favor of the claim of defendant. It further found the amount of profit realized from the joint venture according to defendant's claim, and rendered judgment in favor of plaintiff for a small unpaid balance. Motion for a new trial was made before a judge who had not presided at the

trial. The motion was denied. This is an appeal by plaintiff from the judgment.

[1, 2] It is appellant's claim that the judgment is not supported by the evidence. There is no merit in the appeal. The case is one which presents a conflict in the evidence. No useful purpose would be accomplished by a review of the same. Suffice it to say that the record presents ample evidence to support the finding of the trial court. Appellant further claims that the court erred in the admission of certain evidence. While we are of the opinion the evidence was properly received, no objection was made to its introduction. Under such circumstances appellant cannot here complain.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

118 Cal.App. 131

WAKE DEVELOPMENT CO. v. O'LEARY.

Civ. 8005.

District Court of Appeal, First District, Division 2, California.

Nov. 3, 1931.

Rehearing Denied Dec. 3, 1931. Hearing Denied by Supreme Court Dec. 31, 1931.

1. Payment ⇨89(1).

Action *held* action for money involuntarily paid, not damages for maliciously levying execution.

Complaint alleged in part that plaintiff, as owner, had contracted to sell part of land on which defendant, as third person's judgment creditor, levied execution; that plaintiff immediately brought suit against defendant and sheriff to enjoin execution sale and quiet title, and finally prevailed therein; that in the meantime plaintiff, to prevent purchaser from carrying out threat to cancel contract, was compelled to pay specified amount to defendant to obtain release from levy; and that defendant had caused execution to be levied with intent to abuse process of court and to cloud plaintiff's title.

2. Payment ⇨87(1).

Money paid under compulsion or coercion, rendering payment involuntary, may be recovered.

3. Payment ⇨87(2).

To constitute "compulsion" or "coercion" rendering payment involuntary, there must be some actual or threatened exercise of power possessed, or supposedly possessed, by payee over payer's person or property, from

which payer has no means of immediate relief except by advancing money.

[Ed. Note.—For other definitions of "Coerce; Coercion" and "Compulsion," see Words and Phrases.]

4. Judgment ⇨725(4).

In landowner's action for money involuntarily paid to release levy of execution, ownership of land *held* res judicata because of prior decree enjoining execution sale.

5. Payment ⇨87(3).

Landowner's payment to secure release from wrongful levy of execution, thereby preventing threatened loss of sale of land, *held* involuntary.

6. Appeal and error ⇨1071(6).

Where evidence supported material findings and judgment, judgment should not be disturbed because of absence of findings on immaterial issues.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Wake Development Company against Vera F. O'Leary. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ingall W. Bull and Harold Larson, both of Los Angeles, for appellant.

Charles C. Montgomery, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought this action to recover the sum of \$3,000 alleged to have been paid to defendant under compulsion. From a judgment in favor of plaintiff, defendant appeals.

The plaintiff corporation was the owner of a certain tract of land and had negotiated an advantageous sale of a portion of the tract. While the purchase money was in escrow, defendant levied execution upon the entire tract based upon a judgment against one J. M. Danziger. The purchaser threatened to cancel the contract unless the property was released from the levy. Plaintiff immediately brought a suit against defendant and the sheriff making the levy, seeking to enjoin the sale under execution and to quiet title to said property. While said suit was pending, plaintiff, in order to prevent the loss of the sale to the purchaser, was compelled to pay to defendant the sum of \$3,000 to obtain a partial release. Subsequently the suit was tried, and plaintiff obtained the injunction and decree quieting its title to the property. Among other things, the court found in that suit that plaintiff was the owner of the premises and that defendant's judgment debtor, J. M.

Danziger, did not at any time have any right, title, or interest in the premises. Plaintiff subsequently brought this action seeking to recover the \$3,000 paid to the defendant. The complaint alleged all of the foregoing facts. It further alleged that defendant caused said execution to be levied with full knowledge of the facts and with intent to abuse the process of the court and to cloud plaintiff's title. Then followed allegations that the exaction of the \$3,000 "was without right on the part of defendant and was obtained by fraud, undue influence and oppression and with malice." The trial court's findings were in favor of plaintiff and included a finding "that the exaction of the said sum of three thousand dollars was without right on the part of the defendant and that plaintiff paid same under compulsion and to save financial loss to plaintiff." No findings were made with respect to the allegations of fraud, undue influence, or malice. Upon these findings judgment was entered in favor of plaintiff for the sum of \$3,000 together with interest.

[1-3] On this appeal it is contended that the evidence is insufficient to support the judgment and that the trial court failed to find on material issues. In support of these contentions appellant states that this action is one to recover damages for an alleged malicious levy of execution and from this premise appellant concludes that it was necessary for respondent to allege and prove both malice and want of probable cause, citing *Vesper v. Crane Co.*, 165 Cal. 36, 130 P. 876, L. R. A. 1915A, 541. We are satisfied that appellant's argument is based upon a false premise and that the authority cited is not applicable. This is not an action to recover damages for a malicious levy of execution, but is an action to recover money which respondent paid to appellant under compulsion. It is well settled that, where payment is made under circumstances which amount to compulsion or coercion sufficient to render the payment involuntary, recovery of the money may be had. *McTigue v. Arctic Ice Cream S. Co.*, 20 Cal. App. 708, 130 P. 165; *Rowland v. Watson*, 4 Cal. App. 476, 88 P. 495. See, also, discussion in *Burke v. Gould*, 105 Cal. 277, 38 P. 733, *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 P. 938, and *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176. As was said in the last-named case, at page 272 of the opinion: "What shall constitute the compulsion or coercion which the law will recognize as sufficient to render payments involuntary, may often be a question of difficulty. It may be said in general that there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." In *Burke v.*

Gould, supra, at page 281 of 105 Cal., 38 P. 733, 734, the court said: "The doctrine is an equitable one, and is founded upon the theory of the moral duress not justified by law. 'When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration.'" In *Standard Box Co. v. Mutual Biscuit Co.*, supra, the court said, on page 761 of 10 Cal. App., 103 P. 938, 944, after discussing numerous authorities: "Conceding that the courts recognize what may be termed moral duress under some circumstances, there is always some element of illegality in the demand complained of, some denial of a right, some unfounded claim, some extortion * * * 'as a condition to the exercise by the party of a legal right.'"

[4-6] In the present case it is conceded that there was sufficient evidence to sustain the findings that respondent was the owner of the property and that appellant's judgment debtor had no interest therein. In fact these issues were res judicata by reason of the findings and decree in the injunction suit. Respondent had a right to sell its property without being molested with the wrongful levy of execution based upon appellant's unfounded claim that her judgment debtor had an interest in the property. That right was denied to respondent by the act of appellant. Owing to the threatened loss of the sale and the delay necessarily incident to the prosecution of the injunction suit, respondent's only means of avoiding serious loss was by payment of the money. Under these circumstances the payment may not be considered voluntary (*McTigue v. Arctic Ice Cream S. Co.*, supra), and the trial court properly found that "the exaction of the three thousand dollars from the plaintiff was without right on the part of the defendant and that plaintiff paid the same under compulsion in order to save financial loss to plaintiff." In our opinion the evidence was sufficient to support all the material findings and the judgment. It therefore follows that the judgment should not be disturbed by reason of the failure of the trial court to make findings upon immaterial issues which would not affect the judgment. 2 Cal. Jur. 1033.

Appellant further contends that the trial court erred in denying the motion for new trial. That motion was based upon the alleged insufficiency of the evidence and upon alleged newly discovered evidence. We find no merit in appellant's contention. The sufficiency of the evidence had already been considered. Assuming that the newly discovered evidence set forth in appellant's affidavit was competent, it related solely to the issue of ownership of the property involved. That is-

sue was res judicata by reason of the findings and decree in the injunction suit.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

118 Cal.App. 76

PLUM v. FORGAY LUMBER CO.

Civ. 4397.

District Court of Appeal, Third District, California.

Oct. 30, 1931.

Rehearing Denied Nov. 28, 1931.

1. Venue $\Leftrightarrow$ 52(1).

In action for malicious prosecution and false arrest, record *held* not to show abuse of discretion in transferring cause for convenience of witnesses (Code Civ. Proc. § 397, subd. 3).

2. Venue $\Leftrightarrow$ 8.

Statute requiring trial in county where "injury" occurs *held* limited to physical or bodily injury (Code Civ. Proc. § 395).

Code Civ. Proc. § 395, provides that cause shall be tried in the county "where the injury occurs," if it be "an action for injury to person, or property."

3. Venue $\Leftrightarrow$ 8.

That plaintiff suing for malicious prosecution and false arrest was arrested where he sued *held* not to entitle him to retain action there, no physical or personal injury being alleged (Code Civ. Proc. § 395).

Complaint merely charged that plaintiff was injured socially and financially, and suffered great loss and injury to his business, good name, credit, and reputation.

4. Appeal and error $\Leftrightarrow$ 965.

Venue $\Leftrightarrow$ 52(1).

Order changing venue for convenience of witnesses is largely discretionary and will be disturbed only for clear abuse of discretion (Code Civ. Proc. § 397, subd. 3).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by C. D. Plum against the Forgay Lumber Company. From an order granting defendant's motion for change of venue, plaintiff appeals.

Affirmed.

See also (Cal. App.) 4 P.(2d) 805.

C. D. Plum and John V. Filippini, both of San Francisco, for appellant.

M. C. Kerr, of Quincy, and Young, Hudson & Rabinowitz, of San Francisco, for respondent.

R. L. THOMPSON, J.

This is an appeal from an order granting defendant's motion for a change of venue from Sacramento county to Plumas county. The motion was made pursuant to subdivision 3 of section 397 of the Code of Civil Procedure, on the ground of convenience of witnesses.

The plaintiff commenced suit for damages in Sacramento county for malicious prosecution and false arrest. It is alleged the defendant wrongfully procured his arrest on a charge of grand theft. The criminal proceeding which was instituted in Plumas county was subsequently dismissed. It is alleged the plaintiff was injured thereby, "socially and financially, and suffered great loss and injury to his business, his good name, his credit and his reputation." The defendant filed its answer, together with an application for a change of the place of trial to Plumas county, based upon the ground of convenience of witnesses. Affidavits in support of this motion were filed. The plaintiff filed a counter-motion to retain the cause for trial in Sacramento county for the convenience of witnesses. These motions were heard together. The defendant's motion for a change of venue was granted and the cause was transferred to Plumas county. From this order the plaintiff has appealed.

[1] An abuse of discretion on the part of the trial judge in transferring this cause to Plumas county does not appear from the record. Plumas county is the place where the criminal action was instituted which is the foundation of the present suit for malicious prosecution and false arrest. The defendant's affidavits for change of venue aver the materiality and necessity of the presence of the officers of court and a number of other witnesses of Plumas county who were involved in the criminal proceeding. It is alleged the defendant relied upon the advice of the district attorney of Plumas county, to whom the facts involved in the criminal charge were related; that this officer asserted there was probable cause to believe the plaintiff was guilty of grand theft. It also appears the records of the justice's court in that proceeding are material evidence to be adduced in the present action.

There is a conflict in the affidavits of the respective parties regarding the convenience of witnesses. The plaintiff sets out the names of a large number of witnesses and the substance of their evidence upon which he relies. The identity of these witnesses and the substance of their evidence is identical with the showing made by the plaintiff in

his application to retain in Sacramento county for trial a similar suit for malicious prosecution against this same defendant and one Newhart, 4 P.(2d) 805, in which an opinion of this court affirming the order of the trial court granting the change of venue was this day filed. In this case the plaintiff likewise relies upon the evidence of eight witnesses to establish his former good reputation for honesty. No facts are related qualifying them as character witnesses. The affidavits are defective in that regard. The plaintiff further avers that a trial of the cause in Plumas county will inconvenience one of his witnesses who resides in Stockton, and several who live in San Francisco. All of these witnesses reside beyond the jurisdiction of the Sacramento court to compel their attendance by legal process. It does not appear they consent to voluntarily appear in that court or that they could not as conveniently go to Plumas county. So far as the affidavits are concerned, it may be necessary to take the depositions of all these nonresident witnesses. The plaintiff's showing is also defective in that regard.

It is undoubtedly true the trial of this case in Plumas county will convenience a large number of necessary witnesses.

Moreover, it appears this same suit for malicious prosecution against the defendant was previously instituted in Sacramento county. A similar motion for change of the venue of that case was granted to Plumas county. This plaintiff thereafter dismissed that action and again commenced this suit in Sacramento county upon the identical grounds. This procedure seems like trifling with the court. Indeed, it has been held the plaintiff is estopped from maintaining another action for the same cause, after the original case was dismissed in the county to which it had been previously transferred. 25 Cal. Jur. 914, § 45; Karst v. Seller, 45 Cal. App. 623, 188 P. 298; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023.

[2, 3] The appellant contends that section 395 of the Code of Civil Procedure, which provides that the cause shall be tried "in the county where the injury occurs," if it be "an action for injury to person, or property," entitles him to retain the suit for trial in Sacramento because he was arrested in that county for the offense which furnishes the foundation for the action for malicious prosecution. This is not true. 16 Cal. Jur. 744, § 12.

The injury to person or property above referred to is limited to the infliction of physical or bodily injury and does not include mere injury to reputation, business, or personal feelings. 16 Cal. Jur. 744, § 12; Monk v. Ehret, 192 Cal. 186, 219 P. 452; Coley v. Hecker, 206 Cal. 22, 27, 272 P. 1045; Mason

v. Buck, 99 Cal. App. 219, 278 P. 461. No physical or personal injury is alleged to have been inflicted in the present action. The complaint merely charges that the plaintiff was injured socially and financially, and suffered great loss and injury to his business, his good name, his credit and his reputation. This does not entitle him to retain the action for trial in the county where his arrest occurred.

From the record in this case it appears the trial court was justified in granting the defendant's motion for a change of the place of trial to Plumas county. At least, no abuse of discretion in so doing appears.

[4] The authorities are uniform to the effect that the determination of a motion for a change of the place of trial of a cause upon the ground of convenience of witnesses rests largely in the discretion of the court to which the motion is addressed, and that such an order will not be disturbed except for a clear abuse of discretion. Scott v. Stuart, 190 Cal. 526, 213 P. 947; Werner v. Bryden, 99 Cal. App. 398, 278 P. 869; Kenyon v. Hartford Acc. & Indem. Co., 86 Cal. App. 266, 260 P. 954; Wrin v. Ohlandt (Cal. Sup.) 1 P.(2d) 991; Topham v. Huntington (Cal. App.) 293 P. 678.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 73

PLUM v. NEWHART et al.

Civ. 4398.

District Court of Appeal, Third District,
California.

Oct. 30, 1931.

Rehearing Denied Nov. 28, 1931.

1. Venue §52(1).

An action for malicious prosecution, record held not to show abuse of discretion in changing venue for convenience of witnesses (Code Civ. Proc. § 397, subd. 3).

2. Venue §8.

Statute requiring trial in county where "injury" occurs held limited to physical or bodily injury (Code Civ. Proc. § 395).

Code Civ. Proc. § 395, provides that cause shall be tried in county "where the injury occurs," if it be "an action for injury to person, or property."

3. Venue §8.

That plaintiff suing for malicious prosecution was arrested in county where he sued held not to entitle him to retain action therein, where no physical or personal injury was alleged (Code Civ. Proc. § 395).

Complaint merely charged that plaintiff was injured socially and financially and suffered great loss and injury to his business, good name, credit, and reputation.

4. Appeal and error ⇨965.

Venue ⇨52(1).

Order changing venue for convenience of witnesses is largely discretionary and will be disturbed only for clear abuse of discretion (Code Civ. Proc. § 397, subd. 3).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by C. D. Plum against Albert P. Newhart and another. From an order granting defendants' motion for change of venue, plaintiff appeals.

Affirmed.

See also (Cal. App.) 4 P.(2d) 804.

C. D. Plum, of San Francisco (John V. Filippini, of San Francisco, of counsel), for appellant.

Young, Hudson & Rabinowitz, of San Francisco, and M. C. Kerr, of Quincy, for respondents.

R. L. THOMPSON, J.

This is an appeal from an order granting defendants' motion for a change of the place of trial for the convenience of witnesses pursuant to subdivision 3 of section 397 of the Code of Civil Procedure.

The plaintiff commenced this suit in Sacramento county, for damages for malicious prosecution. The defendants filed their answer together with an application for a change of venue to Plumas county for the convenience of witnesses. This proceeding was in due form. The plaintiff opposed this motion for a change of venue, and at the same time filed a countermotion to retain the cause for trial in Sacramento county for the convenience of his witnesses. These motions were heard together. The defendants' motion for a change of venue to Plumas county was granted. From this order the plaintiff has appealed.

[1] It does not appear there was an abuse of discretion on the part of the trial judge in granting this motion. This suit for malicious prosecution is founded on a charge of grand theft, of which crime the plaintiff was convicted in Plumas county in 1928. The judgment in that case was affirmed. *People v. Plum*, 97 Cal. App. 253, 275 P. 518. The affidavits of the defendants which were presented on this motion for a change of venue show the necessity and materiality of the presence of several officers of the justice's court where the criminal action was instituted, and of several officers of the superior court where the cause was tried in Plumas

county, together with a number of other Plumas county witnesses. The affidavits also show the necessity for the presenting of the records of both of these courts upon the defense to this action. It is also alleged the defendants fully and fairly stated to the district attorney of Plumas county the facts upon which he instructed them there was probable cause to believe this plaintiff was guilty of the charge, and that these defendants relied upon his advice in that regard. The trial of this cause in Plumas county will undoubtedly convenience a large number of witnesses.

From the plaintiff's affidavits in the present proceeding, it appears a number of his witnesses will be inconvenienced by retaining the trial in Sacramento. It is, however, alleged that eight witnesses who live in Sacramento will testify the previous reputation of the plaintiff in Sacramento for honesty was good, and that he was irreparably damaged by the wrongful prosecution and his conviction of grand theft. But it is not alleged these witnesses knew the plaintiff or his reputation in that community at the time of the alleged prosecution. No facts qualifying them as character witnesses are alleged. The affidavit is defective in this regard. The plaintiff further avers that a trial of the cause in Plumas county will inconvenience one of his witnesses who resides in Stockton, and several who live at San Francisco. All of these witnesses reside beyond the jurisdiction of the Sacramento court to compel their attendance by means of summons. It is not alleged that any of them will voluntarily attend court. So far as the affidavit is concerned, it may still be necessary to take the depositions of these witnesses. There is some conflict between the allegations of the respective parties on this proceeding.

[2, 3] The appellant contends that section 395 of the Code of Civil Procedure, which provides that the cause shall be tried "in the county where the injury occurs," if it be "an action for injury to person, or property," entitles him to retain the suit for trial in Sacramento because he was arrested in that county for the offense which furnishes the foundation for the action for malicious prosecution. This is not true. 16 Cal. Jur. 744, § 12.

The injury to person or property above referred to is limited to the infliction of physical or bodily injury and does not include mere injury to reputation, business, or personal feelings. 16 Cal. Jur. 744, § 12; *Monk v. Ehret*, 192 Cal. 186, 219 P. 452; *Coley v. Hecker*, 206 Cal. 22, 27, 272 P. 1045; *Mason v. Buck*, 99 Cal. App. 219, 278 P. 461. No physical or personal injury is alleged to have been inflicted in the present action. The complaint merely charges that the plaintiff was injured socially and financially, and suffered

great loss and injury to his business, his good name, his credit and his reputation. This does not entitle him to retain the action for trial in the county where his arrest occurred.

It appears from the entire record the trial court was abundantly warranted in granting the defendants' motion for a change of venue. At least, it does not appear there was an abuse of discretion on the part of the trial judge in granting the motion.

[4] The authorities are uniform to the effect that the determination of a motion for the change of place of trial of a cause upon the ground of convenience of witnesses rests largely in the discretion of the court to which the motion is addressed, and that such an order will not be disturbed except for a clear abuse of discretion. *Scott v. Stuart*, 190 Cal. 526, 213 P. 947; *Werner v. Bryden*, 99 Cal. App. 398, 278 P. 869; *Kenyon v. Hartford Acc. & Indem. Co.*, 86 Cal. App. 266, 260 P. 954; *Wrin v. Ohlandt* (Cal. Sup.) 1 P. (2d) 991; *Topham v. Huntington* (Cal. App.) 293 P. 678.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 101

BAND v. WILSON et al.
Civ. 6951.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1931.

As Modified Nov. 19, 1931.

1. Brokers ⇐23.

Customer's order for investment broker to sell or exchange for specified stock customer's bonds did not authorize broker's pledging such bonds and appropriating proceeds.

2. Brokers ⇐38(4).

Evidence justified owner's recovery of face value of bonds converted by investment broker, to which amount with interest owner was prima facie entitled.

The evidence disclosed that the owner had paid within a few dollars of the par value of the bonds when he purchased them; that they had never been in default with the broker at any time; that the broker had offered the owner in exchange for his bonds stock valued at 60 per cent. of their face value, for which amount the owner had agreed to sell them; and that in addition to the 60 per cent. the parties had in mind the accrued interest.

3. Appeal and error ⇐1033(2).

Converter of bonds cannot complain that owner prayed for less than amount of their face value to which he was entitled.

4. Appeal and error ⇐110.

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by Charles E. Band against James R. Wilson and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Roy S. Gangestad, of Los Angeles, for appellant Wilson.

Harold J. Hunter, of Los Angeles, for appellant New York Indemnity Co.

Goudge, Robinson & Hughes and Ernest C. Carman, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The appellants prosecute this appeal from a judgment against them and in favor of the respondent in the sum of \$4,516.65 and costs.

[1] The appellant James R. Wilson was an investment broker, and the appellant New York Indemnity Company gave bond for him as such broker. In June, 1927, the respondent delivered to Wilson Farmer River Corporation 7 per cent. first mortgage bonds of the par value of \$5,000 and Columbia Gorge Hotel first mortgage bonds of the face value of \$2,500, with instructions to sell at 75 per cent. of their face value, which instructions were subsequently modified to the extent of authorizing their sale at 60 per cent. of the face value, or their exchange for capital stock of the Garner Royalties, Inc., of the par value of \$4,500. After some considerable delay, Wilson informed respondent that the reason for the delay was that the latter had not formally executed "sell and buy orders," and that if this were done the transaction could be shortly closed. This was on November 7, and after Wilson had made an inspection in Washington of the properties securing the bonds. The selling orders authorized sale of the bonds at 60 per cent. of their face value. On December 12, 1927, Wilson wrote the respondent as follows: "Enclosed you will find my receipt covering \$5000 par value Riverview Farms Corp. 1st of 1935 and \$2500 par value Columbia Gorge Hotel 1st 5 of 1942 which I have taken in trade at the value of \$4516.65 and for which I agree to give you 452 shares of the Garner Royalties, Inc. capital stock at the price of \$10.00 per share." Respondent promptly refused this proposal, both orally

and in writing. Shortly thereafter, Wilson pledged plaintiff's bonds, and appropriated the proceeds to his own use.

It is now urged by the appellant Wilson that there was no conversion of the bonds, for the reason that the written order to sell expressly provided that the bonds might be pledged by him. This contention is the veriest pettifoggery, and its inclusion in appellant's brief merits the stern condemnation of this court. The language relied upon relates to marginal transactions or to pledges of securities to cover the account of the client, and yet there is not one scintilla of evidence—no, not even a suggestion—that respondent had purchased on margin or was indebted to Wilson for one cent. In fact the appellant testified that he had no express bargain with Mr. Band by which he might pledge the bonds.

This appellant also says that even though the evidence is sufficient to support a certain finding which will next be considered, yet the findings cannot support the judgment, for the reason that the court found that "No evidence was offered upon which the court can find any market value except the evidence of dealings between the plaintiff and defendant Wilson with respect thereto." Here again, possibly, counsel has earned the censure of the court. If his brief is to be the sole guide, we cannot understand that his act was other than deliberate and done with intent to mislead us to a wholly erroneous conclusion. Such conduct, if we are correct in our conclusions, is entirely inexcusable and warrants the conclusion that counsel is altogether lacking in appreciation of his duty as a lawyer and an officer of the court. The thing we thus censure is this: The finding correctly quoted reads: "No evidence was offered upon which the court can find any market value or value other than the face value of said bonds of the plaintiff (describing them) except the evidence of dealings of the plaintiff and the defendant Wilson in respect thereto." When properly quoted the finding demonstrates on its face that the argument of appellant is without merit.

[2-4] The last contention, and the only one in which the appellant New York Indemnity Company joins, is that there is no evidence to support the finding of the court which we have already quoted, or to phrase the argument as counsel for the New York Indemnity Company does in one instance, "that the court employed an erroneous measure of damage." The face value of the bonds, as we have noted, was \$7,500. The testimony established that respondent had paid within a few dollars of their par value when he purchased them, and that they had never been "in default with me at all at any time." Then we make mention

of the letter of December 12th where Wilson agreed to deliver 452 shares of the Garner Royalties, Inc., of the par value of \$4,520, and wherein he said that he had taken them in trade "at the value of \$4516.65." The agreement was unsatisfactory to respondent because it concluded with the statement that Wilson was "to deliver this stock on or before six months from January 1, 1928." Also it is to be observed, in connection with respondent's testimony, that Wilson said 75 per cent. was a little high, and therefore when the "sell and buy order" was signed "it was definitely settled then they would work on a 60% basis." And Wilson's figures show that in addition to the 60 per cent., the parties had in mind the accrued interest. Appellants assert that Wilson testified to the value of the securities. We have carefully scanned the testimony of this witness, but we find nothing which we can dignify by the designation of a substantial opinion. He said the cash offer he received for the Columbia Gorge bonds was 40 per cent., and then he rambled along with a story about some of the holdings of the Riverview Corporation, but he failed to demonstrate that he knew anything either of the book or their market value. As evidence, it is not sufficient to establish anything.

Under this state of the testimony, and the fact that the complaint prayed for the sum of \$4,516.65 only, we entertain no doubt that the trial court adopted the correct solution. In *Revert v. Hesse*, 184 Cal. 295, 193 P. 943, 947, the Supreme Court said: "With regard to the question of damages, the general rule is that where a note or other money securities have been converted, 'their owner is, prima facie, entitled to recover their face value with interest.' Sutherland on Damages (4th Ed.) vol. 4, § 1132. Where the converted debt was held by way of pledge, the amount due the pledgee on the principal debt must be deducted from the value of the debt converted (*Gay v. Moss*, 34 Cal. 125), and this was done by the trial court in the instant case." To the same effect, we make reference to *Thompson v. Metropolitan Bldg. Co.*, 95 Wash. 546, 164 P. 222; *Peek v. Steinberg*, 163 Cal. 127, 124 P. 834, and *Pierce v. National Bank of Commerce (C. C. A.)* 13 F.(2d) 40. And of course appellants cannot complain of the fact that plaintiff did not pray for the full amount of the face of the bonds. Appellants also attempt to appeal from an order denying their motion for a new trial, but such an order is not appealable.

Judgment affirmed; appeal from order dismissed.

We concur: WORKS, P. J.; CRAIG, J.

118 Cal.App. 165

PEOPLE v. SAMENIEGO et al. *

Cr. 2128.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1931.

Rehearing Denied Nov. 20, 1931. Hearing Denied by Supreme Court Dec. 3, 1931.

1. Homicide $\Rightarrow$ 228(1).

In prosecution for murder committed during perpetration of robbery, corpus delicti consisted of death and criminal agency; existence of preconceived plan or conspiracy of defendant to commit robbery not being essential.

2. Homicide $\Rightarrow$ 228(1).

Identity of perpetrator of crime is not element of corpus delicti of felonious homicide.

3. Criminal law $\Rightarrow$ 531(3).

Evidence in homicide prosecution *held* to establish that confession was voluntary.

Evidence disclosed that in first conversation with officers, one of the defendants asked whether a charge would be filed against him if he told what he knew, and the officer replied that a charge would be filed if defendant was implicated but would not be filed if he was not implicated, and before making second confession, defendant stated that after thinking the matter over he thought it was best to tell the truth, thereby indicating that the declaration was voluntary.

4. Criminal law $\Rightarrow$ 517(4).

Evidence in prosecution for homicide perpetrated during robbery *held* sufficient to show that offense was murder of first degree, as regards admission of confession.

Evidence disclosed that defendants approached automobile in which deceased was sitting; one went to one side and the other went to the opposite side of the automobile with a drawn revolver which he pointed at deceased's heart and fired fatal shot; and that there was total absence of provocation, justification, mitigation, or excuse for the shooting, thereby making sufficient prima facie proof that the killing was willful, deliberate, and premeditated, and that murder was of the first and not of the second degree.

5. Criminal law $\Rightarrow$ 517(4).

Proof of corpus delicti of crime beyond reasonable doubt is not prerequisite to reception in evidence of confession, prima facie proof being sufficient.

6. Homicide $\Rightarrow$ 253(6).

Evidence in prosecution for murder perpetrated during robbery *held* sufficient to establish common design and conspiracy, thus supporting verdict first degree murder as to defendant not firing fatal shot.

7. Homicide $\Rightarrow$ 234(7).

Existence of conspiracy may be proved wholly by circumstantial evidence.

8. Homicide $\Rightarrow$ 308(5).

Where defendants were either guilty of first degree murder or not guilty, refusing instruction on second degree murder *held* not error.

9. Criminal law $\Rightarrow$ 53.

Statute regarding defense of voluntary intoxication *held* not limited to intoxication from use of liquor, but includes all forms of voluntary intoxication (Pen. Code, § 22).

Pen. Code, § 22, provides that no act is less criminal by reason of the perpetrator having been in a state of voluntary intoxication, but that evidence of intoxication may be considered by the jury in determining the purpose, motive, or intent with which he committed the crime.

10. Homicide $\Rightarrow$ 294(1/2).

Instruction in homicide case that one acting without being conscious thereof was not criminally responsible, and that words spoken while unconscious could not be considered, *held* properly refused as not based on evidence (Pen. Code, § 26).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Jacques Samenigo and Wilbur L. Mossberg were convicted of first degree murder, and they appeal.

Affirmed.

W. E. Lady, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and John Barnes, Deputy Dist. Atty., of Los Angeles, for the People.

FRICKE, Justice pro tem.

Appellants were convicted of murder of the first degree, with the penalty of life imprisonment, and appeal from the order denying their motion for a new trial and from the judgment.

On October 23, 1928, at about midnight the deceased, Ralph Trump, stopped his automobile across the street from the residence of Miss Marjorie Ullman, who was riding beside

him in the front seat of the vehicle. They had conversed for a few minutes when two young men approached on foot from the direction in which the car was faced. One of these men ran to the right front fender and stood there. The other paused a moment in front of the automobile with a pistol in his hand and then ran around to the driver's seat and, without a word being spoken and without any motion on the part of the occupants of the car, shot the deceased through the heart, causing almost immediate death. The defendants were arrested August 2, 1930, in connection with the investigation of a series of robberies and, in the course of the questioning, appellant Sameniego stated that Mossberg had killed a man two years prior. This led the officers to a further inquiry which disclosed that the killing was the one upon which this prosecution is based. Sameniego then went to the scene of the murder with the officers and there gave a more detailed statement and explanation of the circumstances. In his confessions Sameniego stated in substance that he and Mossberg had agreed to "hold up" a "petting party"; that they drove past the automobile occupied by the deceased and his companion, parked the car in which they were riding, and walked back to rob the occupants of the vehicle they had just passed; that he (Sameniego) went to the right side of the automobile and Mossberg went to the driver's side, armed with a pistol, and without a word being spoken, and without any action on the part of the occupants of the automobile, Mossberg shot the deceased; and that appellants then ran away. Mossberg in his first confession told a similar story, but stated that Sameniego fired the shot. The next day both defendants made statements which were taken down in shorthand, going into detail, but substantially the same as the original statement of Sameniego; Mossberg admitting that he fired the fatal shot.

Appellant Sameniego contends that the court erred in the admission of his confession in evidence.

[1, 2] 1. The contention that the existence of a preconceived plan or conspiracy on the part of defendants to commit a robbery must be proved as a part of the corpus delicti is without merit. The corpus delicti of a felonious homicide consists of the death of a human being and a criminal agency. Nowhere will there be found in our law the additional element contended for by appellant. Neither is the identity of the perpetrator of a crime an element of the corpus delicti. *People v. Flores*, 34 Cal. App. 393, 167 P. 413; *People v. Vertrees*, 169 Cal. 404, 146 P. 890; *People v. Rodway*, 77 Cal. App. 738, 247 P. 532; *Id.*, 77 Cal. App. 783, 247 P. 535; *People v. Moe* (Cal. App.) 3 P.(2d) 354.

[3] Appellant Sameniego contends that his confession was involuntary because, in his first conversation with the police, appellant asked whether a charge would be filed against him if he told what he knew and the officer replied that a charge would be filed against appellant if he was implicated but would not be filed if he was not implicated. To this appellant replied that he was not implicated, and then stated that Mossberg had committed a murder, but that he (Sameniego) had nothing to do with it. In the statement made the following day and taken down in shorthand, Sameniego disclosed that his previous statement had not been true in all respects, made certain corrections, and added, "I thought it over last night and thought I might as well tell the truth," a declaration rather clearly indicating that his final statement was the truthful one and was prompted by his voluntary decision to tell the truth. The situation is similar to that in the case of *People v. Haney*, 46 Cal. App. 317, 322, 189 P. 338, 340, wherein, preceding the confession, a police officer had told the defendant that "the truth would not hurt him, and he *better* come out and tell it," language generally held to imply a promise. There, in view of the fact that the defendant preceded his confession by the statement that he had intended to save his statement and tell it in court, but that he might as well go ahead and tell it then, the confession was held free and voluntary.

There is nothing in the language used by the officer in the case at bar which can be interpreted as even suggesting that a benefit might be gained by talking. Appellant was distinctly told that if he was implicated a charge would be filed against him. Furthermore, appellant in his testimony at the trial made no claim that the statement of the officer had any influence upon him whatever; in fact, he denied all recollection of the conversation.

2. No single word, phrase, or sentence addressed by an officer to a prisoner can of itself determine whether an ensuing confession is free and voluntary. All of the facts and circumstances preceding the confession must be taken into consideration, and when the entire proof shows that the confession was made freely and voluntarily the confession becomes admissible even though some isolated expression of the officer, removed from the context might indicate that some inducement was held out to the prisoner. The trial court was fully warranted in holding that the confession was free and voluntary.

[4, 5] Appellants contend that there is no proof other than that contained in the confessions which will sustain the verdict of first degree murder. There can be no doubt that the testimony is amply sufficient to show that

murder was committed. The concrete question here is: Do the circumstances as shown by the testimony of Miss Ullman prove a murder of the first degree? "In *People v. Denman*, 179 Cal. 497, 177 P. 461, this court said: 'We regard it as settled law in this jurisdiction that one who kills another in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is guilty of murder of the first degree by force of the provisions of section 189, Penal Code, altogether regardless of any question whether the killing was intentional or unintentional.'" *People v. Boss*, 210 Cal. 245, 290 P. 881, 882. Do the circumstances of the case at bar show an attempt to commit robbery? Appellants were armed, together they approached two people seated in an automobile at midnight, one went to one side and the other went to the other side of the car with a drawn revolver which he pointed at the driver's heart and fired the fatal shot.

3. Clearly the appellants were engaged in an overt act constituting an attempt and their entire conduct and all of the circumstances show that their purpose was robbery. The pointing of the weapon at the deceased was a demand by action which is as characteristic of an attempt to rob as the command of the gay nineties, "Your money or your life," or the more modern formula, "Stick 'em up." Much less than this has been held to constitute an attempt to commit robbery. See *People v. Moran*, 18 Cal. App. 209, 122 P. 969, wherein two men provided themselves with pistols and masks. One of them pushed open the swinging doors of a saloon, and seeing a crowd of men therein, withdrew and, shortly after joining his companion, and without any further overt act, both were arrested.

4. The circumstances of the shooting, the total absence of provocation, justification, mitigation, or excuse for the shooting, are in themselves sufficient proof prima facie that the killing was willful, deliberate, and premeditated, and that the murder was of the first and not of the second degree.

5. It is well settled that proof of the corpus delicti beyond a reasonable doubt is not a prerequisite to the reception in evidence of a confession, prima facie proof being sufficient. *People v. Fong Wot*, 63 Cal. App. 677, 219 P. 481; *People v. Selby*, 198 Cal. 426, 245 P. 426.

[6, 7] Appellant Sameniego contends that independent of the confession there is no evidence to support the verdict of first degree murder as to Sameniego. While the proof shows that the fatal shot was fired by Mossberg, it also shows that Sameniego when first seen was in the company of Mossberg, that they both approached the automobile and there separated, one going to the side of the car occupied by the woman and the other to the driver's side, and that they left together after the shot was fired. As elsewhere indi-

cated in this opinion, this was sufficient proof, at least prima facie, of an attempt to commit robbery and that at the time of approaching the automobile the two men were engaged in the common design of committing a robbery. The circumstances warrant the inference that such common design was the result of previous agreement and that a conspiracy to commit robbery existed. See *People v. Matthew*, 68 Cal. App. 95, 228 P. 417. That the existence of a conspiracy may be proved wholly by circumstantial evidence is too well settled to require citation of authority.

[8] Appellant Mossberg raises the point that the trial court erred in not instructing the jury as to the law of murder in the second degree and that the jury might return a verdict of guilty of the lesser degree. As previously stated herein, the evidence, exclusive of the confessions, clearly shows that the homicide was a murder of the first degree, a conclusion which is irresistible when the evidence of the confessions is also taken into consideration. No evidence in mitigation, justification or excuse was offered by either of the defendants, their efforts resting entirely with an absolute denial of the killing and an attempt to establish an alibi.

6. The defendants were either guilty of first degree murder or not guilty, and it is conclusively settled by a long line of authority that, in such a case, it is not error for the trial court to refuse to instruct the jury as to a lesser degree of the crime or a lesser included offense. *People v. Northcott*, 209 Cal. 639, 653, 289 P. 634, 70 A. L. R. 806.

[9, 10] Appellants assign as error the failure of the court to give certain requested instructions to the effect that words spoken and things done by a person while unconscious of what he was doing or saying cannot be considered against him in determining his guilt or innocence; that a person who commits an act without being conscious thereof is not criminally responsible therefor; and that if the jury found the defendant was so under the influence of drugs that he was not conscious of what he was doing at the time the crime was committed the jury must acquit the defendant.

In presenting this point appellants' counsel has failed to comply with plain provisions of rule VIII of this court, which requires that: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented" and that "If it be claimed that instructions requested were erroneously refused, the refused instructions must be printed in full in appellant's brief, and all instructions given, bearing upon the subjects covered by the refused instruction, must be printed in appellant's brief in full, or the substance thereof clearly stated, with citation to the line and page where such instructions may be found."

In view of the serious nature of the offense of which appellants were convicted, this court is unwilling to penalize them for the neglect of counsel by applying the penalty for violation of the rule and has therefore examined the record even though the manner of presenting the point indicates that appellant's counsel had no confidence in the merits of his contention.

Appellants in their testimony denied that either of them used narcotics, but said that they had used a drug named dial ciba, the effect of which was the "same thing as whiskey," Mossberg adding, "It goes further than that; it deadens one's conscience."

7. This testimony shows that the condition produced by this drug, if any was used, was that of intoxication, and since the taking of this intoxicating drug was voluntary the law applicable to an act committed while under its influence is not subdivision five of section 26 of the Penal Code but section 22 of that code, which provides that no act is less criminal by reason of the perpetrator having been in a state of voluntary intoxication, but that evidence of intoxication may be considered by the jury in determining the purpose, motive or intent with which he committed the act.

8. Section 22 is not limited to intoxication resulting from the use of intoxicating liquor, but includes all forms of voluntary intoxication.

Even on the theory that the drug in question could produce unconsciousness and that the case falls within the provisions of subdivision 5 of section 26 of the Penal Code, declaring that among those incapable of committing crime are "persons who committed the act charged without being conscious thereof," appellants' contention is untenable.

9. Where there is evidence of the existence of that state of the mind wherein the individual's conscious mind has ceased to operate and his actions are controlled by the subconscious or subjective mind, it would be error to refuse instructions as to the legal effect of such unconsciousness. This leads to the query as to whether any such evidence exists in this case. As to the confessions the testimony of appellants at the trial was that they then could not remember what they had said to the officers during the two days following their arrest. They also testified that prior to the arrest they had each taken an intoxicating narcotic drug known as dial ciba. Their testimony shows no more than an inability at the trial in May, 1931, to remember conversations had in August, 1930. This inability to remember is not evidence that they were unconscious at the time of the confessions. The inability of a defendant or a witness to remember his former incriminatory or otherwise embarrassing declarations is of such common occurrence and so naturally ac-

countable for upon the normal defects of memory, or, what is more likely, the intentional denial of recollection, as to raise not even a suspicion of the declarations having been made while in an unconscious condition. As to the date of the crime, October 23, 1928, defendants testified that they did not commit the crime, and they each further and in detail testified that at the time of the murder they were at places other than the scene or vicinity of the crime. Such testimony directly negatives any contention that they were unconscious at the time of the crime.

10. The requested instructions were properly refused upon the ground that there was no evidence upon which they could be predicated.

The judgment and order appealed from are affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

118 Cal.App. 112
BULLOCK v. MORRISON.
Civ. 546.

District Court of Appeal, Fourth District, California.

Nov. 2, 1931.

Rehearing Denied Nov. 25, 1931.

Malicious prosecution $\S$ 25(3).

Where defendant, sued for maliciously prosecuting charge of defacing residence, had, without fraud, recovered for damage to residence, probable cause *held* conclusively presumed.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Price Bullock against G. H. Morrison. Judgment for plaintiff, and defendant appeals.

Reversed.

Roland Thompson, of Santa Ana, for appellant.

Burr A. Brown, of Long Beach, for respondent.

ALLISON, Justice pro tem.

This is an appeal from a judgment against the appellant entered in this action, awarding plaintiff the sum of \$500, together with his costs and disbursements amounting to the sum of \$233.95. The case was tried by a jury. It appears that on the 4th day of April, 1929, the defendant, the appellant here, swore to a criminal complaint and caused the same to be filed in the justice's court of Seal Beach township, in the county of Orange, state of California, charging the respondent

with the crime of malicious mischief, in that he did willfully, unlawfully, and maliciously mar, deface, and carry away portions of a certain residence or dwelling house, the same being the property of another person. The respondent was arrested and arraigned on said complaint, and upon a plea of "not guilty" was tried by a jury and found to be not guilty.

The respondent charges in his complaint before us that defendant, in making said charges and prosecuting the arrest of plaintiff, did so maliciously and without probable cause, and that by reason of said charges, and his subsequent arrest thereon, plaintiff has been injured in his good name and reputation and credit in the community in which he lives, and that he has been put to an expense in defending said action, and has suffered greatly in body and mind by reason of the disgrace and humiliation thereof.

A second cause of action is set out in respondent's complaint, based upon an action claimed to have been maliciously brought and prosecuted by the appellant against the respondent to recover certain sums of money alleged to be due from respondent.

At the conclusion of respondent's case in chief, the trial court, on motion of appellant, granted a nonsuit as to the second cause of action, and denied his motion for a nonsuit as to the first cause of action.

It is contended that the court erred in denying appellant's motion for a nonsuit as to the first cause of action, for the reason it is urged that respondent failed to prove affirmatively the negative fact of probable cause; also that respondent failed to prove actual malice as a fact. The testimony offered to prove that said criminal proceeding was instituted without probable cause, and that it was maliciously done, is conflicting, and, in view of the conclusion which we have reached in this case, no good purpose will be served by repeating it here.

It is alleged in the complaint before us that on the 24th day of September, 1929, on appeal from the justice's court of Seal Beach township, in the county of Orange, a judgment was given by the superior court of Orange county in favor of the appellant and against the respondent for the damages to the premises in question; the judgment being in the sum of \$100 and costs, which judgment the respondent here has paid in full. This allegation is not denied by the answer, but, on the contrary, the appellant in his answer admits the giving and entering of the judgment by said superior court, and alleges that said action is now fully determined. A certified copy of the judgment of the Superior Court was on stipulation of counsel admitted into evidence in this case, and it appears therefrom that a judgment was given and en-

tered against the respondent in favor of the appellant for the sum of \$100, together with costs, on the second cause of action set out in plaintiff's complaint in the court below. The second cause of action, as set forth in said complaint, charges the respondent here with willful and malicious mutilation of the premises in question to the damage of appellant, which damage the defendant in the court below refused to pay. There is a total absence of evidence in this case of any fraud on the part of the plaintiff in said action in obtaining the judgment in his favor in the trial court. In the case of *Holliday v. Holliday*, 123 Cal. 26, 55 P. 703, it was held that, in an action for malicious prosecution, the plaintiff was entitled to the presumption of probable cause for its institution, by virtue of the judgment in his favor in a proceeding for security to keep the peace by a justice of the peace, and that this presumption is, in the absence of proof of fraud in obtaining said judgment, conclusive. See, also, *Carpenter v. Sibley*, 15 Cal. App. 589, 119 P. 391. It was said in the *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union*, 120 U. S. 141, 7 S. Ct. 472, 481, 30 L. Ed. 614, cited in *Carpenter v. Sibley*, supra, that "the rule is founded on deeper grounds of public policy, in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them." In the case of *Black v. Knight*, 44 Cal. App. 756, 187 P. 89, the court follows the rule announced in *Holliday v. Holliday*, supra, and holds that the conclusiveness of such a judgment applies in civil as well as criminal actions.

The record herein shows that the appellant recovered a judgment in the lower court in his favor and against the respondent for the damage suffered by him which was the basis of the criminal prosecution in the justice's court. This fact entitles him, upon trial of the instant case, to the full benefit of the presumption of the existence of probable cause for the institution of said criminal proceeding, and, as has been pointed out, in the absence of proof of fraud in obtaining said judgment, this presumption is conclusive.

For the foregoing reasons, we are of the opinion that the motion for a nonsuit as to the first or remaining cause of action should have been granted.

The judgment is reversed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

118 Cal.App. 98

PERRINE v. COMSTOCK et al.
Civ. 6921.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1931.

1. Exceptions, bill of $\S$ 40(4).

Ex parte order extending time to prepare, serve, and file bill of exceptions, made after expiration of time previously granted, is void (Code Civ. Proc. §§ 650, 953 et seq., 1054).

2. Exceptions, bill of $\S$ 43(1).

Motion for relief after default, account failure to prepare, serve, and file bill of exceptions, that offered no explanation or excuse or showing on merits, was properly denied.

3. Exceptions, bill of $\S$ 43(1).

Third motion after default based on matters known to movant or counsel before previous motion, but not alluded to in supporting affidavit nor excused in last motion, was properly denied.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by O. T. Perrine against Frank P. Comstock, and others, defendants. From an order made after final judgment in favor of defendants, plaintiff appeals.

Affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellant.

Lyon, Fleming & Robbins, of Los Angeles, for respondents Comstock and Nyberg.

E. B. Evans, of Monrovia, for respondents E. B. and Fred Evans.

Thos. F. Hinds, of Los Angeles, for respondent Moore.

Chandler, Wright & Ward, of Los Angeles, for respondent Herron.

BISHOP, Justice pro tem.

[1] Appellant presents two appeals, both from orders denying him relief from his default in not preparing and serving a proposed bill of exceptions within time. Appellant having been unsuccessful in a trial had before the court without a jury, judgment in favor of the several defendants and against him was entered February 19, 1929. Notice of this entry was served upon appellant February 23, and on February 26, he filed his notice of intention to move for a new trial. This last-mentioned notice was served upon the attorneys for defendants Comstock and Nyberg only, not upon any of the other twelve

defendants in the case. Thereafter, March 20, the motion for a new trial was made and denied, and notice of the order was served upon appellant March 23. (He had filed his notice of appeal from the judgment March 21.) Under the Code provisions, as then effective, appellant had ten days, after receiving notice of the entry of judgment, within which to prepare and serve a proposed bill of exceptions, except in so far as the proceedings on a motion for a new trial extended the time, ten days, from receipt of notice of the decision on the motion. Section 650, Code Civ. Proc. At most, therefore, appellant had until April 2 to prepare and serve a proposed bill. As to the defendants not served with his notice of intention, proceedings for a new trial were not pending (20 Cal. Jur. 103), and it may be that his time, so far as a bill of exceptions would affect them, expired March 5. This we need not decide; we mention it only because it was the theory adopted by appellant in his various moves in the court below, and must be kept in mind, if we are to understand his maneuvers. For example, he served notice of motion, as early as March 27, to be permitted, under section 473, Code of Civil Procedure, to order the preparation of the record on appeal by the alternative method. Section 953a et seq., Code Civ. Proc. This motion he abandoned at the time of hearing, expressing a desire to move instead for leave to prepare and present a bill of exceptions. Whatever motion was made was denied without prejudice. Another motion, on notice, was made April 10, asking that he be relieved of his default in not preparing and filing a bill of exceptions. This also was denied without prejudice. Meanwhile, March 27, he had secured an order giving him until April 20 to prepare, serve, and file a proposed bill. His next recorded move was not until April 23, when another ex parte order extending his time was secured; the time named being May 23. This order was entirely ineffectual, for it was not made until after the expiration of the time which had been granted him. *Lantz v. Vai* (1926) 199 Cal. 190, 248 P. 665. Moreover, if the order had been made April 20, or before, it could not have extended the period beyond May 2; a total extension of not more than thirty days beyond the ten days the statute gives being the most the court was authorized to allow. Section 1054, Code Civ. Proc.; *Keown v. California Pacific Realty Co.* (1929) 207 Cal. 769, 279 P. 764.

[2] We find the appellant in default, then, in not having prepared and served a bill of exceptions, measuring his time by the most favorable yardstick, when, on May 16, he makes his third motion for relief. This motion was based upon an affidavit which was entirely silent as to the reasons why no pro-

posed bill had been prepared and served by May 6, the date of the affidavit, but deals entirely with an attempt to excuse appellant's failure to know that he had failed to serve all the defendants with his notice of intention to move for a new trial. Were this failure excused, it still would not account for the absence of a proposed bill or for the lack of any showing that one was in the course of preparation. Moreover, there was no attempt to set out facts showing that, if allowed time to prepare a bill of exceptions, it would make possible the presentation of a meritorious appeal. This was necessary. *Estate of Keating* (1910) 158 Cal. 109, 110 P. 109. The motion was properly denied, and the order appealed from must be affirmed.

[3] Still a further motion to be relieved of his default was made by appellant June 12. Notice of this motion was limited in its terms to defendant Comstock. It was based on affidavits relating to matters, which, without exception, had taken place and were within the knowledge of appellant or his counsel before the motion of May 16 was made and denied, but which were not alluded to in the affidavit filed in support of that motion. No excuse was offered for their first appearance on this the third making of the same motion, nor was permission granted to remake it. The patient judge of the court below did not err in denying the motion. *Victor Power & Mining Co. v. Cole* (1909) 11 Cal. App. 497, 503, 105 P. 758.

The two orders appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

118 Cal.App. 203

LONG v. NEELAND et al.

Civ. 8008.

District Court of Appeal, First District, Division 2, California.

Nov. 6, 1931.

1. Appeal and error §842(1).

Whether trust arises from particular transactions is primarily fact question for trial court.

2. Trusts §43(1).

Evidence respecting payments to banker for investment showed all elements necessary to create "voluntary express trust," not joint adventure (Civil Code, § 2236).

Plaintiff trusted the banker's business judgment implicitly, and for years paid to him various sums, about half of which

were for investment for plaintiff's benefit. The banker represented that he would hold them as safe as a bank and return greater profits than as if invested in bank. Without plaintiff's consent, he mingled the funds with his own, invested them for his own benefit, did not keep account, and did not return any profit to plaintiff.

[Ed. Note.—For other definitions of "Express Trust," and "Voluntary Trust," see Words and Phrases.]

3. Limitation of actions §103(2).

Action for payments creating voluntary trust is not barred within four years after payments, since limitation runs from repudiation of trust (Code Civ. Proc. § 337).

4. Trusts §219(2).

Generally, whether interest on payments creating voluntary trust should be compounded rests on circumstances of each case.

5. Trusts §219(2).

Compound interest should be added where trustee willfully omits to invest funds, uses them for own benefit, or fails to keep account (Civ. Code, § 2236).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for accounting by M. C. Long against J. M. Neeland and others. From a judgment against named defendant, he appeals.

Affirmed.

Chapman & Chapman and Ward Chapman, all of Los Angeles, for appellants.

Joseph Scott and Leo B. Ward, both of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued for an accounting of moneys alleged to have been advanced to defendants and invested for plaintiff's use and benefit. A nonsuit was granted as to defendant K. M. Neeland, and dismissals were had as to all other defendants except J. M. Neeland, against whom judgment was entered in the sum of \$16,666.05, together with compound interest amounting to over \$14,000. This defendant has appealed upon typewritten transcripts.

No useful purpose would be served in a detailed statement of the facts. Suffice it to say that for many years prior to the commencement of this action defendant was a successful banker with a wide experience in business affairs, having gained a fortune of approximately \$1,000,000; that the plaintiff was an instructor in physical education; that both were warm personal friends, and that the plaintiff trusted implicitly in the de-

defendant's judgment as to all matters of business and investment; that running over a period of some thirteen years the plaintiff paid over to this defendant, in various sums ranging from \$50 to \$6,200, a total of more than \$32,000; that of this sum \$16,686.05 was found to have been intrusted to the defendant by the plaintiff for investment by the defendant for the use and benefit of the plaintiff; that said sum was invested by the defendant in his own name and for his own use and benefit without the knowledge or consent of the plaintiff as to the particular character of the investments; that of the total sum paid to the defendant \$15,800 was invested by him in special enterprises with the knowledge and consent of the plaintiff; that the entire sum was lost to the plaintiff; but that, as to the \$15,800 item, the parties were held to be joint adventurers, for which reason the plaintiff was denied recovery of that item.

[1,2] On this appeal the appellant insists that the evidence is insufficient to show the creation of a trust, and he argues that the evidence shows that the entire sum paid over to him was for the purpose of a joint adventure. It is elementary that the question whether a trust arises from particular transactions is primarily a question of fact for the trial court to determine. Here the trial court found that, as to the fund included in the judgment, the moneys were delivered to the appellant for the purpose of investment and that he mingled them with his own funds, invested them for his own use and benefit, and failed to keep any account of the moneys received or the purposes for which they were invested. The evidence is undisputed that the moneys were paid to the appellant upon his representation that he would hold them as safe as a bank could hold them, and that he would return to the respondent a greater profit than he could get by depositing the moneys in a bank. The confidential relation between the parties is conceded. The delivery of the moneys for purposes of investment is not disputed. The use of the moneys by the appellant for his own benefit and his failure to return any profit to the respondent are admitted. All the elements necessary to create a voluntary express trust are present. On the other hand, there is no evidence which would support a finding of joint adventure beyond the sum which the trial court found was paid to the appellant for that purpose. The respondent urges that the trial court included too much under this finding, and we are inclined to agree with him. However, it is manifest that the evidence to which appellant refers as supporting his contention that the parties were engaged in a joint adventure is evidence relating solely to these par-

ticular investments which the trial court found to be joint adventures, and for which recovery was denied, and is not evidence which affects the sum included in the judgment. We are satisfied from our review of the evidence that it is sufficient to support the finding that a trust was created to the extent of the fund included in the judgment, and, this being so, the obligations of the appellant as trustee thereof are fixed by section 2236 of the Civil Code and by a long line of decisions, typical of which is *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 P. 360.

[3] It is argued, however, that the cause of action is barred by the statute of limitations because not brought within four years after the moneys were paid to appellant (*Code Civ. Proc.* § 337). It is elementary that in the case of a voluntary trust the period of limitation commences to run from the date of repudiation and not from the date of the creation of the trust. 25 Cal. Jur. 268, 271, and cases cited.

Criticism of the judgment is made because the trial court refused to allow appellant to set off the sum of \$1,000 which appellant now claims was paid by a third party to the respondent. The trial court found that this was a transaction independent of the trust, and appellant has not presented any evidence tending to show error in this finding. Our examination of the transcript discloses that upon appellant's objection the trial court refused to let respondent tender proof upon that item.

[4,5] Finally it is argued that the trial court erred in allowing compound interest upon the items paid to appellant in the course of the trust. The question whether interest should be compounded rests generally upon the circumstances of each particular case. When it appears that the trustee has willfully omitted to invest trust funds, but has used them for his own benefit, or has failed to keep an account so that it is extremely difficult or impracticable to ascertain with any degree of certainty what profit was realized from the trust fund, compound interest should be added. *Estate of Clark*, 53 Cal. 359; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 488, 111 P. 360. In truth the decisions are merely re-assertions of the statutory law. Section 2236, Civil Code, provides that a trustee who willfully mingles the trust property with his own is liable for the value of its use. As the interest on the trust fund belongs to the beneficiary, the value of the use of that interest by the trustee is reached by compounding it.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

A. L. JAMESON & CO. v. REDFIELD.

Civ. 6708.

District Court of Appeal, Second District,
Division 2, California.

Oct. 30, 1931.

Rehearing Denied Nov. 28, 1931. Hearing
Denied by Supreme Court Dec. 28, 1931.

1. Frauds, statute of ⇨84.

Where stockbroker and principal had blanket agreement respecting terms of orders for purchase or sale of stock, oral orders for purchases and sales on margin *held* not affected by statute of frauds (Code Civ. Proc. § 1973; Civ. Code, §§ 1624, 1739).

2. Brokers ⇨24(2).

Stockbroker's sale of collateral *held* not unauthorized, notwithstanding statute requiring notice and public auction, in view of agreement (Civ. Code, §§ 3002, 3005).

Sale of collateral was not unauthorized or illegal, in view of agreement between parties permitting sales at public or private sale without notice to customer when such sale or purchase was deemed necessary by stockbroker for stockbroker's protection, and it not being contended that such agreement was in any way violated or that it was invalid.

3. Brokers ⇨72.

In stockbroker's action for reimbursement, principal *held* not entitled, on cross-complaint, to amount of dividend check attached by plaintiff.

It appeared that broker sold, at market price, defendant's collateral, but retained part thereof, on which he collected dividend in form of check payable to defendant, which check defendant declined to indorse and so permit of further reduction of obligation. Such stocks and dividend were attached by plaintiff in present action for moneys expended in defendant's behalf.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by A. L. Jameson & Co. against L. V. Redfield. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Superseding opinion reported in 2 P.(2d) 53.

Culbert L. Olson, of Los Angeles, for appellant.

Moote & Longcroft, of Los Angeles, for respondent.

Ackerman, Wayland & Mathews, Bianchi & Hyman, and Heller, Ehrman, White & McAuliffe, all of San Francisco, amici curiae.

CRAIG, Acting P. J.

The defendant appealed from a judgment rendered by the superior court of Los Angeles county in favor of the plaintiff for moneys alleged and found to have been expended in his behalf.

The action arose out of certain purchases and sales, made for the defendant by the plaintiff as broker, of various listed and unlisted stocks, as security for which transactions the former had hypothecated with said broker several thousand shares of other stock. It appeared from an order signed by the parties and written notices or confirmations introduced upon the trial that there were many entries during the first nine months of 1928 of purchases and sales on margin for appellant's account. Said order contained an agreement, reciting in part:

"This order or deal has been executed or made subject to following conditions and agreements, to wit:

"(a) That all orders or agreements for the purchase or sale of any article, commodity, security, stock or bond, are received and executed subject to the rules and customs of the exchange or market, and its clearing house, if any, where they are executed, and with the distinct understanding that actual delivery is contemplated, and such is understood and agreed to by the party giving the order; (b) that all securities from time to time carried in our customer's marginal account, or deposited to protect the same, or otherwise deposited with us, may be loaned by us, or may be pledged by us either separately or together with other securities, either for the sum due thereon or for a smaller or greater sum, all without further notice to our customers; (c) that we may close out our customer's account by buying or selling at public or private sale without any further call or notice to the customer, if we deem it advisable for our protection; (d) it is understood that all securities carried in this account or deposited to secure the same may be carried in our general loans or miscellaneous accounts and may be sold or bought at public or private sale, without notice to the customer, when such sale or purchase is deemed necessary by us for our protection. * * *

Nearly all of the orders to respondent's representatives for the sale or purchase of stock for appellant were given orally, either by telephone or in person; and the repurchase and resale thereof were effectuated in like manner, as the market might indicate the possibility of profit, or of too great loss, should the items be longer retained. An assistant broker of the respondent company testified that: "A couple of days prior to September 14th, * * * Redfield came down to the exchange again, and he had a policeman call me to the door, and he said: 'Well,

if the market goes any higher I won't be able to take care of that margin; I can take care of it now, so you better go in and buy these stocks in for me,' and I asked him what stocks he wanted me to buy in, and he read them off and I had the cards with me, and wrote down the different stocks that he mentioned." "Mr. Redfield came to the office and told me that he didn't have enough money to pay us what he owed us on the account, and he wanted to know if we couldn't carry him for awhile on what he had up there, and I told him we couldn't, * * * he said he wasn't able to take care of those accounts, that if he paid us what he owed us at this time, he would be entirely broke and he wouldn't be enabled to continue his operations on the street. * * * We figured out just what he owed us." An itemized accounting between the parties which was at that time balanced from the books in appellant's presence was introduced in evidence, showing the amount of \$3,538.56 due from him to the brokers after the above-mentioned purchases had been made. The respondent sold at its market price appellant's collateral, which reduced said indebtedness to \$5,513.25, but retained 102½ shares designated as E. G. B. Company stock upon which respondent collected a dividend in the form of a check payable to appellant, which said check he declined to indorse and so permit of further reduction of the obligation. Said stock and dividend were attached by the plaintiff in this action.

[1] The question of validity of such transactions, we think not affected by the statute of frauds. Upon similar facts our Supreme Court upheld a judgment for commissions by a decision which announced the rule since applied in other jurisdictions, and which does not appear to have been overruled in this state. *Kutz v. Fleisher*, 67 Cal. 93, 7 P. 195. As there stated: "It was not a case of a sale of personal property by a vendor to a vendee, but of a broker (plaintiff) purchasing and selling stocks for account of another (defendant), advancing money for the purpose, and paying assessments on the stocks purchased. The whole transaction was had under an agreement entered into in advance of the purchases being made. It was no part of the terms of the agreement that it was not to be performed within one year from the making thereof. On the foregoing facts, it follows that section 26 of article 4 of the constitution; section 1624, subds. 1, 4, Civil Code; section 1973, subds. 1, 4, Code Civil Proc.,—have no application in this case. The agreement as enforced could be made by parol, and therefore section 1739, Civil Code, has nothing to do with the case." Numerous cases are cited by Meyer on the Law of Stock-brokers and Stock Exchanges, to the same effect, at page 243.

[2] It is contended that the sale of appellant's collateral by the respondent was unauthorized, and that it was illegal because not made in accordance with the provisions of sections 3002 and 3005 of the Civil Code, requiring notice and a public auction of pledged personal property. It is not denied, however, that the parties became bound by the understanding and agreement permitting such sales "at public or private sale without notice to the customer when such sale or purchase is deemed necessary by us for our protection," under which respondent served the appellant for many months in effecting scores of transactions, nor is it contended that such agreement was in any manner violated or that it was invalid. Civ. Code, § 3003.

[3] The appellant alleged by cross-complaint that Jameson & Co. held the check for dividends above mentioned, and demanded judgment for the amount represented thereby. An adverse finding of the trial court is assigned as reversible error, but by no argument or authority is an obligation of the respondent legally established upon the transaction concluded by appellant as heretofore observed.

We find no prejudicial error in the findings or judgment.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.;
FRICKE, Justice pro tem.

118 Cal.App. 120
VITELLI v. MINUTOLI et al.
Civ. 7856.

District Court of Appeal, First District, Division 1, California.
Nov. 3, 1931.

1. Automobiles ⇨242(6).

That corporation owned vehicle and employed driver justifies inference that driver acted within authority, unless contrary evidence as matter of law overcomes inference.

2. Automobiles ⇨193(10).

If driver is acting within employment, joining his private business is immaterial.

3. Automobiles ⇨244(26).

That employee is intrusted with possession and operation of automobile, with discretion to use it in employer's business, imposes liability for negligent operation, on showing of use within general, not necessarily particular, employment.

4. Evidence ⚡590.

That witness is interested may be considered on weight accorded his testimony, notwithstanding presumption that he speaks truth (Code Civ. Proc. § 1847).

5. Automobiles ⚡245(30).

Whether employee negligently operating employer's automobile while driving home was within employment held for jury, notwithstanding statement that he had finished work for day (Code Civ. Proc. § 1847).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Elvira Vitelli, an incompetent person, by Gina Christiani, her guardian, against Andrew Minutoli and another. From an adverse judgment, defendant P. Grassi & Co. "Travertite" Works, Inc., appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

H. Albert George and Philip R. McEnerney, both of San Francisco, for respondent.

PER CURIAM.

The above action was for the recovery of damages for personal injuries alleged to have been caused by the negligence of defendants Andrew Minutoli and P. Grassi & Co. "Travertite" Works, Inc., a corporation (which will be hereinafter referred to as such). Before the suit was filed, plaintiff was adjudged incompetent and appeared by her guardian. A jury returned a verdict against the corporation, which has appealed from the judgment entered thereon, and also against defendant Minutoli, who has not appealed. Following a motion for a new trial, the amount of the verdict was reduced, and it is not claimed that the judgment entered is excessive, nor that the evidence was insufficient to sustain a finding of negligence.

The evidence shows that on Saturday, May 11, 1929, plaintiff was riding in an automobile owned by the corporation and driven by Minutoli. At the intersection of Third and Townsend streets in San Francisco the car came into collision with another automobile, with the result that the plaintiff was injured. Minutoli was the vice president and general manager of the corporation, and it was alleged by plaintiff that the car was being operated in the course of the corporation's business and within the scope of Minutoli's employment.

It is contended by appellant that the evidence was insufficient to show that Minutoli was acting for the corporation at the time of the accident.

Minutoli and his wife were the only witnesses at the trial. He testified that the defendant corporation was engaged in the marble and stone business, of which as its manager he had general supervision; also that the automobile—which was at all times in his possession—was used to go from job to job or upon other errands for the company, and, when not in use, was stored in a garage at his home. Further, that upon the morning of the day of the accident he and his wife, with the plaintiff—who is his wife's mother—drove from San Francisco to Holy Cross cemetery. On their return they stopped for some twenty or thirty minutes at the shop of the company; the witness stating in this connection that "while I stopped at the shop the ladies came in and went around the shop." They then left, and the accident happened while they were on the way to the witness' home. He also testified that when he left the shop he was through work for the week. Mrs. Minutoli corroborated her husband as to the places they visited, and the fact that they were on their way home when the accident occurred.

[1-3] The fact that the vehicle in which plaintiff was riding was owned by defendant corporation, and that the driver was in its employ, would justify the inference that the driver was acting within the scope of his authority (Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Frierson v. Pacific Gas & Elec. Co., 55 Cal. App. 397, 203 P. 788; Bushnell v. Tashiro (Cal. App.) 2 P.(2d) 550), although opposed by other evidence, unless the reviewing court can say that the evidence to the contrary was sufficient as a matter of law to overcome the inference (Mand v. Rose, 96 Cal. App. 564, 274 P. 392; Lemka v. Nauman, 103 Cal. App. 757, 284 P. 1062). If a driver is acting within the scope of his employment, it is immaterial that he joined with this some private business of his own. (Ritchie v. Waller, 63 Conn. 155, 28 A. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894. And, where an employee is intrusted with the possession and operation of a vehicle, with permission to use it in his discretion in the business of his employer, the latter will be held responsible for injuries inflicted upon another resulting from negligence in the operation of the vehicle while using it in such business; and it is not necessary to prove that the employee was engaged in executing any particular business of his principal, it being sufficient to show that he was acting within the general scope of his employment. Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 123 P. 219; Reed v. Parra, 203 Cal. 430, 264 P. 757.

[4, 5] A witness is presumed to speak the truth (Code Civ. Proc. § 1847), but, where he is interested, the fact may be considered in determining the weight to be given his testimony (*Ripperdan v. Weldy*, 149 Cal. 667, 87 P. 276); and under the circumstances of the present case the question whether Minutoli was acting for his employer at the time of the accident was one for the jury, who were not bound by his statement that he had finished work for the day (*Poncino v. Reid-Murdoch & Co.* (Cal. Sup.) 298 P. 818). Moreover, it has been held that, where it was the duty of an employee each day to return to a garage at his home the automobile used by him in his employer's business, the act of taking it there was within the scope of his employment. *Auer v. Sinclair Refining Co.*, 103 N. J. Law, 372, 137 A. 555, 54 A. L. R. 623. This rule was referred to with approval in *Riordan v. Gas Consumers' Ass'n*, 4 Cal. App. 639, 88 P. 809, and *Hall v. Puente Oil Co.*, 47 Cal. App. 611, 191 P. 39.

We cannot say that the testimony as a matter of law overcame the inference which the trial court drew from the admitted facts, and, on the contrary, are satisfied that the evidence fairly supports its findings.

The judgment is affirmed.

118 Cal.App. 136

SANFORD v. HARGROVE.

Civ. 164.

District Court of Appeal, Fourth District, California.

Nov. 3, 1931.

1. Brokers Ⓒ86(1).

In salesman's action to recover from broker half of commission on sale of realty, evidence held to support findings that additional agreement to prosecute all disputed claims for commissions and divide expense was never made.

2. Brokers Ⓒ86(1).

In salesman's action to recover from broker half of commission on sale of realty, evidence supported finding that salesman never abandoned claim to interest in commission sought to be recovered.

3. Appeal and error Ⓒ1011(1).

Trial court's findings on conflicting evidence are conclusive.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by N. H. Sanford against A. E. Hargrove, doing business under the firm name

and style of the Hargrove Realty Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

McFadden & Holden, of Anaheim, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

BARNARD, P. J.

This action was brought by the plaintiff to recover one-half of an amount collected by the defendant as a commission for the sale of certain real estate. The defendant was a real estate broker, and the plaintiff was for some years employed in defendant's office as a real estate salesman. Except as herein pointed out, it is agreed that the plaintiff was to receive one-half of any commission earned when he produced a purchaser for property listed for sale. In the matter here in controversy, as admitted by the answer, one F. C. Wilson listed certain property with the defendant for sale, and a buyer procured by the plaintiff entered into a written contract to purchase the property. Thereafter Wilson refused to pay the commission, and this defendant brought suit and recovered judgment, which was affirmed on appeal (97 Cal. App. 605, 275 P. 979), and the defendant received \$5,783.54 as commission on the deal. It appears that three other suits were filed by this defendant to collect commissions, the claims for which arose while this plaintiff was employed by the defendant. In the first of these other actions, one Glenn was sued, and an attachment was levied upon the furniture in an apartment house containing eight apartments. This plaintiff advanced \$50 to the sheriff in connection with this attachment, and later this defendant took over a conditional sales contract under which said furniture was being sold to Glenn, paying the vendor of the furniture the sum of \$100 for his interest. Subsequently the defendant disposed of the furniture, and returned to this plaintiff the \$50 advanced by him. The other two suits filed were against W. C. Steffens and C. U. Paxton, respectively, in both of which actions this defendant failed to recover.

In his answer to this action, the defendant sets up as a defense that, in the original oral agreement between the parties hereto, it was agreed that, in case any commission should be earned and not paid, suit should be brought to recover the same and prosecuted to final judgment, and that each party would pay one-half of the costs and attorneys' fees necessitated by such a suit. It is then alleged that the plaintiff, upon discovering that the Glenn attachment was uncollectable, stated to the defendant that he would not prosecute any other actions for the collection of commis-

sions, that he would not be bound by his agreement in respect to prosecuting claims for commissions, and that he would not be responsible for any further costs of litigation. It is alleged that at that time the Steffens, Paxton, and Wilson claims were all in the office and still uncollected. It is further alleged that on the day the Steffens action was set for trial the plaintiff refused to appear therein as a witness; that he refused to pay any further expenses in connection with any litigation over commissions earned; that he stated that he would have nothing further to do with any of the claims; and that the plaintiff thereupon left the office of defendant and has never returned. It is then alleged that the plaintiff broke his agreement and repudiated and abandoned any interest in the Wilson claim. After a trial, the court found that all of the allegations of the plaintiff's complaint were true; that it was not true that the original agreement between the parties provided for the bringing of suits to recover all commissions not paid, and for the division of expenses in every case; that it was not true that the plaintiff told the defendant that he did not care to prosecute any other claims arising under his employment; and that the plaintiff did not ask the defendant to release him from liability for any further costs of litigation. The court further found that the plaintiff did not repudiate his agreement with the defendant, nor abandon his claim for commissions earned during the time of his employment. Judgment was entered for \$2,338.29, being one-half of the amount collected by the defendant on the Wilson claim, less one-half of the costs and expenses incurred in the collection thereof. From this judgment the defendant has appealed.

[1] The appellant attacks specifically most of the findings made by the trial court, upon the ground that the same are not sustained by the evidence. While some fourteen points are raised, so far as they are material or important, they fall into two groups, namely, one to the effect that an additional agreement to prosecute all disputed claims for commissions and to divide the expense was never made, and the other to the effect that the respondent had never abandoned his claim to an interest in any commission that should be recovered from Wilson.

Taking up the first group, to the effect that no such additional agreement was made: The respondent testified that no such agreement was ever made, and that nothing was said along that line. A witness named Fowler testified that he was employed as a salesman in the same office during the same time; that his oral contract of employment was similar to that under which the respondent was working; that at the time he was employed nothing was said by the appellant about the payment of costs or attorneys' fees, in the event any suit should be started to recover

commissions; and that nothing was ever said concerning such costs or attorneys' fees. The appellant testified that his agreement with the respondent was the same agreement he had always used, and that it was exactly the same as his agreement with his other salesmen. There was also introduced in evidence a letter signed by the appellant, setting forth details of the arrangement under which the salesmen were supposed to work, a copy of which letter was given to each of the salesmen, including the respondent, during the term of their employment. While this letter sets forth in considerable detail how deals were to be handled and how the proceeds were to be divided, it contains nothing about an additional agreement as to costs and attorneys' fees. Respondent's testimony is further corroborated by the fact that, when an attempt was first begun to collect the Wilson commission, the parties talked over the matter and then agreed what should be done. The appellant testified as follows:

"A. I told him I felt we had earned the commission and I wanted to collect it and he agreed with that, that the deal had been put up to Wilson fair and square and we should be paid.

"Q. What did he tell you? To go ahead and try to collect it? A. Yes, to do anything I could to get the thing started in a way that it could be collected."

It fully appears that at that time the appellant conceded that the respondent was entitled to share in the proceeds of that claim. In this connection, the appellant argues that the fact that the respondent advanced \$50 for costs in the Glenn suit conclusively proves the existence of an agreement to bring suit in all cases and share in the expense. At best, it is only some evidence, the value of which is lessened by the fact that a separate agreement was made in the Wilson case, indicating the absence of a general agreement. Appellant complains of a finding that he had never accounted to the respondent for the proceeds of their claim in the Glenn case. That finding is amply supported by the evidence, although we can see no materiality of the finding in the case before us.

[2] In regard to the second group of findings to the effect that the respondent had never abandoned his interest in the Wilson claim. The respondent testified and the court found that no such an abandonment had taken place, and that nothing had ever been said between the parties relating to an abandonment by the respondent of the Wilson claim. Respondent testified that nothing had ever been said about releasing any claim, except that he had told appellant that he would have nothing to do with the Paxton and Steffens claims because the appellant had never secured the signatures of all the parties to that deal, and the respondent did not think they were entitled to

a commission. The appellant testified that, before proceedings were started to collect the Wilson claim, he talked the matter over with the respondent, and they agreed that he should go ahead. He also testified that from that time, until the respondent demanded his share of the Wilson payment, after the judgment was affirmed, he had had no conversation with the respondent. Appellant complains of the court's findings that the respondent was justified in not desiring to press the claims against Steffens and Paxton. This finding is amply supported by the evidence, but again it is not material, as an abandonment of the claims against these parties would not show an abandonment of the claim against Wilson, and the court found against the existence of any contract that all claims should be pressed by court action.

[3] It would serve no useful purpose to take up separately each point raised by the appellant and quote the evidence sustaining that particular finding. Every material finding and most, if not all, of those not material, are supported not only by the evidence but by a preponderance thereof. Nothing more than a conflict in the evidence is pointed out by the appellant, and the familiar rules apply.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

118 Cal.App. 90

WOLFE v. PAN AMERICAN BANK OF CALIFORNIA.

Civ. 6618.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1931.

Rehearing Denied Nov. 30, 1931. Hearing Denied by Supreme Court Dec. 31, 1931.

1. Banks and banking ⚡39.

Subscriber to banking corporation stock whom preorganization committee orally promised employment could not rescind because promise was breached; directors not having ratified contract.

Subscriber could not rescind, since, before the organization of the bank itself, the preorganization committee could have no authority to make any such oral contract of employment.

2. Banks and banking ⚡54(7).

Plaintiff could not recover from bank corporation salary lost because preorganization committee's oral promise that corporation would employ him was breached.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by M. I. Wolfe against the Pan American Bank of California. From the judgment, defendant appeals.

Reversed.

Derthick & Hull, W. J. Cusack, and Herbert Ganahl, all of Los Angeles, for appellant.

Hutchinson & Hutchinson, of Salt Lake City, Utah, and Freston & Files, of Los Angeles, for respondent.

Elbert W. Davis and J. H. Hoffman, both of San Francisco, for Edward Rainey, Superintendent of Banks, as amici curiæ.

YORK, J.

This is an action against the Pan American Bank of California for money alleged to have been paid by plaintiff to a preorganization committee that was formed for the purpose of raising by way of subscription sufficient funds to create the corporation. This preorganization committee was authorized by the superintendent of banks of the state of California, on or about the 31st day of December, 1925, to sell to the public at large twenty thousand shares of stock of the par value of \$100 each, and that each subscriber who purchased such shares should pay the further sum of \$50 for each share, which additional sum should form part of a surplus and contingent fund of \$1,000,000. The superintendent of banks authorized the preorganization committee to function, and granted the right to use the name Pan American Bank of California, when the corporation was created. The articles of incorporation, when completed, were to be submitted to the superintendent of banks for his approval, prior to filing them with the secretary of state of the state of California. This was carried out, and the corporate existence began on December 27, 1926. It is alleged that on or about the 15th day of December, 1926, the plaintiff entered into an oral agreement with the said preorganization committee, wherein it was agreed that if the plaintiff herein would subscribe, or agree to purchase, \$25,000 of the capital stock of the defendant corporation (the same to be organized and created in the future), at \$150 per share, the defendant corporation when formed would elect the plaintiff a vice president and director of its bank, and place him in the position of manager of its savings department at a salary of \$6,000 per annum, payable \$500 per month, his services to begin when said bank opened and began doing business. It was further alleged that in pursuance of this agreement (which was oral, and which was made with less than one-half of the members of the preorganization committee which consisted of at least twenty members), and in performance of the same, plaintiff on or about the 15th day of December, 1926, agreed to purchase \$25,000 of the capital stock of the defendant corporation to be created in the future, at an agreed price of \$150 per share, it

being agreed at the same time that the plaintiff should pay one-third of the amount subscribed, the balance to be paid when he was elected vice-president and director of the said bank and installed as manager of the savings department of said bank at an agreed salary of \$6,000 per annum, payable \$500 per month, upon receiving ten days' notice from said bank.

The court found that, pursuant to the terms and conditions of the said oral agreement, the plaintiff paid to the preorganization committee the sum of \$8,550, receiving therefor from the said committee a written receipt, receipting for said money so paid, and providing therein that upon the creation of defendant bank, said defendant bank would deliver to plaintiff fifty-seven shares of its capital stock. (This receipt did not refer to the so-called contract of employment.) The court found that the said sum of \$8,550 was slightly in excess of one-third of \$25,000, and that just prior to and at the time plaintiff paid said sum, it was determined that plaintiff could not pay one-third of \$25,000 and receive an even number of shares of stock therefor, and it was therefore agreed between plaintiff and the preorganization committee that the said sum of \$8,550 should represent plaintiff's first payment under said oral agreement upon the stock subscribed for by him. The organization of the bank proceeded, and the Pan American Bank of California came into existence on the 27th day of December, 1926. The court found that, on or about the 30th day of December, 1926, the defendant corporation accepted, adopted, and approved the oral agreement entered into by the plaintiff herein and the said preorganization committee, practically as has been set forth herein.

The court also found that the directors of the corporation had knowledge on or about the 30th day of December, 1926, of the said agreement and of its terms and conditions, and knew that the plaintiff had performed his part of the agreement, to wit, the payment of the sum of \$8,550. The only evidence of such action or knowledge by said corporation was that only a few of the directors had knowledge of such oral promise on the part of some members of the committee.

Plaintiff from time to time requested that he be installed in such position, and it was promised by officials of the bank from time to time that the bank would perform the oral agreement, if any vacancy occurred. Finally, on the 18th day of April, 1928, the plaintiff served a notice of rescission upon the defendant corporation rescinding and canceling the alleged oral agreement between himself and the said defendant corporation, and tendered to the defendant bank the fifty-seven shares of its capital stock, demanding back from the defendant the sum of money he had paid therefor, to wit: \$8,550. He also demanded 7 per cent. interest thereon from the 23d day of De-

cember, 1926. This tender was refused by the bank.

The court also found that the plaintiff held himself ready to accept the position plaintiff says he was to have, at any time, but that the defendant failed, refused, and neglected to appoint him to such or any position; and the court found that at no time between December 31, 1926, and the 18th day of April, 1928, did the plaintiff seek or receive employment from any one.

On plaintiff's second cause of action, the court found that plaintiff had been damaged by reason of the defendant company's failure, neglect, and refusal to perform the terms and conditions of the said oral agreement in the sum of \$8,596.22. Judgment was thereafter entered for the sum of \$9,810.15, with interest at 7 per cent. per annum from February 4, 1929, on plaintiff's first cause of action, and for the sum of \$8,596.22, together with interest at 7 per cent. per annum from February 4, 1929, on plaintiff's second cause of action.

[1, 2] Before the organization of the bank itself, the preorganization committee was not authorized, and could not have been authorized, to make any such oral contract of employment. *Robinson v. Contra Costa County Building & Loan Association* (Cal. App.) 296 P. 922; *Rideout v. National Homestead Association*, 14 Cal. App. 349, 351, 112 P. 192. The Pan American Bank itself could only acquiesce in or make such a contract by the regular action of its board of directors.

The notice of rescission, upon which plaintiff's right to recover on his first cause of action is based, was predicated upon the failure of the bank to elect the plaintiff vice president and director of the bank, and place him in the position of manager of the savings department of the bank at a salary of \$6,000 per annum. Said notice of rescission, in reciting the terms of the contract, recites the fact that the plaintiff was to be elected to such position if he would subscribe in writing for the sum of \$25,000 capital stock of the said bank. Thereafter in said notice, it recites the fact that he purchased fifty-seven shares of the stock paying only the sum of \$8,550 on account thereof. In the next paragraph of said notice, it is recited that the plaintiff has performed all the terms and conditions of the said verbal agreement *incumbent upon him to perform*. (Italics ours.) It does not, however, recite that the plaintiff did actually subscribe in writing for the said sum of \$25,000 of the capital stock.

Plaintiff alleges that he received fifty-seven shares of the capital stock of the bank and paid to the corporation therefor the sum of \$8,550 on or about the 23d day of December, 1926, which date was a date before the organization of the bank had been completed. The board of directors having failed to ratify the agreement to place the plaintiff in the position, and such failure to so place the plaintiff

being the ground of the rescission, the plaintiff cannot recover upon his first cause of action.

His second cause of action for the salary of such position during the time he held himself in readiness to fulfill the duties of such position, for the same reason, would not be sufficient upon which to predicate a judgment against the defendant.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

BASTJAN v. BASTJAN, *

Civ. 7985.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1931.

Rehearing Denied Dec. 2, 1931. Hearing Granted by Supreme Court Dec. 31, 1931.

1. Divorce $\S$ 127(3).

In action for divorce, all evidence of prevailing party need not be corroborated.

2. Appeal and error $\S$ 1011(1).

Conflicts in testimony are to be settled by trial court, and not on review.

3. Husband and wife $\S$ 252.

Desert claim entered in name of husband, but paid out of community funds, *held* community property, as regards division of property in divorce action.

4. Frauds, Statute of $\S$ 265.

Each spouse entering oral partnership agreement to pool real estate not excluding any property held separate real estate in trust for other, statute of frauds not being applicable (Civ. Code $\S$ 1741).

5. Divorce $\S$ 252.

In divorce action, husband and wife having entered into partnership agreement to pool their realty, court erred in not awarding plaintiff her interest in property remaining in husband's name.

6. Divorce $\S$ 235.

In divorce action, court awarding plaintiff one-half of appraised value of property pooled by spouses' partnership agreement did not abuse discretion in refusing permanent maintenance.

7. Divorce $\S$ 194, 227(2).

Award to plaintiff in divorce action of \$300 counsel fees and \$200 appeal costs, *held* not excessive.

Such an award, was not excessive when property awarded plaintiff paid small in-

come, and defendant was earning a salary in addition to income from his share of property.

Appeals from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Divorce suit by Stefani Bastjan against Frank Bastjan, in which defendant filed a counterclaim. From a judgment and order for counsel fees and costs, and refusing to award plaintiff maintenance pending appeal, both parties appeal.

Order affirmed. Judgment reversed, and cause remanded, with directions.

George S. Hupp and Frank C. Hill, both of Los Angeles, for appellant.

I. Henry Harris, of Los Angeles, for respondent.

STURTEVANT, J.

By their pleadings, each party asked for a divorce and a division of properties. Each spouse accused the other of cruelty. The plaintiff set forth all properties held by both parties claiming to own a half interest in each. The defendant set forth all properties making the same claim, except that he claimed as separate property a tract located at Newport in Orange county, and a tract located in San Bernardino county.

The trial court made a finding that the plaintiff's allegations of cruelty were true, and that the defendant's allegations of cruelty were not true, and awarded the plaintiff an interlocutory decree of divorce, counsel fees in the sum of \$500, costs of suit, and also awarded her properties of the estimated value of about one-half of all the properties exclusive of those located in Orange county and those located in San Bernardino county. Those tracts the court held to be the separate property of the husband. After the decree was entered, the plaintiff announced her intention to appeal, and the court made an order awarding her counsel fees on appeal in the sum of \$350, and, for costs on appeal, \$200. It refused to award her maintenance pending the appeal. Each party appealed from the judgment, and also from the order. Each party settled a bill of exceptions, but they have brought up only one transcript.

[1, 2] The defendant claims the evidence was insufficient to support a finding of cruelty against him. In this behalf, he claims that all of plaintiff's evidence was not corroborated. But it is not necessary that all of the evidence of the prevailing party should be corroborated. *Cooper v. Cooper*, 88 Cal. 45, 25 P. 1062. That at least a part of the testimony given by the plaintiff was corroborated is clear. Tr., fols. 698, 818, 723, 707 and 717. The fact that the defendant and Helen (his daughter by a former marriage)

gave testimony contradicting the plaintiff created at most a conflict, but all conflicts were to be settled by the trial court, and not a court of review.

All other questions turn on the division of the properties between the parties and the awards of relief or refusal of relief to the plaintiff. It will not be controverted that in divorce actions the trial court has the power, where the charge is extreme cruelty, to award to the offended party such part of the community property " * * * as the court, from all the facts of the case, and the condition of the parties may deem just." Civ. Code, § 146, subd. 1. The record before us shows that at all times the court and both counsel were attempting to ascertain what properties each spouse had an interest in, and to divide such properties share and share alike. The record shows that the parties were married October 26, 1918. At that time the plaintiff was possessed of moneys in her own right in the sum of \$3,100. The defendant was the owner of what is called the Newport property, fifteen acres, for which he paid \$350 per acre and on which he owed \$2,000. His equity amounted, therefore, to \$3,250. He owned a lot valued at \$1,200, but his brother held a judgment lien thereon for \$350, leaving an equity of \$850. The defendant also held a desert claim on 320 acres, being the property located in San Bernardino county. Later it was entered in his own name, but paid for out of community funds. There was evidence that shortly after their marriage the parties agreed orally to pool their interests and to become equal partners, that they did so, and that they bought and sold certain properties after the date of their marriage and before April 15, 1925, the date this action was commenced. The judgment held by the defendant's brother was paid by moneys advanced by the plaintiff. The incumbrance on the Newport property, both principal and interest, was paid by the partnership. Lands purchased were taken by the spouses under joint tenancy deeds. The expenses of both spouses and of the husband's daughter, Helen, were paid out of a joint bank account. During that same period, the expenses of, and the taxes and insurance on, all properties were paid out of the same joint bank account. This was done whether the title stood in the name of both spouses or in the name of the defendant. The Newport property stood of record in the name of the husband at the date of the marriage, and the record was never changed. The desert claim was taken in the name of the defendant, and was never changed. No writing was executed by the spouses showing the partnership nor the properties owned by it. In finding No. IV, the trial court found that the parties acquired as copartners and as community property and held in joint tenancy every parcel except the lands in Orange county and those in San Bernardino county.

In finding No. V, the court found that the Newport property and the desert claim were the separate property of the defendant. It did not find the value of either tract, but awarded both tracts to him. We think that the court erred in applying the law to the facts.

[3] The desert land claim was clearly community property. The general rule regarding conveyances and contracts of and concerning claims to public lands is stated in 50 C. J. 1123: "But in the absence of any express or implied prohibition in the statute under which he is seeking to acquire the land, an entryman or one whose application to purchase land has been approved has an equitable interest in the land which he may assign or convey to another, although he has not yet paid the government price for the land." At an early date, that rule was adopted in California. For many years it had been provided by the federal statute that homestead claims might be located. On June 8, 1872, a statute was passed authorizing individuals to locate additional lands. U. S. Rev. Stats. § 2306 (43 USCA § 274). A claim entered under that section was the subject of dispute in the case of *Rose v. Wood & Lumber Company*, 73 Cal. 385, 15 P. 19. Speaking of the assignment of such a right, on page 388 of 73 Cal., 15 P. 19 the court said: "As stated before, section 2306 is independent of the other provisions of chapter 5, and in the absence of an express prohibition against an alienation of the property by the claimant, after the issuance of a certificate from the general land-office, to locate in person or by agent a certain number of acres, we cannot say that the right so to alienate does not exist. It is a right which need not in terms be granted by the sovereign authority, for it exists if not expressly prohibited, or opposed to public policy." Under federal legislation supplemented by state legislation, provision was made for the location of lots under what was known as the "Townsite Acts." A married woman had entered certain lots and a man who afterwards became her husband had located certain other lots. Later they married. Litigation arose regarding the title of the husband to the lots located by him. Title to the lots upon his request was taken in the name of his wife. The payments were made by the husband out of his separate money. In the case of *Morgan v. Lones*, 78 Cal. 58, 20 P. 248, it was held that said lots were community property. In *Phillips v. Carter*, 135 Cal. 604, 67 P. 1031, 87 Am. St. Rep. 152, the court was considering lands entered under the same statute as the desert claim was entered in the instant case. Commencing on page 606 of 135 Cal., 67 P. 1032, the court cites many cases decided by the Supreme Court of the state of California, and also many cases decided by the Supreme Court of the United States, which declared the rule as stated above. Turning again to *Morgan v. Lones*, 78 Cal. 58, at page 62, 20 P.

248, 250, we quote as follows: "The presumption is that property acquired by purchase during marriage is community property, and the party who claims that it is separate property must prove it to be such by clear and satisfactory evidence. (Citing cases.)" In the record before us, the defendant did not introduce evidence sustaining that burden.

[4] As to the Newport property, the facts are slightly different. Both before and after the marriage it stood in the name of the husband. There was clear testimony of an oral partnership agreement. The court found a partnership was formed. If it was formed for the purposes hereinabove recited, then from the moment it was formed the partners held the properties in trust for themselves and for each other, and no writing was necessary to take the case outside the statute of frauds. 12 Cal. Jur. 861. There was no evidence that the interests of the partnership were, by the terms of any contract, limited to properties other than the Newport property. That property, as well as all others, went in. It thus appears that there was no evidence to sustain finding No. V; that is, that the Newport property and the desert claim in San Bernardino county are defendant's separate property.

The Newport property was set over to the defendant as his separate property because the trial court was of the opinion that a contract in writing was indispensable evidence in proof of any claim by the plaintiff. Whatever may be the rule in other jurisdictions, the rule is settled in this state contrary to the holding of the trial court. It will not be contended that a partnership may not be created by an oral agreement. When that agreement is entered into and is partly performed, the statute of frauds (Civ. Code § 1741) is not applicable. *Pio Pico v. Cuyas*, 47 Cal. 174, 178, 179; *Hill v. Den*, 121 Cal. 42, 53 P. 642. In *Bates v. Babcock*, 95 Cal. 479, commencing on page 486, 30 P. 605, 607, 16 L. R. A. 745, 29 Am. St. Rep. 133, the court said: "No interest or estate in the land is created by such an agreement, but by the subsequent acts of the parties under the agreement rights are acquired in reference to the land that may be purchased in pursuance of the agreement, which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud. * * * It is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement. The same principle should apply when the object of the partnership is to deal in lands, and the assets of the partnership with which the lands are to be purchased are made up of the skill and money which are respectively contributed by the partners as its capital. Upon proof of the existence of such a partnership, the rights and obligations of the respective partners

should be determined upon the same principles and with the same results as in other partnerships. The settlement of partnership accounts, and the conversion into money of the assets of the partnership, whether real or personal, and their division among the partners, has always been one of the functions of a court of equity, and that court never stops to inquire into the source of the title of such assets, or in whose name they are held. * * * If, however, the agreement was valid at its inception, it is not rendered invalid by the subsequent act of one of the parties, and, although it cannot be changed into a different agreement, such as an agreement for the conveyance of the land, yet either party has the right to its enforcement for the purpose of carrying out its original purpose, the division of the profits resulting from the speculation. The same principles are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale under the directions of a court of equity, with a distribution of the proceeds thereof according to the rights of the individual partners." *Koyer v. Willmon*, 150 Cal. 785, 787, 90 P. 135, is to the same effect. See, also, 12 Cal. Jur. 861.

[5, 6] In framing its decree, the trial court awarded to each spouse property equal to one-half of the appraised value of those parcels found to be community, partnership, or joint. Having done so, it refused to allow to the plaintiff permanent maintenance in addition to said property awards. We have shown above that the plaintiff should have been awarded property, in money or in kind, representing her interest in the Newport property and her interest in the desert claim, and that the court erred in not doing so. But the record does not contain any evidence showing that it is was an abuse of discretion to refuse an allowance as for maintenance.

[7] The properties awarded to the plaintiff are not producing much of a net income. If counsel fees and costs had not been awarded to her the plaintiff would have been compelled to incur debts in order to maintain this appeal. The defendant is employed and receives a wage. He also has some income from his properties. These several facts show that the trial court did not err in allowing the wife \$300 as counsel fees, and \$200 as for costs on appeal. Nor can it be said that said sums are excessive.

The order appealed from is affirmed. The judgment is reversed, the cause is remanded, and the trial court is directed to retry the issues involving the property described in finding No. V, and thereafter make findings on said issues, and render a judgment in conformity with the findings heretofore made as modified by the findings herein directed to be made anew.

We concur: NOURSE, P. J.; SPENCE, J.

214 Cal. 287

BONNELFILLIO et ux. v. RICKS.

Sac. 4541.

Supreme Court of California.

Nov. 17, 1931.

1. Appeal and error ☞931(7).

Appeal being on judgment roll, Supreme Court assumed facts found, and not within pleadings, were by agreement put in issue during trial.

2. Vendor and purchaser ☞352.

Findings showing purchasers paid \$3,500, some nine years prior, on land which vendor failed to convey, supported judgment for \$5,000 against vendor.

The findings supported judgment for \$5,000 against vendor for breach of contract, since simple interest at legal rate on the sum of \$3,500 for time elapsing between date of payment and findings, added to principal, more than equaled amount of judgment.

In Bank.

Appeal from Superior Court, Solano County; Percy S. King, Judge.

Action by Gluseppe Bonnellfillio and wife against H. L. Ricks, as special administrator of the estate of Eva L. Ricks, deceased. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

W. U. Goodman, of Fairfield, for respondents.

PER CURIAM.

[1] In this action the appellant advances two major points in support of his appeal. It is first contended that the findings are not supported by the pleadings. As the appeal is upon the judgment roll, we must presume that all facts found by the court and not within the pleadings in the case were by agreement of court and counsel put in issue during the trial of the action. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Fighiera v. Radis, 180 Cal. 660, 182 P. 418.

[2] Appellant's second contention is that the judgment is not supported by the findings. The particular point made by appellant in this contention is that while the findings show that the plaintiffs paid to the defendant the sum of \$3,500 on the purchase price of the land, which the defendant failed to convey to plaintiffs under their contract, the judgment calls for \$5,000 damages against the defendant for this breach of contract. There might

be some merit in this contention were it not for the fact that the findings show that this payment of \$3,500 was made some nine years prior to the date of the findings. Simple interest at the legal rate upon the sum of \$3,500 for this period of time, added to the principal sum, would more than equal the amount of the judgment. It is unnecessary, we think, to specially mention other points made by appellant. The mere statement of them would show their inapplicability to the facts in this case.

The judgment is affirmed.

214 Cal. 241

BUCKLEY v. ROCHE et al.

S. F. 13019.

Supreme Court of California.

Nov. 2, 1931.

1. Stipulations ☞14(10).

On stipulation that policeman died from heart spasm resulting from exertion in climbing stairway to work, pension fund trustees abused discretion in finding that death did not result from injury sustained while performing duties (San Francisco City and County Charter, c. 10, art. 8, § 4).

2. Municipal corporations ☞187.

That policeman dying of heart spasm had previous heart affliction would not defeat wife's right to pension if exertion in climbing stairs precipitated death by aggravating condition.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mary Buckley for a writ of mandate to compel the award of a pension, against Theodore J. Roche and others, as members and constituting the Board of Trustees of the Police Relief and Pension Fund of the City and County of San Francisco, Cal. Judgment for plaintiff, and defendants appeal.

Affirmed.

Superseding opinion in 298 P. 816, which superseded the opinion in 290 P. 646.

John J. O'Toole, City Atty., and Sylvain D. Leipsic, Asst. City Atty., both of San Francisco, for appellants.

William A. Kelly, of San Francisco, for respondent.

CURTIS, J.

This is an appeal from a judgment of mandate rendered in favor of petitioner by the superior court of the city and county of San Francisco.

The plaintiff is the widow of William Buckley, who at the time of his death was a member of the police force of said city and county, and had been such for many years immediately prior to his death. For some time before his death Buckley had suffered from a heart affliction which at times rendered it necessary for him to temporarily retire from active duty. His death occurred on the morning of March 7, 1925. Long prior thereto he had been assigned to the photograph gallery of the police department, and continued in such assignment up to the time of his death. This photograph gallery was situated on the roof of the Hall of Justice, and was reached by a spiral stairway of two flights of stairs, each consisting of twelve steps. On the morning of his death, in accordance with his usual custom, Buckley reported for duty on the first floor of the Hall of Justice as required by the rules of the police department, and immediately thereafter, and in order to reach the photograph gallery where his police service was required to be performed, he proceeded by elevator to the fifth floor of the building. He then ascended the spiral stairway to the photograph gallery, where he entered upon the discharge of his duties as an officer of the police department. Shortly thereafter and while in said photograph gallery he suffered a heart spasm from which thereafter and within a few hours he died.

The plaintiff herein, the widow of Buckley, made application to the police commission of said municipality for a pension in accordance with the provisions of the charter of said city and county. Section 4, c. 10, art. VIII. Her application was denied, and she thereupon instituted this action in said Superior Court for a writ of mandate directed to said commission to compel said commission to grant her a pension under the provisions of said charter as the widow of said William Buckley. Upon a trial of the action, judgment was rendered in favor of the plaintiff and against said board of police commissioners. From this judgment the defendants have appealed.

The case was tried upon a stipulation of facts, so there is no dispute regarding any of the facts of the case. The facts recited above were covered by said written stipulation. As to the immediate cause of Buckley's death, the stipulation sets forth the facts as follows: "While in said photograph gallery, Buckley suffered a heart spasm from which in a few hours thereafter he died. Said heart spasm resulted from the exertion incident to the stairway ascension."

[1] By the charter of the city and county of San Francisco (section 4, c. 10, art. VIII) it is provided that: "The commission shall,

out of the Police Relief and Pension Fund, provide as follows for the family of any officer, member or employee who may be killed or injured while in the performance of his duties, and who shall have died within three (3) years from the date of such injury," etc. The only facts necessary for the petitioner, the widow of Buckley, to prove in order to entitle her to a pension under this provision of the charter were that at the time of the death of Buckley she was his lawful wife, and that he died as a result of an injury sustained while in the performance of his duties. Her lawful marriage to Buckley is conceded. The fact that Buckley died as a result of an injury received while in the performance of his duties, we think is conclusively proven by the stipulation of the parties regarding the cause of his death.

The appellants, the members of the police commission, however, refer to and rely in support of their action in denying the application upon a further provision of said section 4 which reads as follows: "The judgment of said commissioners respecting said application shall be final, unless in determining said application said commissioners commit a clear abuse of discretion." Appellants, therefore, claim that under this provision of the charter the judgment of the commission respecting the application of Mrs. Buckley was final, unless in reaching said judgment the commission committed an abuse of discretion. We think it will be conceded, if not, the doctrine is supported by ample authority, that, if the commission deny an application for a pension when the uncontradicted evidence before it showed that the applicant was entitled to receive a pension, then the commission abused its discretion in denying the application. For instance, it would be an abuse of discretion for the commission to deny a pension to a widow of a police officer who met his death, according to the undisputed evidence, while attempting to lawfully arrest a person accused of crime. To the same extent would it be an abuse of discretion for the commission to deny a pension to a widow of a police officer who while walking his beat accidentally fell into a hidden and unguarded opening in the sidewalk and was thereby killed. It was stipulated in this case that Buckley, the police officer, died from the effect of a heart spasm resulting from his exertion in climbing the spiral stairway. There can be no controversy regarding the meaning of this part of the stipulation. The exertion of climbing the twenty-four steps of the spiral stairway produced a heart spasm from which he died. The producing cause of his death was the climbing of the stairway. These words are so plain and their meaning is so clear that it seems a waste of time to attempt to further explain them. For the commission, therefore, to deny a pension to the widow in the face of the positive and uncon-

tradicted evidence was a clear abuse of discretion upon its part.

This language of the charter is quite similar in principle to the wording of the Workmen's Compensation, Insurance and Safety Act (St. 1917, pp. 831, 876), wherein it is provided (section 67c) that: "The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review." Yet it has been held in an unbroken line of decisions commencing shortly after the enactment of the first Workmen's Compensation Act, and continuing down to the present, that, where the findings of the commission have been made without any evidence to support them, the award will be annulled. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *Knock v. Ind. Acc. Com.*, 200 Cal. 456, 253 P. 712; *Fogarty v. Dept. of Indus. Relations*, 206 Cal. 102, 273 P. 791. In many of these cases, including the two cases last cited, an order of the commission denying an award was annulled on the ground that the uncontradicted evidence showed that the injury for which compensation was asked arose out of and in the course of the employment of the deceased. These decisions were based upon the theory that in disregarding such evidence and denying an award contrary thereto the commission was acting without jurisdiction, and its acts were subject to review, in spite of the provision of the act directing that the findings of the commission on questions of fact shall be conclusive and final and not subject to review. This provision of the Workmen's Compensation Act has been construed to mean that the commission has been given the absolute power to pass upon the evidence in cases pending before it, and to determine the weight and value of such evidence, and that its findings and conclusions based thereon are conclusive and final; yet this power given to the commission does not authorize it to disregard the evidence entirely and to make findings or grant or deny an award when there is no evidence before it supporting such action. We think the principles of law established in compensation cases are applicable to cases arising under the provisions of the charter of the city and county of San Francisco governing the power of the police commission in the matter of granting or denying pensions to widows of deceased police officers. The commission is given plenary power when it comes to passing upon the weight of the evidence in behalf of or against an applicant for a pension, and its conclusions drawn therefrom are final and conclusive, but it is not given the arbitrary power either to grant or deny such an application when there is no evidence to support its action. Such action on the part of the commission amounts to a clear abuse of discretion, and is subject to review and annulment by a court of competent jurisdiction.

[2] The fact that Buckley had at the time a previous heart affection did not of itself defeat his wife's application for a pension if the exertion in climbing the stairs precipitated his death by aggravating this condition. Under these conditions, the injury was such as would bring it within the terms of the charter and entitle his widow to a pension in case of his death from said injury. This principle has frequently been applied in cases arising under the Workmen's Compensation Act, and we can see no distinguishable difference from such cases and those arising under said charter.

The leading case to be found upon this subject is from the Supreme Judicial Court of Massachusetts, where it was held that: "Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act." *In re Brightman*, 220 Mass. 17, 107 N. E. 527, 528, L. R. A. 1916A, 321.

That case was followed by this court in the decision of the case of *G. L. Eastman Co. v. Ind. Acc. Com.*, 186 Cal. 587, where this court on page 594, 200 P. 17, 20 said: "If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." In the *Eastman Case* we also (page 597 of 186 Cal., 200 P. 17, 21) quote with approval the following language from the case of *In re Madden*, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000: "'It is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting on a healthy employee.' Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment, because it develops within it."

In *Knock v. Ind. Acc. Com.*, 200 Cal. 456, 253 P. 712, this court not only followed the *Eastman Case* and held that, although *Knock* was affected with a previous heart disease, the conditions of his employment were such as to have precipitated his collapse sooner than would otherwise have happened, but it set aside the order of the commission denying an award to the dependents of *Knock* as being contrary to the undisputed evidence in the case.

In *Fogarty v. Depart. of Indus. Relations*, 206 Cal. 102, 273 P. 791, this court refers with approval to the *Eastman* and *Knock Cases*, and quotes from the *Eastman Case* the exact language which we have quoted above as contained in the opinion in that case. The court also in the *Fogarty Case* annulled the

order of the commission denying an award in favor of the dependents of Fogarty on the ground that the uncontradicted evidence before the commission showed that the employment of Fogarty precipitated or accelerated his death. These authorities establish beyond question that acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration.

That the death of Buckley, the husband of petitioner, was due to an injury sustained by him while in the performance of his duties, we think is conclusively shown by the stipulation of facts in this case. The climbing of a spiral stairway of twenty-four steps, even if it were a part of the routine service of Buckley, according to the stipulation produced the heart spasm which caused his death. The exertion of ascending the stairway, therefore, caused the injury which produced his death. As he was required in the course of his employment to ascend this stairway, the injury caused thereby was an injury received while in the performance of his duty. His widow was therefore entitled to a pension. Under this state of facts the action of the police commission in denying the petitioner a pension was a clear abuse of discretion on its part.

The judgment of the trial court directing the issuance of a writ of mandate as prayed for by the plaintiff is affirmed.

We concur: LANGDON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

214 Cal. 247

DEXTER v. PIERSON et al.
L. A. 11934.

Supreme Court of California.
Nov. 2, 1931.

1. Contracts ☞129(5).

Provision in mortgage for unlimited waiver of statute of limitations *held* valid, although no such waiver appeared on note (Code Civ. Proc. § 337).

2. Limitation of actions ☞197(1).

Evidence established that mortgagor's grantee taking subject to mortgage had notice of waiver of statute of limitations by mortgagor, hence was bound thereby (Code Civ. Proc. § 337).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Louie S. Dexter against George M. Pierson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

For opinion of District Court of Appeal adopted herewith, see 1 P.(2d) 435.

Edwin J. Miller and Wier Casady, both of Los Angeles, and Robert M. Cordill, of Omaha, Neb., for appellant.

J. Irving McKenna and Geo. M. Pierson, both of Los Angeles, for respondent Catherine A. McKenna.

PRESTON, J.

We granted a rehearing in this cause to give further consideration to the contention of respondent that she could, as a subsequent purchaser, invoke the statute of limitations as a defense to a foreclosure action, notwithstanding an express covenant by the mortgagor or of the premises inserted in the mortgage that such plea was perpetually waived. She cites a long line of cases, beginning with *Lord v. Morris*, 18 Cal. 482, and ending with *Foster v. Butler*, 164 Cal. 623, 627, 130 P. 6.

The substance of these holdings is that the mortgagor cannot, by waiving the bar of the statute, affect the right of a subsequent purchaser or incumbrancer of the mortgaged premises to insist, as to himself, that the action was not brought in time. Or, as stated in *Wood v. Goodfellow*, 43 Cal. 185, 188: "When third persons have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the State."

But this doctrine does not reach the situation before us. The cases referred to relate to acts or conduct of the mortgagor occurring after the purchase or incumbrance, in good faith, or such acts or conduct before, of which the purchaser had no notice. Here the instrument hypothecated the property to secure the debt, giving a lien thereon, and it provided that such lien might not be defeated by the plea that it was barred by the statute.

Such provision being valid and contained in the instrument of record, the purchaser took with notice of it. Whether or not it was a covenant running with the land (section 1462 Civ. Code) is immaterial, as a valid, continuing lien was created of which the purchaser had due notice, and that is sufficient. *Fresno Canal, etc., Co. v. Rowell*, 80 Cal. 114, 22 P. 53, 13 Am. St. Rep. 112; *Fresno Canal,*

etc., Co. v. Dunbar, 80 Cal. 530, 22 P. 275; Title Insurance, etc., Co. v. Miller & Lux, 183 Cal. 71, 88, 190 P. 433.

We therefore republish our former opinion, as follows, to wit:

This action was brought for the purpose of foreclosing two mortgages given to secure an indebtedness of \$1,600, evidenced by two promissory notes, each in the sum of \$800. Each note is dated May 28, 1915, and matures one year from date. The property mortgaged consists of a considerable number of parcels of real property. At the time these mortgages were duly and properly recorded, they constituted a first lien on the real property involved. The notes and mortgages were signed by George M. and Rena W. Pierson, who were acting as trustees for one H. Percival Oates. Oates paid the interest on the notes until January of 1917, since which time no payments of principal or interest have been paid. The mortgagee was one Edward Russek.

Since 1917, the property involved has been in constant litigation. Edward Russek, the mortgagee, died in that year, and his estate, including the two notes and the two mortgages here involved, was distributed to his widow, Rosario Russek. The decree of distribution misdescribed the notes, the description being corrected by order of court, dated December 6, 1927.

In 1920, Ester Russek, as purported assignee, commenced an action to foreclose the mortgages, which action resulted in a judgment of foreclosure. This action was subsequently dismissed in September of 1924.

In April of 1924, Ester and Rosario Russek transferred the notes and mortgages to Louie S. Dexter, the plaintiff and appellant herein, and gave as evidence of the transfer a quitclaim deed to the property. This quitclaim deed was reformed by order of court, dated October 14, 1927, so as to constitute a formal assignment of the notes and mortgages.

In March of 1924, the Piersons, the original mortgagors, conveyed all the real property covered by the two mortgages to L. and Roy Lockwood. Catherine A. McKenna, respondent herein, subsequently secured the Lockwood title to the property.

Louie Dexter, after securing the quitclaim deed mentioned above, started a quiet title action against the Lockwoods and others, but subsequently dismissed as to the Lockwoods. Catherine A. McKenna intervened in that action and took a default judgment against Dexter. This default judgment was subsequently set aside by order of court.

In July of 1926, Dexter commenced this present foreclosure action, naming the Piersons, Oates, Catherine A. McKenna, and others as defendants. The complaint sets forth two causes of action, one on each note and mortgage, and in each cause of action it is

specifically pleaded that defendants have waived the bar of the statute of limitations. On various motions and on two trials of this action, five different trial judges have passed on the question as to whether the action is barred by the statute of limitations; three judges ruled that it was not barred, and two that it was. Judgment was finally entered in favor of defendants, principally on the theory that the action was barred. From the judgment so entered appellant has prosecuted this appeal. From an examination of the briefs filed in this case, it appears that neither counsel has shown the diligence in the preparation of the briefs nor the regard for the rules of court expected of counsel in causes pending in this court. In the interests of justice, however, we will consider the merits of the appeal.

The only question worthy of discussion presented is whether or not the statute of limitations has been waived by these defendants. In each mortgage appears the following clause: " * * * The pleading of the statute of limitations as a defense to any demand secured by this mortgage is hereby waived. * * * "

[1, 2] The debt, evidenced by the promissory note, is obviously the "demand" referred to, and, in reference to such "demand," the mortgagor has expressly waived the statute. The fact that no such waiver appears on the face of the note is immaterial. The situation is simply one by which the mortgagor, by a separate writing, has waived the statute of limitations (Code Civil Proc. § 337) in reference to any action based on the note or mortgage. From the facts of the case, it clearly appears that the grantee of the mortgage had notice of the waiver of the statute by her predecessor in title. It is obvious that, if the waiver is binding against the mortgagor, it is likewise binding on all those who take the property subject to the mortgage and with knowledge thereof. The only question involved, therefore, is whether this waiver, being unlimited as to time, is a binding and enforceable waiver. Although there is a great conflict of authority in other states as to the effect of such unlimited waiver (37 Cor. Jur. 722, section 41 et seq.), the law in this state has been finally settled by the case of Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714. In that case, this court, after a complete review of the authorities, held a waiver for 99 years was valid. In McGee v. Jones, 79 Cal. App. 403, 249 P. 544, on the authority of the DeFrees Case, supra, the District Court of Appeal held an unlimited waiver valid. In Hammell v. Atkinson, 79 Cal. App. 708, 250 P. 1117, the very point now being discussed was decided. In that case, the waiver was to be found in a mortgage, and was in exactly the same words as the waiver here relied on.

The court held that the waiver was valid, and that the statute of limitations was no defense to an action to foreclose.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

214 Cal. 207

ANCHESTER v. KECK et al. (SCOTT et al., Interveners).

L. A. 10691.

Supreme Court of California.

Oct. 30, 1931.

1. Estoppel §58.

Optionee *held* not misled, so as to estop optionor from relying on option to buy stock, by negotiations for new option.

Plaintiff testified that he stated frequently during negotiations for new option that he was waiving no rights under original contract. Defendant wrote plaintiff a letter, stating that said contract was still in force, and proposed new agreement simply tentative, and proposed agreement did not purport to modify original option, which was not mentioned therein.

2. Equity §66.

He who seeks equity should do equity.

3. Corporations §116.

Optionee, not tendering agreed price and asking equitable relief after failure of negotiations for new option to buy stock, *held* not entitled to recover deposit.

4. Appeal and error §213.

Plaintiff not pleading facts, but setting up common counts for money loaned and received, and not complaining of motions for nonsuit as too general when made cannot make such complaint on appeal.

5. Appeal and error §854(5).

Order granting nonsuit will be sustained if it might have been properly granted upon any ground, whether made ground of motion or not.

In such case, order will be sustained, since reason of rule of disclosure of specific grounds for motion is for court's protection, and rule has no application to an order granting motion, but only to order denying such motion.

6. Trial §165.

Rules applicable to motions for nonsuits do not require courts to put themselves in incongruous positions to hold case in court.

Courts will not give strained or unnatural construction to language or conduct, or distort orderly laws of sequences or logic of given situation to force unnatural result.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Henry Anchester against W. M. Keck and others, in which Joseph Scott and another, as receivers of the California-Eastern Oil Company and the Julian Petroleum Corporation, intervened. From a judgment of nonsuit, plaintiff and interveners appeal.

Affirmed.

Adopting opinion of District Court of Appeal, reported in 295 P. 91.

A. G. Ritter, Anderson & Anderson, Frank P. Doherty, M. Eleanor Mack, and William R. Gallagher, all of Los Angeles, for appellants.

Chandler, Wright & Ward and H. T. Morrow, all of Los Angeles, for respondents.

SEAWELL, J.

The petition for a hearing was granted in this cause after decision by the District Court of Appeal, First Appellate District, Division 2, Sturtevant, J., writing the opinion of said court, for the purpose of giving this court an opportunity of making a closer examination of a voluminous record than it was possible to do under our appellate system upon petition for hearing. Upon a further examination of the record and the merits of the appeal, which was taken from a judgment entered after an order granting respondents' motion for a nonsuit, we are of the opinion that the questions presented upon appeal were correctly disposed of by the opinion of said District Court of Appeal, which is herewith adopted as the decision of this court, together with such supplemental observations as we have appended thereto:

The plaintiff commenced an action against the defendant to recover a deposit made under a contract of option. The defendant answered. The receivers of the California-Eastern Oil Company and Julian Petroleum Corporation filed a complaint in intervention. The defendant answered the complaint in intervention. On the issues so framed, a trial was had before the court sitting with a jury. At the end of the plaintiff's case, the trial court granted defendant's motions for nonsuits. The plaintiff and the interveners have appealed, have brought up typewritten transcripts, and have filed one set of briefs. Here-

inafter we will refer to both parties as the plaintiff.

On the 2d of October, 1926, the plaintiff and defendant executed a contract under the terms of which the plaintiff was given an option to buy a block of stock in the Superior Oil Company at \$1 per share. He paid down \$100,000, and under the terms of that agreement it was further provided that: "Henry Anchester shall have to and including the 1st day of November, 1926, in which to elect whether or not he will exercise this option. If Henry Anchester elects to exercise this option, he shall, on or before said date, deposit with the Farmers and Merchants National Bank of Los Angeles, the sum of two million dollars (\$2,000,000) in cash with instructions to said bank to pay such cash to W. M. Keck or order, and will at the same time deliver to W. M. Keck a written notice of the exercise of this option, whereupon the said Henry Anchester shall be obligated to purchase, and W. M. Keck will be obliged to sell, * * * and in the event of the failure of Henry Anchester to make any of the payments hereinabove provided for at the times herein stated, all previous payments made by him shall be forfeited as agreed and liquidated damages for his breach of the agreement, and this agreement shall be terminated and he shall have no right, title, or interest of any kind or character in and to any of the stock of the Superior Oil Company so deposited or any claim or right of any kind against W. M. Keck or any other person. * * * Time is hereby declared to be of the essence of this agreement." On October 26, 1926, the plaintiff and defendant commenced a discussion of the terms of a new contract of option, not the modification of the existing option. Some of the terms of that proposed contract were to the effect that the plaintiff should have an option extending to the 27th day of December, 1926, at the same price per share, but the plaintiff was to pay \$250,000 on the execution of the new option, and there was to be released to the defendant certain equipment then owned by the Superior Oil Company. Said negotiations continued from the 26th day of October until late in the afternoon on November 3, 1926. At that time the negotiations were broken off. No paper or papers were signed evidencing the new agreement, and we do not understand either party to contend that the inchoate transactions ever culminated in a contract.

The plaintiff did not plead the facts, but he pleaded two counts. He set up a common count as for money loaned, and he set up a common count as for moneys had and received. The complaint in intervention set up one count only, and that was a common count as for moneys had and received. In the defendant's answers he denied the material allegations contained in the plaintiff's complaint and in the complaint in intervention.

Each party made an opening statement. Many witnesses were called and examined. No one of them testified to any fact or facts showing rescission, abandonment, or estoppel excepting as the negotiations for a new option may be evidence thereof.

[1] The plaintiff contends that the defendant, by entering into negotiations with plaintiff looking toward the execution of a new option, estopped himself from relying on the contract of October 2, 1926, that he misled the plaintiff to his injury, and that the defendant therefore breached and abandoned said contract. He does not claim that the defendant, or any one of his agents, made any declaration or promise which lulled him to sleep. He relies solely on conduct. But, in that connection, the plaintiff testified that during those negotiations he stated "every fifteen minutes" that he was not to be understood as waiving any rights under the contract of October 2, 1926. The defendant stated his position in writing. He caused to be delivered to the plaintiff on October 30, 1926, a letter which states: "We understand that your option agreement with Mr. Keck dated Oct. 2, 1926, is still in full force and effect and that this other proposed agreement is simply tentative and not binding on either party and either party has the right to refuse to enter into any additional agreements other than the agreement of Oct. 2, 1926." Giving the plaintiff the benefit of every right to which he was entitled on the presentation of a motion for a nonsuit (*Hoff v. Los Angeles Pacific Co.*, 158 Cal. 599, 112 P. 53), it is patent that the plaintiff, under such a set of facts, may not claim that he was misled. This conclusion is re-enforced by a consideration of the terms of the proposed agreement dated November 3, 1926. Had it been executed, the plaintiff would not have been entitled to the repayment of his \$100,000 nor for a credit as for a payment on account. It does not purport to be a modification of the option dated October 2, 1926. It does not mention that option nor the said \$100,000. It is a wholly new and independent instrument.

[2, 3] Examined as an action in equity, the result is the same. If it be claimed that the plaintiff was misled, still it does not follow that he was wholly excused from performance. But, by proper pleadings and proof, he was entitled to apply to a court of equity to be given relief. *Glock v. Howard*, 123 Cal. 1, 9, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. But he who seeks equity should do equity. If, as claimed, the plaintiff was ready, anxious, and willing on November 1, 1926, to elect to take up the option dated October 2, 1926, except for the wrong impression he formed as to the defendant's intentions as to a sale, then his remedy was to make a belated tender, and ask a court of equity to approve it and relieve him from

his forfeiture. However, the plaintiff has never made a tender nor an offer to perform and does not now do so. November 3, 1926, it became clear that the defendant was not willing to give another option under the terms of the inchoate agreement of that date. The plaintiff's rights, if any, depended, therefore, on the contract of October 2, 1926, and the duty rested on him of serving a written notice of his election and of tendering \$2,000,-000 as provided in that instrument. But this he has wholly failed to do.

The facts which we have already set forth show that the defendant at no time abandoned his contract dated October 2, 1926, but at all times relied thereon.

There is no evidence that at any time the defendant was ever in default nor that at any time he departed from his contract nor that he rescinded it in any respect.

The plaintiff cites and relies on *Hulen v. Stuart*, 191 Cal. 562, 217 P. 750. That case is not in point, because it involved very different facts. In that case the defendant Stuart made certain positive statements that he would later perform the existing contract. In the instant case a proposed agreement was merely being discussed, and the defendant made no promises as to the existing contract.

[4] The plaintiff complains because the defendant did not in his motions for nonsuits state specifically the defects in the proof that had been made by the plaintiff. The defendant replies that, when a motion for a nonsuit has been granted, a court of review will uphold the judgment of nonsuit if it can be upheld under any possible theory whether such theory was or was not specified in the motion. *Miller v. Wade*, 87 Cal. 410, 412, 25 P. 487. Moreover, the plaintiff pleaded his case by adopting (1) a common count for money loaned and (2) a common count for money had and received. He did not plead the facts. In stating his motion for a nonsuit, the defendant was fully as exact and as specific as was possible under the allegations of the complaint. In his brief, the plaintiff states for the first time the circumstances under which he claims the courts should ignore the terms contained in his written contract. Until that brief was filed, the defendant could only guess the plaintiff's theory. The plaintiff heard the motion when it was made, but he did not then complain because it was too general and not specific, and thereafter the motions were argued at length in the trial court. We think the point is not well taken.

[5] Supplementary to that portion of the opinion which treats of the point made by appellants to the effect that the grounds stated in the motion for nonsuit were not sufficiently specific to justify the granting of the motion, it may be observed that the cases cited by appellants, such as *Millar v. Millar*, 175 Cal. 799, 167 P. 394, *L. R. A.* 1918B, 415, *Ann.*

Cas. 1918E, 184, are not in point. The only grounds stated in those cases were phrased in the most general terms, as, for example, "there is not evidence before the court justifying it in granting the relief prayed for," or, "that plaintiff had failed to prove a sufficient case," etc. In those cases the motion for a nonsuit was denied for the reason that there was no pretense of pointing out the grounds of the motion. In the instant case the grounds are as specifically set out as it was possible to point out the infirmities of plaintiff's case, and that they were sufficient to inform the court of the specific grounds of defendant's motion is made manifest by the court's affirmative action in granting the motion. The reason of the rule of disclosure is for the court's protection. In those several cases cited by appellants in which no attempt was made to disclose to the court the specific grounds of the motion to dismiss the action, the motion was denied, and upon appeal the order of the trial court was affirmed; but here, the court having been fully informed in the premises, the motion was granted. But aside from the question of sufficiency of specification, the rule invoked by appellants has application only to cases in which the motion for nonsuit is denied, and not to an order granting it. In the latter instances the motion will be sustained if it might have been properly granted upon any ground, whether made a ground of the motion or not. *Miller v. Wade*, 87 Cal. 410, 25 P. 487; *Davey v. Southern Pacific Co.*, 116 Cal. 325, 48 P. 117; *Bailey v. Brown*, 4 Cal. App. 515, 88 P. 518.

We have also given consideration to appellants' claim that the case made by them was sufficient to pass a motion for nonsuit and should have gone to the jury for decision on the theory that the District Court of Appeal failed to disregard conflicts in the evidence and also failed to apply the rule that the evidence offered by plaintiff must be examined in the light of the evidence which is most favorable to plaintiff's cause.

Appellants, in support of their main contention, insist that the conduct and statements made by respondent misled appellant Anchester and those associated with him in the management of the Julian Petroleum Corporation to the prejudice of said Anchester or his principal. We are unable to understand how this could be so in the face of the fact that both parties to the option agreement dated October 2, 1926, in which time is made the essence by the agreement, were dealing with each other at arm's length, and in view of the letter which respondent caused to be written and delivered to Anchester on October 30, 1926, in which Anchester was specifically forewarned that the option agreement dated October 2, 1926, "is still in full force and effect and that this other proposed agreement is simply tentative and not binding on either party and either party has the right

to refuse to enter into any additional agreements other than the agreement of October 2, 1926." In addition to the above notice served on Mr. Anchester two days before his option expired under the first agreement, Anchester testified at the trial that he repeatedly stated during negotiations looking to the making of the other agreement that he was not to be understood as waiving any rights under the contract of October 2, 1926. Thus the understanding of the parties as to the binding effect of the option agreement dated October 2, 1926, was clearly and expressly stated by both parties, to the end that subsequent negotiations as to the making of a different option agreement might not invalidate or impair it in any respect.

It is a circumstance of some significance that Anchester, notwithstanding he seems to have experienced some difficulty in raising the first payment under the proposed second option, did not suggest that the \$100,000 deposit made in the first transaction should be treated as a credit pro tanto in the second transaction. The second proposed agreement nowhere refers to it as moneys for which Anchester was entitled to a credit or claimed a credit.

[6] The rules applicable to motions for nonsuits do not require courts to put themselves in incongruous positions in order to hold a case in court. Courts will not give a strained or unnatural construction to language or conduct, or distort the orderly laws of sequences or the logic of a given situation to force an unnatural result. Looking at the case as presented, and giving the effect to the evidence which in reason it should receive, we are in accord with the conclusions reached by the District Court of Appeal. The evidence as a matter of law is insufficient to support a judgment for appellants.

The order and judgment are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

214 Cal. 215

FISH v. STATE BAR OF CALIFORNIA.

S. F. 14081.

Supreme Court of California.

Oct. 30, 1931.

Rehearing Denied Nov. 27, 1931.

I. Attorney and client ☞53(2).

Evidence in proceeding before board of governors of state bar established that attorney had violated rules of professional conduct in respect to soliciting employment.

2. Attorney and client ☞54.

Administrative committee of state bar had right to call as witness attorney charged and indulge inferences because of failure to answer questions.

3. Attorney and client ☞38.

Violation of rules of professional conduct by solicitation of business warranted suspension of attorney, though offenses were not enumerated in statute (Code Civ. Proc. § 287).

4. Attorney and client ☞52.

Filing of verified complaint in proceeding before board of governors of state bar was not jurisdictional, though attorney had no notice of pre-investigation.

5. Attorney and client ☞54.

Members of local committee in disbarment proceedings *held* not disqualified, in absence of showing of statutory ground of disqualification (Code Civ. Proc. § 170, subs. 1, 2, 3).

6. Attorney and client ☞54.

Bias or prejudice of board of governors of state bar *held* not to disqualify them in disbarment proceeding.

Board of governors of the state bar were not disqualified because of alleged bias or prejudice because board sitting in discipline cases was an administrative body acting as administrative arm of court, and its findings, although based on conflicting evidence, were not binding on court which can and does pass on weight of evidence.

7. Attorney and client ☞58.

Suspension of attorney for one year because of unprofessional conduct in soliciting employment *held* excessive and reduced to three months (Code Civ. Proc. § 287).

Suspension for one year was held too harsh a punishment for offenses charged, inasmuch as they did not show any violation of relation of attorney and client, in addition to which all acts charged were committed before Supreme Court had determined that the rules of professional conduct provided additional guards for discipline of attorneys to those provided in Code Civ. Proc. § 287.

WASTE, C. J., dissenting.

In Bank.

Application by C. H. Fish to review an order of the Board of Governors of the State Bar recommending that petitioner be suspended from practice of law within state for the period of one year.

Petitioner ordered suspended for three months.

C. H. Fish, of San Francisco, in pro. per.

Robert L. McWilliams, of San Francisco (Paul T. Wolf, of San Francisco, of counsel), for respondent.

PER CURIAM.

Petitioner instituted this proceeding for the purpose of reviewing an order of the board of governors of the state bar recommending that petitioner be suspended from the practice of law in this state for the period of one year. The petitioner was charged by the state bar with various violations of the Rules of Professional Conduct and of certain provisions of section 287 of the Code of Civil Procedure. The local administrative committee, before whom an extended hearing was had, found that all charges except those involving violations of rules 2 and 3 of the Rules of Professional Conduct, as approved by this court, were not sustained by the evidence, and recommended their dismissal. That committee also found that petitioner had violated, on several occasions, the above-numbered rules, and recommended his suspension for one year. The board of governors adopted the findings and recommendation of the committee. In fairness to petitioner, it should be said that the charges, other than those involving violations of rules 2 and 3, were not supported by any material evidence.

Rules 2 and 3 of the Rules of Professional Conduct, which petitioner was found to have violated, read, at the time the offenses charged are alleged to have been committed, as follows:

"Rule 2. A member of The State Bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories."

"Rule 3. A member of The State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining, professional employment for him; nor shall he directly or indirectly share with an unlicensed person compensation arising out of or incidental to professional employment, nor shall he directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom; nor shall he knowingly accept professional employment on behalf of a claimant in a personal injury or death case offered to him as a result of or as an incident to the activities of an unlicensed person that for compensation controls, directs or influences such employment."

[1] We have read the record, and are of the opinion that the evidence produced clearly shows a violation by petitioner of the above-mentioned rules, in that petitioner, by him-

self and through the agency of Harry B. Rose and John Doe Brown (first name unknown), did solicit professional employment in various cases, or did accept employment when he knew that the same had been solicited for him. Petitioner does not seriously contend that the evidence is insufficient in this regard, but does urge various other objections to the order of suspension, all of which will be considered later in this opinion.

The evidence produced at the hearing before the administrative committee of the state bar, clearly shows without material contradiction the following facts:

That on February 25, 1929, a person by the name of Gus Pascal received serious burns in the course of his employment on a steamer in San Francisco Bay. After receiving first-aid treatment at the emergency hospital, Pascal was removed to St. Mary's Hospital, arriving there at about 10 a. m. Early that afternoon a Mr. Brown arrived at the hospital, called on Pascal, and passed him a card, stating that he (Brown) represented and worked for Mr. Fish, petitioner herein. Pascal told Brown to go away, as he was too sick to talk with him. The next day Brown returned to the hospital, and again solicited the case for petitioner, and was quite urgent in his advice to start suit immediately against the employer, but again Pascal told him he was too sick to talk with him. The next day Brown again returned, and this time induced Pascal and his wife to sign a paper. This document is entitled "Power of Attorney and Agreement" (Accused's Exhibit 2), and amounts to a contract of employment whereby Pascal employed Fish to represent him on a 50 per cent. contingent basis; Fish to advance all costs. The name of petitioner is typed on the instrument in four different places. It is rather significant that the typewriter used in preparing this contract was equipped with script type, and that the legal documents later prepared by Fish are prepared with the same sort of type.

Several days later Brown returned to the hospital in company with petitioner, and then, for the first time, Pascal met his attorney or proctor; the case being one in admiralty. At that time Fish presented to Pascal, and secured his signature to, a libel in admiralty and an affidavit in forma pauperis. These documents were explained to Pascal by his wife at that time. Fish then started action against the employer. Later Pascal settled the case. Fish urged his client to continue the action, but, when Pascal insisted on settling, petitioner agreed to the settlement, and was induced to accept 15 per cent. of the recovery, from which he paid the costs, in place of the 50 per cent. provided for in the contract. From the above brief résumé of the facts, and from the fact that Fish refused to answer any pertinent questions as to his re-

lationship with Brown, the inference is clear that the contract of employment was prepared in petitioner's office with his knowledge and consent; that petitioner knew of Brown's activities in connection with the matter; that Brown was the agent or employee of petitioner; and that petitioner accepted the employment with knowledge that the same had been solicited. In fairness to petitioner, it should be stated that the client has made no complaint to the state bar concerning petitioner, and expressed himself as well satisfied with the legal services rendered.

The next charge against petitioner had to do with the Lyons-Kale cases. On March 21, 1929, Evelyn and Lillian Lyons, sisters, and Mrs. Kale, were injured while riding in the automobile of one H. Reynolds. A few hours after the injured women were taken home, a Mr. Brown called at the apartment and talked with Reynolds and handed him a card of petitioner. Later that evening Reynolds called Fish by telephone and arranged with him to have the women sent to the hospital for treatment, Fish to advance all moneys necessary, the evidence showing that the women were destitute and badly in need of hospital treatment. Petitioner, evidently in response to this telephone call, came to the apartment and agreed to take the case. Brown was at the apartment during Fish's visit. Petitioner refused at the hearing to answer any questions as to his relationship with Brown, and refused to tell the committee whether this Mr. Brown was the same Mr. Brown that appeared as the soliciting agent in the Pascal case. The evidence shows that, after being retained by these women, petitioner represented them ably and well, advanced money to them, and secured satisfactory settlements for them. None of the clients ever complained to the state bar or to any other agency, and expressed themselves as well pleased with the services rendered by petitioner; one of them testifying that she believed that she owed her life to him. The administrative committee found that Brown was a stranger to Reynolds; that Brown solicited the case for petitioner; that petitioner knew of Brown's activities in this regard. Neither Reynolds nor Brown was produced as witness by either side. After reading the record, we do not feel that the evidence produced by the state bar or the inferences that arise by virtue of petitioner's refusal to answer certain questions are sufficient to sustain the findings in this case. The evidence produced is equally capable of the interpretation that Brown knew Reynolds; that Brown recommended Fish; that Reynolds, on behalf of the women who had been injured in his car, requested Fish to take the case. We are inclined to favor this interpretation of the evidence, and therefore find that the charges contained in counts 4, 5, 6, and 7 of the order to show cause are not sustained by the evidence.

The next charge involved the solicitation of a personal injury case by Harry B. Rose of Agnes Holt Fuson. On September 14, 1929, Mrs. Fuson was injured by an automobile, while crossing the street. After receiving first aid at the emergency hospital, she was taken to her home. Almost immediately Mr. Rose appeared at the house and informed Mr. Fuson that he represented various attorneys. Rose quite forcefully solicited the case from both Mr. and Mrs. Fuson. After some "high pressure" salesmanship, Rose secured the necessary signatures to a contract employing Fish as attorney on a 33⅓ per cent. contingent basis. This contract contains the name of petitioner in four different places. A day or so later Rose returned to the Fuson home and brought petitioner with him, and considerable discussion was had concerning the accident, and concerning the financial condition of the Fusons. Rose informed the Fusons that a loan could be arranged. Several days later Fish sent the Fusons his personal check in the sum of \$100 to aid them in their financial distress. Fish, on behalf of his client, and with her consent, subsequently started suit. The evidence likewise disclosed the fact that Rose worked from petitioner's office and had the same telephone number.

The above evidence, when considered with the fact that petitioner refused to answer any questions as to his relationship with Rose, clearly indicates that not only did petitioner know that the contract had been solicited by Rose for him, but likewise raises the inference that Rose was the agent of petitioner in such solicitation.

In reference to this Fuson case, this court cannot refrain from commenting on the activities of an adjuster for the Pacific Indemnity Company and the lack of good faith shown by the Fusons toward their attorney. After suit had been commenced, the Fusons, acting independently of their attorney, negotiated a settlement with one J. J. O'Connor, adjuster for the company named above. O'Connor admitted, when called as a witness, that he knew that petitioner was attorney for the Fusons and that petitioner had advanced money to the Fusons for their living expenses. O'Connor, obviously a "high pressure" adjuster, finally settled with the Fusons for \$300 and secured a release from them. He testified that he did not care about Mrs. Fuson's relationship with petitioner or whether or not she paid petitioner for costs or money advanced; that the deal was one of "cold dollars" as far as he was concerned. The attitude of the Fusons is indicated by the fact that they told O'Connor that they did not intend to pay Fish even for the money loaned to them. When petitioner learned of this settlement, he secured the consent of the Fusons to permit him to try to break the release. The attorney for the insurance company, through the efforts of Fish, finally set-

tled for an additional \$350, from which sum Fish properly deducted the money advanced and his fee, remitting the balance. The Fusons charged him with misappropriation of part of this money, but the committee found, and the evidence clearly shows, that petitioner's accounts with this client were true and correct in all particulars.

In the Norred case, the undisputed evidence shows that Fish approached Norred while the latter was in the hospital suffering from personal injuries, and told him that he (Fish) was an attorney. Fish at that time gave Norred his telephone number, and told him to telephone in the event that he decided to sue. At that time he showed Norred a check for \$5,000, stating that it represented a settlement negotiated for a client a few days before. Fish never secured employment in the matter, although the evidence shows that he personally did solicit the case.

From the above summary, we are of the opinion that the evidence clearly shows that petitioner personally solicited the Norred case; that in the other cases above mentioned Brown and Rose solicited employment for petitioner; that petitioner knew when he accepted employment in said cases that the same had been solicited for him by these men; that the inference is clear that these men were in the employ of petitioner or were his agents for this purpose. It is obvious that the above acts constitute clear violations of rules 2 and 3, above set forth.

Petitioner, as already indicated, does not seriously contend that the evidence above set forth does not sustain the above findings, but attacks the validity of the findings and the order of suspension on other grounds.

[2] In the first place, he contends that the administrative committee had no power to call him as a witness, and that no inferences can be indulged in because of his failure and refusal to answer questions as to his relationship with Brown and Rose. In this, we think he is in error. Before the passage of the State Bar Act (St. 1927, p. 38, as amended), it was specifically held that in disbarment proceedings the accused may be called as a witness, and that, if he fails to testify in his own behalf, the inference of guilt may be indulged in. Thus in *Re Vaughan*, 189 Cal. 491, at page 495, 209 P. 353, 354, 24 A. L. R. 858, this court specifically stated: "It is insisted by appellant that the court erred in allowing him to be called to the stand and compelled to testify over his objection. He contends the disbarment proceedings are in the nature of a criminal action, and that the accused in such a case should be accorded the same right to refuse to testify as is a defendant charged with the commission of a crime. This position cannot be maintained. Although it has been held that an accusation is in the nature of a criminal charge (*Matter of Haymond*, 121 Cal.

385, 53 P. 899) and that a proceeding on such a charge is a quasi-criminal action (*In re McCowan*, 177 Cal. 93, 170 P. 1100) 'this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them.' *Matter of Danford*, 157 Cal. 425, 108 P. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual but for the protection of the courts and the legal profession. *Ex parte Finley*, 97 S. C. 37, 81 S. E. 279."

And again, at page 496 of 189 Cal., 209 P. 353, stated quoting from another case: "This is a special proceeding of a civil nature, and the rules applicable to criminal cases do not apply. *In re Wellcome*, 23 Mont. 259, 58 P. 711; *In re Randel*, 158 N. Y. 216, 52 N. E. 1106. If the accused is not guilty, nothing would have been easier than for him to deny all knowledge of the charges laid at his door. His having failed to testify in his own defense, when he should do so, and deny the statements of Whiteside and Clark, not only justifies, but irresistibly impels, this court, upon the evidence before it, which is credible, to the conclusion that he is guilty.' In our opinion, in view of these considerations, this is not such a criminal prosecution against appellant as would entitle him to decline to testify on the ground that he cannot be compelled 'to be a witness against himself' (Const. Cal., art. 1, § 13), but he may be called and examined for the information of the court, without, of course, infringing his right to decline to answer questions propounded to him on the ground that his testimony would tend to incriminate him."

The position here indicated has been recently held by this court to apply to proceedings before the committees of the state bar. *McIntosh v. State Bar*, 211 Cal. 261, 294 P. 1067.

[3] Petitioner strenuously contended before the board of governors and before this court that, inasmuch as the offenses of which he has been found guilty are not enumerated in section 287 of the Code of Civil Procedure, he cannot be suspended or disbarred, for the reason that that punishment can be meted out only for those offenses enumerated in that Code section. He contends that mere solicitation of business does not involve any act of moral turpitude, dishonesty, corruption, deceit, or collusion, or any violation of his oath; that suspension or disbarment cannot be imposed upon any attorney, unless some act involving one of the above elements is present. In other words, petitioner contends that violation of the Rules of Professional Conduct, unless such violation involves one or more of the above elements, is no ground for disbarment or suspension in this state. This is

equivalent, practically, to a contention that the State Bar Act is a nullity. We think that these contentions of petitioner are completely answered adversely to him by the recent cases of *Howe v. State Bar* (Cal. Sup.) 298 P. 25, and *Barton v. State Bar*, 209 Cal. 677, 289 P. 818.

[4] Petitioner also objects to the entire proceeding on the ground that the proceeding was not instituted by the filing of verified complaint. Since petitioner's first briefs were filed, this contention has been decided adversely to petitioner in the case of *In re Herron* (Cal. Sup.) 298 P. 474. Petitioner has since filed, with permission of court, a supplemental brief, in which he urges that the proceedings here were not in accord with the requirements indicated by the *Herron* Case. Petitioner points out that this court, in that case, stated that the State Bar Act contemplates a pre-investigation of the charges by a proper committee, and that this pre-investigation takes the place of the verified complaint. Petitioner relies on the following language appearing at page 475 of 298 P. in the *Herron* Case, *supra*: "Such an investigation doubtless does and it should allow an opportunity for the accused to be heard before a proceeding is begun."

There is no doubt that in the case at bar the petitioner had no notice of the pre-investigation, nor was he given any opportunity to be heard by that investigating committee; petitioner not knowing of the proceeding until served with the order to show cause. Although we feel that it is much better practice for the investigating committee, if it intends to proceed without a verified complaint, to inform the accused of the charges before the order to show cause is issued, we do not think such a requirement is jurisdictional. Particularly is that so in this case, for the reason that petitioner was not injured in any degree by this failure to inform him of the charges before the order to show cause was drawn. This contention we find to be without merit.

[5] The last contentions of petitioner have to do with the alleged disqualification of the committee and the board of governors to hear his case. Concerning these contentions, little need be said. Petitioner challenged the qualifications of the entire committee and also one member thereof on various grounds, none of which is contained in subdivisions 1, 2, or 3 of section 170, Code of Civil Procedure. Rule 18 of the Rules of Procedure provides: "*Challenge and Disqualification*. No member of the local committee, if challenged before the introduction of evidence upon the hearing, shall act as a member of the committee in any matter before such committee if he would be disqualified as a judge upon any of the grounds specified in subdivision 1, 2, or 3 of section 170 of the Code of Civil Procedure.

The committee shall pass upon the challenge. No local committee shall, however, hear a complaint against one of its own members."

Since none of the alleged grounds of disqualification fall within the first three subdivisions of section 170, it is obvious that none of the members of the committee was disqualified. See *Aydelotte v. State Bar*, 209 Cal. 737, 290 P. 41.

[6] Petitioner also challenges the qualifications of the board of governors to pass upon his case. The grounds alleged go entirely to the question as to whether the board was biased or prejudiced. We do not feel that the board of governors or any of its members can be disqualified because of any alleged bias or prejudice. It has repeatedly been indicated by this court that the board of governors, when sitting in discipline cases, is an administrative body acting as the administrative arm of this court. Its findings, although based on conflicting evidence, are not binding on this court. This court can, and in this particular case has, refused to sustain findings of the board of governors based on conflicting evidence. In other words, in such cases this court can and always does pass upon the weight of the evidence. The rule is well settled that there is no disqualification upon the ground of bias or prejudice in administrative proceedings, particularly when the administrative board is the only body that can practically pass upon the particular case. *Federal Construction Co. v. Curd*, 179 Cal. 489, 177 P. 469, 2 A. L. R. 1202. The very point here involved has been decided by the District Court of Appeal in reference to the board of medical examiners. See *Dymment v. Board of Medical Examiners*, 93 Cal. App. 65, 268 P. 1073. The point is without merit.

[7] Because of the above set forth violations of rules 2 and 3, the administrative committee recommended that petitioner be suspended for one year. The board of governors adopted this recommendation. In addition to what has already been stated, it should be pointed out that petitioner is not a young attorney, having been admitted to practice in this state in 1903, and cannot logically claim not to have apprehended the restraint imposed upon attorneys by the above rules. Nor has petitioner shown any indication that the charges in this case have served to impress him with the fact that attorneys are duty bound to adhere strictly to the rules of professional conduct as approved by this court and that a violation of such rules reflects upon him in any way. In fact, petitioner concludes one of his briefs with the statement that "petitioner in this matter is proud of his conduct, as proven by every word of the record." There is nothing in the attitude or acts of petitioner which appeals to the sympathy of this court. However, we are of the

opinion that suspension for one year is too harsh a punishment for the offenses charged, inasmuch as they do not show any violation of the relation of attorney and client. Moreover, it should be pointed out that all of the acts of petitioner were committed before this court had determined that the rules of professional conduct provided additional guards for discipline of attorneys to those provided in section 287, Code of Civil Procedure.

We are of the opinion that suspension for the period of three months more adequately fits the offense.

It is therefore ordered that petitioner be suspended from practice as an attorney and counselor at law in this state for a period of three months from and after the filing of this order.

WASTE, C. J.

I dissent. As the majority opinion correctly sets forth, petitioner has practiced law in this state for more than twenty-five years. He is a man of more than average intelligence, and has been fully cognizant of the efforts made by the organized state bar of California to rid itself of the very practice he has consistently and persistently followed during the greater part of his career as a legal practitioner. When called to account by the state bar, he at all times assumed a defiant, and what appears to me to be a very supercilious, attitude toward the efforts of that organization to discipline him for his improper practice.

As the majority opinion well points out, petitioner does not appear to have shown any indication that the charges against him had any effect upon him other than to cause him to earnestly set about thwarting the efforts of the state bar in his case. He claims to be "proud of his conduct." The majority opinion states that "there is nothing in the attitude or acts of petitioner which appeals to the sympathy of this court." With that statement I am in thorough accord, and it is for that reason that I vigorously dissent from the reduction of the period of suspension recommended by the state bar.

214 Cal. 194

SHARP v. QUINN et al.

S. F. 13498.

Supreme Court of California.

Oct. 30, 1931.

Covenants ☞72.

Grantee in deed containing restrictions, also clause that restrictions could be abrogat-

ed by sixteen of restricted property holders, could not enforce restrictions violated before instrument of abrogation was recorded, where such suit was commenced thereafter.

Such an action could not be maintained because the violation of the restrictions by defendant did not give plaintiff a vested right to the perpetual enforcement of such restrictions, since, when plaintiff acquired her lot, she became equally bound by the restriction plan with all its incidents, one of which was that, when the owners of sixteen lots agreed, and executed an instrument abrogating the restrictions, they were no longer binding.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Violet Izora Sharp to enjoin violation of building restrictions against Arthur Quinn and Bernard Quinn. From a judgment of mandatory injunction for plaintiff, defendant appeals.

Reversed.

Harold J. Abraham and P. L. Benjamin, both of San Francisco, for appellants.

Adams & Adams and Stewart G. Manson, all of San Francisco, for respondent.

SHENK, J.

This is an appeal from a judgment of mandatory injunction in favor of the plaintiff. The plaintiff and the defendants are, respectively, the owners of adjoining residence lots on Fortieth avenue between Geary and Clement streets in the city and county of San Francisco. The block is known as outside land block No. 220. The tract was subdivided and sold by Jacob Weissbein. The plaintiff and the defendants deraign title from Weissbein and wife as their common grantors. Each original deed contained building restrictions, among which were: That "walls of brick, stone or concrete * * * not exceeding six feet in height * * * may be placed thereon" and "that all residences facing on * * * 40th avenue shall be set back * * * not less than 15 feet from a point in the center of said front boundary of said lots." The plaintiff's residence was constructed in conformity with said restrictions. The defendants acquired the adjoining lot, and constructed improvements thereon. The construction work was commenced on February 19, 1925, and was completed on June 18 of the same year. The court found that the house was built 13.38 feet from the front boundary line, and that a concrete wall had been constructed more than 6 feet in height, and that said structures were in violation of said building restrictions.

A judgment of injunction was entered commanding the defendants to move the building back or otherwise make such change therein as to conform to said set-back restriction and likewise to cause the concrete wall so to conform. From this judgment the defendants have appealed.

Each original deed issued contained also the following provision: "Eighth. That at any time after sixteen (16) of the lots in said Outside Land Block No. 220 have been sold and conveyed by the said parties of the first part [Weissbein and wife], their heirs and successors or assigns, the several restrictions, conditions and covenants aforesaid may be abrogated, rescinded, or annulled, in whole or in part, by the owners of not less than sixteen (16) of the lots in said block, evidenced by an instrument in writing executed by the said owners in the manner provided by law for the conveyance of real property, and duly recorded in the office of the county recorder aforesaid."

One of the defenses interposed by the defendants was that on the 7th day of September, 1925, more than sixteen lots in said block had been sold and conveyed by the original grantors, and that on that day, pursuant to the eighth provision of said deeds, above quoted, an instrument in writing had been duly executed in the manner provided by law for the conveyance of said property, and in which it was provided, in accordance with the power conferred upon the signers of said instrument by the terms of said deeds, "that the restrictions, conditions and covenants hereinafter specifically set forth, and which said conditions, restrictions and covenants are a portion of those contained in the aforesaid deeds, are hereby abrogated, rescinded and declared to be null and void as to all of said Outside Land Block No. 220 and any part thereof." Included in the restrictions so specified were those relating to the set-back line and the concrete wall. This instrument was, on the 11th day of September, 1925, duly recorded in the office of the county recorder. Weissbein and wife joined in the execution of said instrument, but the plaintiff did not join. A copy of this instrument was annexed to and made a part of the answer. The genuineness and due execution of said instrument was admitted by failure to deny the same as provided in section 448 of the Code of Civil Procedure.

The complaint herein was filed on December 14, 1925. On the trial the defendants offered the instrument recorded on September 11, 1925, in evidence as defensive matter. On objection by the plaintiff, the instrument was excluded. The action on the part of the trial court in this regard is urged as the main ground for reversal. This contention presents the crucial point in the case.

It is conceded that the defendants acquired their lot with knowledge of said restrictions,

and that they were bound thereby so long as they were in force. It may also be taken for granted for the purposes of this case that, while said restrictions existed, the requirements of *Werner v. Graham*, 181 Cal. 174, 183 P. 945, and *McBride v. Freeman*, 191 Cal. 152, 215 P. 678, were present and obtained with reference to the uniform plan of restrictions imposed for the benefit of all lot owners in the block.

The question is as to the effect of the instrument of abrogation and annulment of said restrictions. The plaintiff contends that, inasmuch as the improvements of the defendants were constructed before said instrument of abrogation was executed, a vested right attached in her behalf to the perpetual enforcement of said restrictions which could not be affected by the subsequent abrogation without her consent. With this contention we cannot agree. When the plaintiff acquired her lot, she became equally bound by the restriction plan with all of its incidents, one of which was that, when the owners of sixteen lots agreed, and evidenced their agreement in the manner provided in her deed and all of the other deeds, to the effect that said restrictions shall no longer be binding, the plaintiff was bound by said agreement. In reality she was a party to the agreement that the restrictions might be abrogated in the manner provided, and, when such abrogation was so accomplished, she must be deemed to have consented thereto and be bound thereby, even though she did not sign the instrument of abrogation. Consequently she cannot be heard to complain against that to which she has given her consent. It may be assumed that she had a well-founded complaint against the violation of such restrictions prior to the filing of the instrument on September 11, 1925, and that prior to that date a court of equity would afford appropriate redress. It may also be assumed that the plaintiff in the present action would be entitled to such damages as she may have sustained prior to September 11, 1925, by reason of the violation by the defendants of said restrictions. But, when said instrument was recorded on that day, said restrictions ceased to exist, and the alleged violation thereof was then removed from the domain of equity.

We are not called upon to consider the reasonableness of said restrictions or the wisdom or propriety of providing for the abrogation thereof, as was done in paragraph 8 of the deeds. It is obvious that such provisions are matters of private contract as to which all parties thereto are equally bound, in the absence of some controlling principle of law or public policy, none of which is present in this case.

The case of *Couch v. Southern Methodist University* (Tex. Com. App.) 10 S.W.(2d) 973, 974, seems to be directly in point. In that case the deeds to the lots in the tract provided that

the conditions and restrictions therein contained might be amended by a vote of three-fourths of the owners determined on a front-foot basis. The required number of voters agreed to amend the restrictions in such a way as to remove the block or blocks affected from a reserved residential district. The lower court enjoined a threatened violation of the restrictions. The judgment was reversed, the court saying: "The very instrument which creates the conditions likewise creates the right and the method to amend the restrictions. * * * The express authority conferred is to amend the 'conditions' so far as they affect the property conveyed, but the legal effect necessarily is to amend the contract or deed of conveyance through a change in the conditions. * * * The universal rule of construction of deeds, where there is uncertainty, is to adopt that construction most favorable to the grantee, for the grantor selects his own language, and the policy of the law * * * favors the utmost freedom of titles. * * * So that, conceding that the owners of that portion of the addition within the territory affected by this suit, have, by their proposed amendments, completely destroyed or removed the restrictions within that district, nevertheless such was clearly their right under the power conferred in the deeds."

The determination of the main contention of the defendants renders it unnecessary to pass upon other points in the case.

We conclude that the court erred to the prejudice of the defendants in excluding from evidence the instrument setting aside said restrictions, and that with said instrument in evidence the plaintiff has presented no case for equitable relief.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

214 Cal. 281

CLARK v. STATE BAR OF CALIFORNIA.

L. A. 12935.

Supreme Court of California.

Nov. 17, 1931.

I. Attorney and client ☞53(2).

Evidence held insufficient to sustain finding that attorney intentionally violated rule of State Bar by associating himself with adjustment company engaged in illegal business of ambulance chasing (Rule 3 of Rules of Professional Conduct of the State Bar).

Evidence showed that attorney entered into contract with company bearing name of Equitable Adjustments, Incorporated, requiring him to organize a legal department and devote all of his time to company's business, described as the conducting of a financing and claims adjustment and settlement company, and attorney testified that, until several months after executing contract, he had no suspicion that company was engaged in illegal business frequently known as ambulance chasing, and, on learning that fact, he obtained cancellation of contract, and it appeared that disciplinary proceeding was not begun until over six months after attorney had terminated contract and moved his offices to another building.

2. Attorney and client ☞57.

On review of disciplinary proceedings against attorney, Supreme Court must finally determine weight and sufficiency of evidence (St. 1927, p. 41, § 26, as amended by St. 1929, p. 1257, § 3).

In Bank.

Petition by Hal R. Clark to review a recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for six months.

Proceeding against petitioner dismissed.

Andrew J. Copp, Jr., of Los Angeles, for petitioner.

Allen W. Ashburn and Philbrick McCoy, both of Los Angeles, for respondent.

PER CURIAM.

The petitioner, Hal R. Clark, was notified to appear and show cause why he should not be suspended or reproved by reason of his violation of rule 3 of the Rules of Professional Conduct of the State Bar of California. The notice was issued by local administrative committee No. 11, for the county of Los Angeles, and his appearance in response to said notice was to be made before that committee at a time and place in said notice designated. The violation of other rules of the state bar and of certain subdivisions of section 287 of the Code of Civil Procedure by petitioner was also alleged in said notice to show cause, but as he was exonerated as to these charges by the Board of Governors of the State Bar, no further reference need be made to them. The conduct of petitioner, which it is alleged in said notice to show cause, constituted violations of rule 3 of the Rules of Professional Conduct of the State Bar grew out of his connection with and employment as an attorney at law in certain actions filed in the superior court of the county of Los Angeles.

In response to said notice to show cause, the

petitioner appeared, and a hearing upon said charges was had before said committee. At the conclusion thereof, the committee made findings wherein it found that petitioner had violated not only said rule 3 but other rules of professional conduct of the state bar, as well as the provisions of certain sections of the Code of Civil Procedure. Upon these findings, the committee recommended that petitioner be publicly reprimanded. The record of the trial and hearing of petitioner before said committee was certified to the Board of Governors of the state bar. That board, after reviewing said record, directed that petitioner be notified to appear before that body and show cause why "the measure of discipline should not be increased." Petitioner was duly notified of this action of the board, and, in response to the notice, appeared before said board with his attorney, at which time and place a further hearing was had upon the said charges preferred against petitioner, and thereafter said Board of Governors made its findings, wherein it found that petitioner was guilty of the violation only of said rule 3. At the same time, it recommended that petitioner be suspended from the practice of law for the period of six months. The matter is now before us upon a petition for review filed by petitioner under section 26 of the State Bar Act (as amended by St. 1929, p. 1257, § 3).

[1] The gravamen of the charge against petitioner is that he acted as attorney for a company bearing the name of Equitable Adjustments, Incorporated, and that the services rendered by him under his contract with said company constituted a violation of said rule 3. This contract was put in evidence at the hearing before the committee. We do not find it, however, among the exhibits forwarded to this court by the state bar. A copy of it is set out in petitioner's petition for a review, and, as no claim is made that it is not correctly set forth therein, we will assume that said petition accurately alleges the contents of said contract. By reference to this contract, we find that it is called by the parties thereto, an "Agreement of Employment." It bears date, March 29, 1929, was executed by the Equitable Adjustments, Incorporated, a Delaware corporation, as party of the first part, and Hal R. Clark, as party of the second part. Petitioner agreed therein to organize a legal department in connection with the business of the adjustment company, and to "devote all of his professional time and perform to the best of his ability such legal services for party of the first part as it may require in connection with the operation of its business of conducting a financing and claims adjustment and settlement company and of protecting its interests in and/or under certain contracts or agreements between third parties including the institution and/or prosecution in the name of said third parties

of actions both in law and/or in equity in state courts as well as Federal courts." This is the only reference in the contract to the nature of the business of the adjustment company. For the services which petitioner agreed to perform, he was to receive a flat salary of \$500 per month to be paid by the adjustment company. Petitioner testified that his attention was first called to the Equitable Adjustments, Incorporated, by an old friend of his who informed him that the company was contemplating the organization of a legal department in connection with its business, and was casting about for some reputable attorney to head such department. He further informed petitioner, so the latter testified, that the Equitable Adjustments, Incorporated, was composed of a number of well-to-do individuals whose purpose was more altruistic than mercenary, and that "they were all such high type that they had more business coming to them than they could handle; that they were not like an ordinary company engaged in the business; that they looked more to the taking care of the injured than they did to making money; if a man was hurt or sick or in bed by reason of his injuries and unable to help himself, that they would advance him house rent and money for his grocery bills if they were due and if they had to have groceries, they would buy them, and if a recovery was had they would take over the money received or money that had been extended in behalf of the injured and would take out a fair compensation for their services." Petitioner claimed that in all the negotiations had by him with representatives of the adjustment company leading up to the execution of said agreement of employment, nothing was ever said by anybody that the adjustment company solicited business or was engaged directly or indirectly in the business of what is now commonly known as and has been frequently referred to in the decisions of the courts as "ambulance chasing." He further asserts that he had no knowledge or information, which even led him to suspect that the adjustment company was engaged in the illegal business of ambulance chasing until the month of October, following the date of his contract, and that immediately on gaining this information he sought to be released from his contract with the company, and on November 8th of the same year, he succeeded in obtaining a written cancellation of his "agreement of employment," whereupon he withdrew from the office of the adjustment company and established himself in the practice of law in another building in the city, and he has had no connection with the company since that date. To the foregoing facts, the petitioner testified before the committee, and later to the extent of his examination respecting these matters before the Board of Bar Governors.

On the other hand, H. B. Martin, who was

the principal stockholder and the officer in charge of the affairs of the Equitable Adjustments, Incorporated, gave evidence which tended directly to contradict that given by the petitioner. It appears from his evidence that the Equitable Adjustments, Incorporated, was operating under a license from the insurance commissioner of the state, as an insurance adjuster, issued under section 633e of the Political Code (as added by St. 1925, p. 421, as amended by St. 1929, p. 1045). There is no question that its business was principally, if not exclusively, that of ambulance chasing. This witness testified that the petitioner was fully informed of the nature of the business carried on by the Equitable Adjustments, Incorporated, prior to entering into its employ, and at that time and at all other times during his said employment knew of the type of business in which the company was engaged.

Ordinarily, this evidence would be sufficient to sustain a charge like that made against the petitioner, and a finding based thereon would not be questioned. However, there are certain circumstances surrounding this evidence which we think should be considered before taking it at its face value, and which require it to be carefully weighed before holding it sufficient to sustain the charges against the petitioner. It is quite evident from a reading of the record that Martin was greatly incensed at petitioner because of the latter's withdrawal as attorney for the adjustment concern, of which Martin was the controlling spirit. He first refused to consent to petitioner's request for a termination of this relation, and it was only after petitioner had resorted to what might be considered rather drastic measures, that Martin yielded to petitioner's request and executed the writing which terminated petitioner's employment. At the time the parties terminated their contract, there were left unsettled certain matters, and, as to these, the two men later failed to agree, and their relations became more strained. Martin was to write certain letters, which petitioner thought necessary for the proper protection of certain parties whom petitioner had represented in court while under his so-called agreement of employment. Petitioner, on the other hand, was to collect and pay over to Martin certain funds that had been deposited with the courts as jury fees in cases which, as we understand, were never tried. These matters were delayed, and Martin employed an attorney to collect these jury fees from petitioner. On the attorney mentioning the matter to petitioner, the latter informed the attorney of their differences, and the attorney agreed to see that the letters were written and sent as agreed, and petitioner turned over to the attorney the warrant he had received from the county of Los Angeles for the jury fees, which warrant had been held but never cashed by peti-

tioner. These matters greatly embittered Martin against petitioner, and, as a result thereof, he made complaint against petitioner to the local administrative committee, and this proceeding based upon Martin's complaint was instituted against petitioner on May 16, 1930, over six months after the petitioner had severed his relations with the adjustment company and had moved his offices from the building in which it was carrying on business. In the meantime, Martin had apparently run counter to certain provisions of the criminal statutes of the state, and at the time he gave his testimony before the local administrative committee was in the charge of the sheriff of the county, after his conviction in the superior court of the county of Los Angeles of the crime of bribery, and he was then being held by said sheriff pending his appeal from the judgment of conviction in said action. Martin was the only witness called to prove the charge against petitioner, except a lady who entered the employ of the adjustment company on October 15, 1929, and who testified that she knew nothing about petitioner's contract "until after he was gone, so I don't know whether he worked under it or not."

[2] It will thus be seen that the only evidence against petitioner in support of the charges was given by the witness Martin. It is manifest from a mere reading of the testimony given by him that he was greatly embittered against petitioner and was a most partisan and prejudiced witness. In addition to this weakness in his testimony, Martin himself was discredited by proof of his being convicted of a felony, to wit bribery. As against this testimony, we have the evidence of the petitioner. It is true that he is an interested party, and for that reason his testimony should be scanned with care. The record, however, shows that he has been a practicing attorney for over twenty years and that his father before him and a number of his relatives were members of the legal profession. Petitioner formerly resided in Kansas, where he practiced law at the city of Independence, the place of his birth, for a number of years before coming to California. After arriving in this state he has followed his profession, and was connected with a number of the most reputable legal firms in the city of Los Angeles. During his years at the bar, his conduct has never been called in question except in the present proceeding. His record as an attorney of over twenty years' standing is without a blemish, except that which may have been cast upon it by the testimony of Martin. Under these circumstances, charged as we are with the responsibility of finally determining the weight and sufficiency of the evidence in proceedings of this nature, we are unable to accept the evidence of Martin, a prejudiced and a partisan witness, and discredited by a judgment

of conviction of a felony, as against that of petitioner, who, though personally interested in the final outcome of this proceeding, bears an enviable reputation as a member of the bar of this state with a record reaching back over years of faithful and honorable service in the profession of his choice.

We, therefore, are of the opinion that the evidence against petitioner is not sufficient to sustain the finding that he intentionally violated rule 3 of the Rules of Professional Conduct of the State Bar. The recommendation, therefore, of the Board of Bar Governors, based upon such finding, cannot be approved. It is therefore ordered that the proceeding against petitioner be dismissed.

214 Cal. 234

YANDELL et al. v. CITY OF LOS ANGELES.
L. A. 12921.

Supreme Court of California.

Oct. 30, 1931.

Appeal and error ⇨78(3), 870(5).

Order striking cross-complaint *held* not "final judgment," and hence nonappealable, being reviewable on appeal from final judgment (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by W. W. Yandell and others against the City of Los Angeles. From an order striking its cross-complaint, the city appeals.

Appeal dismissed.

Erwin P. Werner, W. Turney Fox, F. M. Bottorff, Carl A. Davis, and T. B. Cosgrove, all of Los Angeles, for appellant.

Chase, Barnes & Chase, of Los Angeles, A. H. Swallow and Swallow & Richards, all of Bishop, and Surr & Hellyer, of San Bernardino, for respondents.

LANGDON, J.

This is an appeal by defendant from an order striking its cross-complaint from the files in the action. Plaintiffs, owners of ranch lands in Owens valley, brought the action against defendant city, owner of contiguous lands, to enjoin an alleged excessive diversion of percolating water. Defendant answered, denying material allegations in the complaint, and also filed a cross-complaint seeking to condemn the lands of plain-

tiffs. Plaintiffs moved to strike the cross-complaint on the ground that it did not relate to the transaction or affect the property involved in the action, and on the further ground that the remedy was not permissible as a means of bringing a special proceeding such as condemnation. The lower court's order granting the motion is appealed from.

We have recently discussed the nature of a cross-complaint (see *Hanes v. Coffee* [Cal. Sup.] 300 P. 963), but we deem it improper to go into the question at this time, for we agree with plaintiffs that this appeal is prematurely brought. Our statute provides for an appeal from (1) a final judgment, or (2) certain specified orders and judgments. Cal. Code Civ. Proc. § 963. The order here appealed from is not one of those listed in section 963, and it is plainly not a final judgment. It has accordingly been held that an order striking out a cross-complaint or a counterclaim is not itself appealable, but that the correctness of the order may be reviewed on the appeal from the final judgment. *Pritchard v. King*, 104 Cal. App. 460, 285 P. 1086; *Merchants National Bank v. Clark-Parker Co.*, 97 Cal. App. 757, 276 P. 387.

Defendant relies mainly upon *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39, where an appeal from an order striking out a cross-complaint was permitted. In that case, however, the cross-complaint was filed by several defendants against other defendants, and the parties in the cross-action were, of course, not identical with those in the main action. The court held that, as to the cross-complaining defendants, the order was a final determination of their cause of action against the other defendants, and that it was severable from the judgment in the main action. In the instant case we have no such situation. Where the parties to both actions are the same, it cannot be said that such an order is a complete determination of the cause. The *Howe* Case is distinguished on this ground in *Merchants' National Bank v. Clark-Parker Co.*, *supra*.

The appeal is dismissed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.

SHENK, J.

I concur in the order of dismissal, but I think attention should be called to the fact that the answer of the defendant alleges that the water from the wells referred to in the complaint, the pumping of which is sought to be enjoined in this action, is and has been devoted to a public use, and the defendant prays that, in the event the court should find that the plaintiffs are damaged by a continuance of such pumping and public use, then the court determine the extent of such

damage, and that, if injunctive relief be granted to the plaintiffs, such relief be made contingent upon the failure of the defendant to pay such compensation as the court may find the plaintiffs entitled to. This answer and the attitude of the defendant as evidenced by the prayer therein brings the cause within the holding of this court in the recent case of *Collier v. Merced Irrigation District*, 2 P.(2d) 790, as a reverse condemnation proceeding, and the presence of said cross-complaint has become of no consequence, for the reason that the relief sought therein may be granted under the remaining pleadings in the case.

I concur: PRESTON, J.

RICHARDS, J.

I concur in the conclusion arrived at in the main opinion, but I do so upon the following grounds:

By their original complaint in this action the plaintiffs sought to enjoin the defendant from continuing an excessive diversion of the waters of the Owens river, which otherwise would by percolation supply the plaintiffs' several wells upon their respective farms with water. The titles to the several plaintiffs' respective farms were not, or, at the most, were but incidentally, involved in the action.

The proceeding to obtain an injunction in this form of action is an equitable one, wherein the plaintiffs' remedies are essentially summary in character. The defendant herein does not attempt to deny the ownership in plaintiffs of their respective lands, but at most only puts in issue, or could put in issue, the amount of percolating water to which the plaintiffs are respectively entitled by virtue of the relation of the lands of each of them to the source of supply.

The defendant, however, has attempted to engraft upon this action by means of a cross-complaint an entirely separate and independent cause of action, arising out of the statutes relating to eminent domain and entirely disconnected with the plaintiffs' cause or causes of action, and wherein it seeks a remedy in no wise affecting plaintiffs' ripened right to an injunction for past offenses and for their threatened continuance, but only seeks to acquire by condemnation the plaintiffs' lands for future uses and in order to forestall subsequent injunctions.

These two proceedings are so essentially foreign to each other, to my mind, as to prevent their being united in a single proceeding by means of the defendant's attempted cross-complaint.

The case of *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39, bears no similarity to the instant situation. In that case

the right of the defendants and cross-complainants, as between themselves, in an action arising out of a single casualty and to which they were all original parties, would have been wholly lost by virtue of the order striking out the cross-complainant's pleading, but, in the case at bar, the right of the defendant to maintain, as against one or all of the plaintiffs, by way of cross-complaint, a proceeding in eminent domain, is not at all affected by the order of the trial court refusing to allow them so to do. The order of the trial court striking out the defendant's cross-complaint was therefore a proper order, and was one from which the defendant has no present right of appeal.

214 Cal. 199

In re FARRELLY'S ESTATE.

S. F. 13942.

Supreme Court of California.

Oct. 30, 1931.

Rehearing Denied Nov. 27, 1931.

1. Charities ⇨22(1).

Where part of will bequeathed residuary estate to testatrix' nieces by gift absolute, subsequent direction that nieces use property for charitable purposes impressed no trust on property, since void for uncertainty (Civ. Code, §§ 1317, 1318, 1322).

2. Wills ⇨487(3).

To throw light on testatrix' intention, her letter written after, but on day of, will's execution, received without objection, may be resorted to (Civ. Code, §§ 1317, 1318, 1322).

3. Wills ⇨448.

Statutory rule that of two interpretations of will one preventing total intestacy is preferred is applied to partial intestacy (Civ. Code, § 1326).

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Henrietta Farrelly, deceased. From a decree of final distribution, Elizabeth Blakeslee and others appeal.

Affirmed.

Superseding opinion in 296 P. 670.

Stanislaus A. Riley, of San Francisco (Henry F. May, of San Francisco, of counsel), for appellants.

Fitzgerald, Abbott & Beardsley, Girard N. Richardson, and Chapman, Trefethen & Chapman, all of Oakland, for respondents.

SHENK, J.

This is an appeal from a decree of final distribution.

Henrietta Farrelly, a widow, died on December 17, 1927, in the county of Alameda, leaving a substantial estate therein. Her husband, Robert S. Farrelly, had predeceased her. She left no parent nor issue, but left collateral heirs. Her husband likewise left no parent nor issue, and also left collateral heirs. The estate consists entirely of community property of the spouses. Mrs. Farrelly, hereinafter called the decedent, left a will dated November 6, 1926, in which numerous bequests were made to relatives and others and by which the entire estate was, or was attempted to be, disposed of. Charles H. Hale and Amzi B. Cary of San Leandro were named executors. The nineteenth and twentieth clauses of the will provide as follows:

"Nineteenth. All the rest, residue and remainder of my property of every kind and nature and wheresoever situate, I give, devise and bequeath to my said nieces Mattie C. Allen and Maude T. Pesante, share and share alike. If said residue shall not exceed one-third of my estate I direct that the same shall be expended for charitable or philanthropic purposes and in accordance with my views as expressed. If such residue shall exceed one-third of my estate, I direct that said one-third of my estate shall be expended as in this item provided, and the excess thereof shall be expended by them as I may suggest to them hereafter.

"Twentieth. In the event the Home Place which is that certain tract of land consisting of fifty acres, more or less, and now occupied by me and my late husband as our late residence for many years and fronting on East Fourteenth Street near Stanley Road, be not sold during the administration of my estate, I give, devise and bequeath the same to Charles H. Hale, but in trust however, to manage and control the same, and I direct that he sell said property at the earliest possible time consistent with his judgment and discretion, and upon the completion of said sale the net proceeds in cash derived from said sale shall vest in and become the property of my nieces Mattie C. Allen and Maude T. Pesante, share and share alike, but it is my wish that said proceeds from said sale be expended for charitable or philanthropic purposes and in accordance with my views as heretofore expressed, and thereupon said trust herein created shall terminate. The creation of this trust on said conditions shall in no way be inconsistent with a sale of said property by my said executors during and pending the administration of my estate."

After the will was executed, but on the same day, the decedent addressed a letter to Martha C. Allen, which is as follows:

"Mrs. Mattie C. Allen, Brooklyn Township, Alameda County, California. My dear niece: In my will I have mentioned that I would leave a letter addressed to you with reference to the disposition of certain property, and this is the letter.

"I would like to have the house and lot on Tenth Street near Jefferson Street in Oakland, California, used for some charitable or philanthropic purpose. The only purpose that occurs to me now that it might be put to is a place where trained nurses temporarily out of employment might find a home.

"The six acre piece in San Leandro, I should also like to have devoted to some use which generally I should define as being made useful for children and young people, if such use can be found, and provided, of course, that I do not dispose of the same prior to the taking effect of my will.

"You will note that I have left the residue to you and to Maude T. Pesante to carry out the purposes herein set forth. You will discuss and counsel with Maude T. Pesante, I know, in connection with these things.

"The above charitable purposes are only suggestions on my part. After investigation and advising with Maude T. Pesante and others who may be competent to advise with you, you may find a better use for each or all of these properties, but you know my general desire in the matter and I leave it to your good judgment.

"If other suggestions occur to me I will add them and leave them with this letter."

The will was admitted to probate. The final account and petition for distribution was filed by the executors, in which, among other things, it was prayed that the residuary estate be distributed to Martha C. Allen and Maude T. Pesante, nieces of the decedent, share and share alike. An answer to the petition was filed by certain heirs at law and next of kin of Robert S. Farrelly, the deceased husband, opposing and contesting the petition for distribution, and claiming to be entitled to the residuum specified in the nineteenth clause of the will, on the ground that the decedent had by said clause attempted to devise and bequeath the residue of her estate in trust for certain unnamed and undesignated charitable or philanthropic purposes and uses, that said residuary clause was uncertain, indefinite, unenforceable and void, and that as to said residuary estate the decedent died intestate. Upon a hearing of the petition and answer, the court found and concluded that by the nineteenth clause of said will the decedent had made an absolute devise and bequest to Martha C. Allen and Maude T. Pesante of the entire residuum, share and share alike. A decree was

entered accordingly. The heirs at law and next of kin of the deceased husband have appealed from said decree.

[1, 2] The appellants contend that by the nineteenth clause of the will the decedent intended to create a trust for the purposes and objects mentioned therein, that the attempt was futile, for the reason that the proposed trust is void for uncertainty, and that intestacy as to the residue has resulted. It is conceded by all parties to the litigation that, if the decedent intended to create a trust, the trust so intended is void for uncertainty. It is also conceded by the respondents that, if a trust was intended to be created, intestacy as to the residuary estate has resulted; but it is their contention that, when the will as a whole and the attending circumstances are properly considered, it must be declared that no trust was intended to be created, and that the residuary legatees take beneficially in equal shares.

Section 1317 of the Civil Code provides that "a will is to be construed according to the intention of the testator." On the face of the will in question, uncertainty is created as to the disputed point. In such case "the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." Civ. Code, § 1318. Section 1322 of the Civil Code provides: "A clear and distinct devise or bequest cannot be affected * * * by any other words not equally clear and distinct, or by inference or argument from other parts of the will. * * *" The first sentence of the residuary clause is as follows: "All the rest, residue and remainder of my property of every kind and nature and wheresoever situate, I give, devise and bequeath to my said nieces Mattie [Martha] C. Allen and Maude T. Pesante, share and share alike." If the decedent had stopped here, no question of uncertainty could arise. No words could express more clearly or distinctly the absolute character of the testamentary intent that Mrs. Allen and Mrs. Pesante take beneficially in equal shares. Inferences and much argument are indulged by counsel by reason of the second and third sentences. If it were not for these sentences, the case would not be here. The second sentence seems to reflect the thought of the decedent, or her draftsman, that the inhibition of section 1313 of the Civil Code must be avoided. But that could have no application now, for the decedent's death occurred more than six months subsequent to the execution of her will, and she left no husband, parent, or issue, as contemplated by the amendment of said section in 1919 (St. 1919, p. 324).

When we conclude, as we must, that the first sentence in the nineteenth clause is clear and distinct as a gift absolute, beneficially

and in severalty, it would necessarily follow that it must stand as the decedent's clearly expressed intent, unless the second and third sentences are in irreconcilable conflict with the first sentence (section 1321, Civ. Code), or express an equally clear and distinct contrary intent. It must be conceded that an irreconcilable conflict exists if a trust was created, or was intended to be created, as the appellants contend, but that no such conflict exists if no trust was intended, as argued by the respondents. The question, therefore, presented is whether the decedent by said second and third sentences intended to create a trust.

It is not disputed that the words of the will and the attending circumstances must be the guide. There is some dispute as to whether the letter to Mrs. Allen executed on the same day as, but after, the will, may be considered as an attending circumstance, but we incline to the view and hold that it may be so considered, in view of the fact that it was received by the trial court apparently without objection and in a sense was a part of the same transaction. It may not be considered as part of the will itself, but may be resorted to for whatever light it may throw upon the question of the intention of the decedent.

In *Estate of Marti*, 132 Cal. 666, 61 P. 964, 966, 64 P. 1071, it was said: "The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause. [Citing cases.] The rule has been formulated in this state in section 1322, Civ. Code, which declares that a clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct, or by inference or argument from other parts of the will." In that case the expression of a "desire" on the part of the testator was held to be precatory. It was recognized, however, that precatory words annexed to a bequest or a devise might impose an imperative obligation, and exclude the exercise of discretion with reference to the act in question. Likewise the use of the word "direct" has, under some circumstances, been held to be precatory when addressed to the legatee or devisee and not to the executor. *Estate of Hull*, 77 Cal. App. 792, 247 P. 1093; *In re Jansen*, 181 Wis. 83. The expression of a desire, wish, recommendation, assurance, re-

quest, etc., is prima facie precatory in character. Estate of Marti, supra. Also a "direction" prima facie imports a command, and, when given effect, is sufficient to impose a trust. A hard and fast rule may not be laid down as applicable to all cases. Each case must be controlled by its own facts, and we have found no case so similar to the present one as to be controlling.

What did the decedent in this case intend by the use of the words "I direct" and "shall be expended * * * in accordance with my views as expressed" in the second sentence, and "as I may suggest to them [Mrs. Allen and Mrs. Pesante] hereafter," in the third sentence? If the words in the second sentence, "as expressed," referred to any views disclosed contrary to the direct bequest in other parts of the will, it must be said that we find none therein. If the words above quoted and relied upon by the appellants were intended to create a trust, it is significant that in the twentieth clause of the will apt words to create a trust in Charles H. Hale as to the fifty-acre "Home Place" on East Fourteenth street were employed, viz., the words, "but in trust however." If the decedent desired to create a trust under the nineteenth clause, why was the intention not as clearly expressed therein as in the twentieth clause? It may here be noted that the twentieth clause provides that upon the sale of the "Home Place" by the trustee the net proceeds of the sale "shall vest in and become the property of my nieces, Mattie C. Allen and Maude T. Pesante, share and share alike," but it is "my wish" that the proceeds "be expended for charitable or philanthropic purposes, and in accordance with my views as heretofore expressed." It is not urged by the appellants that the twentieth clause created or was intended to create a trust in the nieces for charitable or philanthropic purposes, and it must be taken that they concede that this clause does not have that effect. If no trust was intended as to the proceeds of this undoubtedly very valuable piece of property, then it may very well be inquired why was a trust intended, as appellants contend, as to the residuary estate? The answer would seem to be that, if a trust was not intended as to the one, likewise it was not intended as to the other. See *In re McVeigh's Estate*, 181 Mo. App. 566, 164 S. W. 673; *Williams v. Committee of Baptist Church*, 92 Md. 497, 48 A. 930, 54 L. R. A. 427.

When we resort to the letter of November 6, 1926, above quoted, for the purpose of gaining what light it may afford in ascertaining the intention of the decedent, we find the use of the words "I would like to have" a certain house and lot "used for some charitable or philanthropic purposes." Also "I

should also like to have" a certain six-acre piece "devoted" to a similar use; and "the above charitable purposes are only suggestions on my part * * * but you know my general desire and I leave it to your good judgment."

It may be conceded that, in the absence of the first sentence of the nineteenth clause, the wording of the subsequent sentences in that clause might well be held to intend the creation of a trust, and that the wording of the letter would not be inconsistent therewith, but the letter is likewise consistent with the conclusion that no trust was intended, that an obligation was likewise not intended, and that the decedent left performance to the good faith of the legatees without interference on the part of a court of equity. See *Kauffman v. Gries*, 141 Cal. 295, 74 P. 846.

The appellants point to the fact that Mrs. Allen and Mrs. Pesante were made legatees under the third and fourth clauses of the will, and the deduction is urged that it could not have been the intention of the decedent again to make absolute gifts to them. The fact noted is undisputed, but the deduction cannot reasonably be made, for the reason that under the twentieth clause the decedent likewise made additional absolute gifts of a very substantial portion of the estate to the residuary legatees.

Under the early English rule precatory words were seized upon to impress a trust, as reflected in *Briggs v. Penny*, 3 Macn. & G. 546, 42 English Rep., Full Reprint, 371, relied on by the appellants. At that time the use of such words, it would seem, was held to create a presumption of trusteeship. But that rule was departed from, and the *Briggs Case* was expressly not followed in the later case of *Stead v. Mellor*, 5 Ch. Div. 225.

[3] Further citation of authority would seem to be unnecessary, except on a further point. Section 1326 of the Civil Code provides: "Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." The same rule has been applied to partial intestacy. *O'Connor v. Murphy*, 147 Cal. 148, 81 P. 406; *Estate of Heberle*, 153 Cal. 275, 95 P. 41.

We conclude that the question whether the decedent intended to create a trust must be resolved in favor of testacy, and that the trial court was justified in placing the construction which it did on the disputed language of the will.

The decree is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

118 Cal.App. 149

SOUTHERN SURETY CO. v. BANK OF LASSEN COUNTY et al.

Civ. 4360.

District Court of Appeal, Third District,
California.

Nov. 4, 1931.

1. Banks and banking — 99.

Banks' agreement to buy warrants of irrigation district issued to contractor for work held contract of purchase and not guaranty, hence not ultra vires (Civ. Code, §§ 1559, 2787).

2. Banks and banking — 194.

Bank's agreement to buy irrigation district warrants "upon understanding" that another bank would buy held to mean that first would buy if second would agree to buy (Civ. Code, § 1638).

3. Contracts — 153.

Where one construction would make contract unusual and another equally consistent with language employed would make it reasonable, latter must prevail.

4. Action — 50(5).

Two banks each signing separate identical agreements to buy irrigation district warrants upon understanding that other would buy held properly joined as defendants, in action for breaching contract to purchase warrants.

Such banks were properly joined as defendants because they were liable under the same contract.

5. Action — 50(5).

Suit against two banks upon separate identical agreements to buy irrigation district warrants upon understanding that other would buy stated only one cause of action.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by the Southern Surety Company against the Bank of Lassen County and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. E. Pardee and J. A. Pardee, both of Susanville, for appellants.

Ernest T. Hall and George A. Work, both of San Francisco, for respondent.

TUTTLE, Justice pro tem.

[1] This is an action brought upon contract. Upon trial by the court, judgment was rendered against each of the defendants in

the sum of \$3,371.82. The appeal is taken from the judgment.

The facts are undisputed. Baxter Creek irrigation district and Tule irrigation district were and are irrigation districts organized under the laws of California. Their water supply is owned jointly by the two districts, and is derived from the Eagle Lake Water System. During the year 1924, certain work was done under contract to improve this water system, but through faulty engineering, little benefit was derived therefrom. At that time, bond interest coupons, due July 1, 1924, were unpaid, and warrants of both districts were then outstanding and unpaid.

On October 11, 1924, one Edward Whaley submitted to the boards of directors of the two irrigation districts, a bid for the construction of certain proposed works at Eagle Lake, to remedy the defects in the prior work. This bid or proposal contained the following provision: "The districts shall, before the final execution of said contract, furnish to the undersigned satisfactory assurances in writing that any and all district warrants that may be issued in payment on account of said contract will, upon presentation, be cashed at par and accrued interest from the date of their registration."

In an effort to comply with the foregoing provision, J. A. Pardee, secretary of both districts, interviewed three banks relative to the purchase of warrants which were to be issued to Whaley for his work under the proposed contract. Anglo-California Bank of San Francisco agreed to take \$25,000 worth of such warrants, but insisted that the local banks (defendants herein) handle some of them. Thereafter, each defendant bank addressed the following letter to Mr. Pardee:

"Nov. 12, 1924.

"J. A. Pardee, Secty. Tule and Baxter Creek Irrigation Districts,

"Susanville, California.

"Dear Sir:

"Confirming our conversation of recent date we wish to state that we will handle \$7500.00 of the warrants of Tule and Baxter Creek Irrigation Districts issued in part payment of work to be done by Edward Whaley in performance of contract between him and your districts for the lowering of approach cut and tunnel at Eagle Lake, upon the understanding that Lassen Industrial Bank will handle a similar amount of said warrants, and upon the further understanding that the first \$25000.00 of warrants issued by the districts to Edward Whaley for such purpose, shall be handled by Anglo-California Trust Company of San Francisco. It is also to be understood that any moneys which may be recovered by the districts from Grant Smith & Company, on account of the claim the districts have against said Company, shall, after payment of bond interest coupons of Baxter Creek Irri-

gation District, which became due July 1, 1924, and which have not yet been paid, be used by the districts in taking up their warrants now outstanding. Yours very truly,
C. H. Bridges, Cashier."

And the one from the Lassen Industrial Bank being as follows:

"Nov. 13, 1924.

"J. A. Pardee, Secty. Tule and Baxter Creek Irrigation Districts,
"Susanville, California.

"Dear Sir:

"Confirming our conversation of recent date we wish to state that we will handle \$7500.00 of the warrants of Tule and Baxter Creek Irrigation Districts issued in part payment of work to be done by Edward Whaley in performance of contract between him and your districts for the lowering of approach cut and tunnel at Eagle Lake, upon the understanding that Bank of Lassen County will handle a similar amount of said warrants, and upon the further understanding that the first \$25000.00 of warrants issued by the districts to said Edward Whaley for such purpose, shall be handled by Anglo-California Trust Company of San Francisco. It is also to be understood that any moneys which may be recovered by the districts from Grant Smith & Company, on account of the claims the districts have against said Company, shall, after payment of bond interest coupons of Baxter Creek Irrigation District, which became due July 1, 1924, and which have not yet been paid, be used by the districts in taking up their warrants now outstanding.

"Very truly yours,

"Jules Alexander, President."

It was stipulated at the trial that Whaley relied upon these letters, and but for them, would not have entered into the contract, and that both defendants knew this. It was also stipulated that the word "handle," as used in the letters, should be construed as "buy at par."

Thereafter, on November 18, 1924, Whaley and the two districts signed the contract mentioned, and the former commenced work thereon. He was unable to complete performance, and plaintiff, Southern Surety Company, which had executed a faithful performance bond, undertook to, and did actually, complete the contract. The work was accepted by the districts, at a cost to plaintiff of some \$9,000. An assignment of the contract was executed by Whaley to plaintiff. Prior to May 24, 1926, each of the defendants bought from Whaley warrants of the face value of \$4,900. Thereafter plaintiff presented to each defendant warrants in the sum of \$2,600, but payment was refused. The judgment against each defendant is made up of said sum of \$2,600, with interest thereon.

It also appears, and the court found, that after each defendant had cashed \$4,900 worth of warrants, it was instructed by the superintendent of banks of California, not to pay any more of said warrants.

It is contended by appellant that the complaint fails to state a cause of action, in that the contract with Whaley was ultra vires. The facts set forth in the complaint are the same as those disclosed above in this opinion. "It may be conceded," states appellant in his brief, "that the warrants of Irrigation Districts were of the character of securities which, under the law, the defendants could buy, but such being true, is the contract, the letters, one of purchase or of guaranty? If the contract is one of purchase, then it may be within the powers of the banks, and enforceable, but if it is a contract of guaranty, it is beyond their powers and void."

As we view the situation, the transaction between the banks and the irrigation districts was a contract, made and entered into expressly for the benefit of Whaley, and which could be enforced by him or his assignee. Section 1559, Civ. Code. A "guaranty" is defined in section 2787 of the Civil Code as follows: "A guaranty is a promise to answer for the debt, default, or miscarriage of another person." We find nothing in the wording of the agreement, or in the conduct of the parties, which indicates that the banks' agreement to purchase these warrants was conditional upon the failure or default of any one else to pay for the work, or to buy the warrants. As we view it, defendants simply agreed to buy the warrants as they might agree to buy bonds, negotiable paper, or other securities. There was no promise made to Whaley directly, as a creditor, under a contract of guaranty. The banks did not say to Whaley, "We will pay the warrants in the event the Districts fail to do so." The letters of the banks constituted an original promise, and the transaction lacked the essential elements of a contract of guaranty. "If it can be seen that the person sought to be charged is primarily liable, prior to the breach of the contract or duty by someone else, the contract in question is an original promise." 28 C. J., p. 887. When the warrants were issued to Whaley, he was under no duty to present them to the districts. His cause of action against defendants was not dependent upon a breach of contract or duty upon the part of the districts. We believe that appellant has confused the principles governing a contract made for the benefit of a third party, with those applying to a contract of guaranty. If it had been a guaranty, payment by the banks would have been made contingent upon refusal of the districts to pay. As a matter of practical construction, the record shows that the warrants which were paid were never presented to the district, but were presented

for payment to the banks upon being issued. We conclude, therefore, that the contract was not one of guaranty, but an original promise, and hence not ultra vires, and that the complaint is not open to this objection.

[2, 3] It is further contended that the contract is conditional in this: That the promise of the Bank of Lassen County to buy was made upon the express condition that the Lassen Industrial Bank would buy and vice versa, and these conditions not having been met, neither bank was obligated to buy. In other words, that such promises were conditions precedent. The language used in each letter states that the writing bank will buy *upon the understanding* that the other bank will buy. As we construe the letters, each bank, in effect, promised that it would buy the warrants if the other bank *would agree* to do likewise. The interpretation adopted by appellants would, in our opinion, be unreasonable, and lead to an absurdity. "The language of a contract governs its interpretation only so far as it is clear and explicit and does not involve an absurdity." *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 P. 788, 790, citing section 1638, Civ. Code. Each bank, if the contention of appellants is to be upheld, could have stood back and bowed to the other, saying, "You first," and thereby rendered the entire contract nugatory. "A principle of construction well settled is that where one construction would make a contract unusual and extraordinary, and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *Stoddart v. Golden*, 179 Cal. 663, 178 P. 707, 708, 3 A. L. R. 1060. We are satisfied that the real intent was that each bank should *bind itself* to purchase the warrants, and when all had done so, the condition was performed and fulfilled. We believe that where a contract admits of two constructions, the court ought to adopt that which is most equitable and which will not give an unconscionable advantage to one party over the other. *Allemong v. Augusta National Bank*, 103 Va. 243, 48 S. E. 897. The point is without merit.

[4, 5] It is contended that the trial court erred in overruling a special demurrer, based upon the grounds, first, that the defendants were improperly joined as defendants, and, second, that two separate causes of action are improperly joined in the complaint, and not separately stated. As to the first ground, defendants were properly joined because they were liable under the same contract. As to the second ground, only one cause of action was stated, to wit, an action upon the contract. Assuming that there is some merit in the position of appellants, they have not shown that any prejudice resulted from the alleged error.

As we have stated, the undisputed facts show that upon the signing of the letters by defendants, Whaley executed the contract with the districts, and commenced work, and that he would not have done so if these letters had not been signed. Both of the defendants were aware of these facts. Neither justice nor equity should now permit the defendants to escape the consequences of their own voluntary act, and repudiate a promise which had been acted upon by a third party to his detriment.

The judgment is accordingly affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 249
MELVIN v. CARL et al.
Civ. 519.

District Court of Appeal, Fourth District, California.

Nov. 9, 1931.

Hearing Denied by Supreme Court Jan. 7, 1932

1. Judgment $\Rightarrow$ 822(4).

Judgment or decree of court of sister state cannot affect title to property in California.

2. Receivers $\Rightarrow$ 207.

Receiver appointed by court of sister state has no authority over property in California.

3. Appeal and error $\Rightarrow$ 1050(1).

In action to vacate deed of plaintiff's husband, admitting records of Iowa court in divorce action authorizing receiver to deliver husband's sole deed *held* not prejudicial against plaintiff, evidence showing property was husband's separate property.

4. Husband and wife $\Rightarrow$ 267(1).

Wife's joinder in husband's deed conveying husband's separate property *held* not required (Civ. Code, §§ 157, 172, 172a, and § 164 as amended by St. 1917, p. 827).

5. Husband and wife $\Rightarrow$ 255.

Husband's separate property, brought by him to California from sister state and used in purchase of realty in California, remained husband's separate property, notwithstanding statute defining community property (Civ. Code, §§ 157, 172, 172a, and § 164 as amended by St. 1917, p. 827).

Property remained husband's separate property, and investment of such funds in real estate in California in 1920 did not

change separate character of property, and Civ. Code, § 164, as amended by St. 1917, p. 827, which provides that "all other property" acquired after marriage by either spouse or both, including realty situated in California and personalty wherever situated, acquired while domiciled elsewhere, which would not have been separate property of either, if acquired while domiciled in California, is community property, could not deprive husband of his separate property.

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

Action by Martha E. Melvin against Ida M. Carl, executrix of the estate of Fred W. Carl, deceased, and others. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Robert F. Shippee and C. C. Caswell, both of Los Angeles, for appellant.

Lucian J. Clarke, of Los Angeles, for respondent.

MARKS, J.

M. E. Melvin, now deceased, and Martha E. Melvin, appellant, had been husband and wife and had lived together as such in the city of Marshalltown, Iowa, for more than thirty years prior to July 12, 1922. During their married life considerable property was accumulated, which, under the laws of Iowa, was the separate property of the husband. In November, 1919, they came to Los Angeles for the benefit of the health of M. E. Melvin, returning to their home in Iowa in 1921.

While in California M. E. Melvin purchased two lots in the city of Los Angeles with money which he had acquired in Iowa. On April 25, 1922, he deeded the two lots to Fred W. Carl, since deceased, for the sum of \$5,000, \$3,000 being paid in cash and a note and mortgage given to secure the balance. The deed of conveyance was not signed by Martha E. Melvin.

In August, 1921, M. E. Melvin filed an action for divorce against Martha E. Melvin in the district court of Marshall county, Iowa, which was tried on July 2, 1922, and resulted in a final decree of divorce being granted to Mr. Melvin. In this decree the court reserved the right to dispose of the property of either of the parties and make provision for the support of Martha E. Melvin. A receiver was appointed to take over the property of M. E. Melvin and divide it between the parties.

On August 23, 1922, the receiver filed his petition in the district court of Marshall county praying for an order authorizing him to deliver the deed from M. E. Melvin to Fred W. Carl, which deed was evidently then in

his possession. After a hearing upon this petition, the court approved the sale of the real property in Los Angeles from Melvin to Carl and authorized the delivery of the deed and also authorized the receiver to execute a receiver's deed in case he deemed such an instrument necessary. Fred W. Carl thereupon received the deed from Melvin and recorded it in Los Angeles county on September 20, 1922. The note and mortgage for the \$2,000 were subsequently paid.

Fred W. Carl died in October, 1922, and M. E. Melvin died in November, 1923, after the commencement of this action. No steps were taken to substitute Melvin's personal representative herein.

Appellant filed this action in the superior court of Los Angeles county on February 17, 1923, seeking to set aside and vacate the deed and mortgage hereinbefore referred to, alleging that the property conveyed was the community property of herself and her former husband and that she had neither joined in, nor signed the deed from Melvin to Carl.

[1-3] Appellant complains of the rulings of the trial court in admitting in evidence exemplified copies of the records of the district court of Marshall county, Iowa, in the divorce proceedings and receivership hereinbefore referred to. Objections to the introduction of this evidence should have been sustained. It has been held by our Supreme Court that a judgment or decree of a court of a sister state cannot affect title to property situated within the state of California. *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 P. 542; *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074. It has also been held that a receiver appointed by a court of a sister state has no authority over property in California. *Universal Oil Land Co. v. Gates* (Cal. App.) 3 P. (2d) 1034. However, the rulings of the trial court admitting these documents in evidence were not prejudicial to the rights of appellant.

[4, 5] The trial court found upon ample evidence, and correctly so, that the property acquired in Iowa, with part of which the property in Los Angeles was purchased by M. E. Melvin, was his sole and separate property, and that the lots purchased were likewise his sole and separate property and not the community property of himself and Martha E. Melvin. Under the provisions of sections 157, 164, 172, and 172a of the Civil Code, Mrs. Melvin did not need to join in a deed conveying her husband's separate property. Section 164 of the Civil Code, as amended in 1917 (St. 1917, p. 827), read in part as follows: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, * * * acquired while domiciled elsewhere, which

would not have been the separate property of either if acquired while domiciled in this state is community property." (Italics ours.)

In commenting upon this amendment the Supreme Court in *Estate of Frees*, 187 Cal. 150, 201 P. 112, 113, held as follows: "Two rules have uniformly been adhered to in the interpretation of section 164, Civil Code, and its amendments: First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here; second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction. Thus, notwithstanding that the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein, and subsequently brought to California by them at the time of establishing residence in this state, retained the status that it had in the state where it was acquired, regardless of our definition of community property. As in most of the states property acquired after marriage was the separate property of the husband, it remained such, when brought to this state by the husband. *Kraemer v. Kraemer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, 68 P. 488; *Estate of Nicolls*, 164 Cal. 368, 129 P. 278; *Estate of Warner*, 167 Cal. 686, 691, 140 P. 583; *Estate of Boselly*, 178 Cal. 715, 175 P. 4."

This rule finds support in *Estate of Arms*, 186 Cal. 554, 199 P. 1053, and *Estate of Drishaus*, 199 Cal. 369, 249 P. 515, 516. In the latter case it was said: "The effect of these earlier and later decisions of this court cannot be held to be other than that of deciding that the vested interest which the decedent in the instant case had in the personal property brought by him to this state as his separate property, and since then up to the time of his death held and owned by him as his separate property and estate, was unaffected by the foregoing amendments to the Civil Code, and that at the time of the death of said decedent the whole of said property was his separate property and estate."

In the case of *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519, 523, a question quite similar to the one we are considering was before the Supreme Court. In this case the 1923 amendment to section 1401 of the Civil Code (St. 1923, p. 29) was under consideration in respect to its effect on the wife's right to make a testamentary disposition of an interest in community property acquired in 1918. The Court said: "Could a subsequent statute or an amendment to the statute in force at the time the property was acquired invest the wife with a right which she did not possess prior to the enactment of said statute or

amendment? This question has frequently been before the courts of this state, and particularly in proceedings where the nature and extent of the interest of the wife in the community property of herself and husband have been the subject of controversy. It has been consistently and repeatedly held by this court, beginning with the case of *Spreckels v. Spreckels*, reported in 116 Cal. 339, 58 Am. St. Rep. 170, 36 L. R. A. 497, 48 P. 228, down to cases of recent determination that amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments. *Spreckels v. Spreckels*, supra; *Estate of Frees*, 187 Cal. 150, 201 P. 112; *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22; *Schubert v. Lowe*, 193 Cal. 291, 223 P. 550; *Estate of Drishaus*, 199 Cal. 369, 249 P. 515; *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197. The decisions of the District Court of Appeal upon this question have been to the same effect. *Clavo v. Clavo*, 10 Cal. App. 447, 102 P. 556; *Jacobs v. All Persons*, 12 Cal. App. 163, 106 P. 896; *Scott v. Austin*, 57 Cal. App. 553, 207 P. 710; *Scott v. Austin*, 58 Cal. App. 643, 209 P. 251; *Copp v. Rives*, 62 Cal. App. 776, 217 P. 813. At the time of the purchase of said real property the respondent took the absolute title thereto subject to whatever rights his wife had therein by virtue of the fact that the same was the community property of himself and his wife. This right of his wife was the right to receive upon the death of her husband, and subject to his debts, one-half of the community property. In other words, the wife was given a right in the community property contingent upon her surviving her husband, and upon the happening of this contingency such right would have ripened into a vested interest in her in and to the said community property. Her death, however, prior to that of her husband, made the happening of this contingency impossible and thereupon the entire estate belonged to the husband without administration. Civ. Code, § 1401, prior to its amendment in 1923. These rights of the respective spouses in the community property attached to the property and were acquired by the parties at the time of the conveyance of the property, and, as we have seen, said rights cannot be impaired or destroyed by subsequent legislation."

In *Williams v. Sutphen*, 92 Cal. App. 697, 268 P. 946, it was held that property which was the separate property of a wife in the state of Oregon and which was brought by her and her husband to California in 1921, more than three years after the amendment to section 164 of the Civil Code in 1917, remained the separate property of the wife in California. A similar conclusion was

reached in Estate of Bruggemeyer (Cal. App.)
2 P.(2d) 534.

Under the authorities cited we have concluded that the separate property of M. E. Melvin, brought by him to California from the state of Iowa and used in the purchase of the two lots in the city of Los Angeles, remained his separate property, and that the investment of these funds in real estate in California in the year 1920 did not change the separate character of the property. The provisions of section 164 of the Civil Code, as amended in 1917, could not deprive him of his separate property.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

118 Cal.App. 269

LARSON v. ABDUN-NUR.

Civ. 8054.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1931.

1. Stipulations ⇨18(9).

In action for rent, stipulation that plaintiff might recover amount due up to trial precluded consideration of point not raised below that plaintiff was required to rent premises to reduce damages.

2. Trial ⇨64.

Refusal to allow defendant to read in surrebuttal on second trial testimony of unsubpoenaed absent witness on first trial held proper.

3. Appeal and error ⇨731(5).

Assignment that findings were not sustained by evidence and not specifying findings nor quoting evidence held insufficient.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Edwin Larson against A. S. Abdun-Nur, in which defendant filed a counterclaim. From a judgment for plaintiff, defendant appeals.

Affirmed.

Halverson & Halverson, of Los Angeles, for appellant.

Crail, Shutt, Penprase & Miller and Edward A. Penprase, all of Los Angeles, for respondent.

STURTEVANT, J.

The plaintiff sued the defendant to collect rent. The defendant answered and filed a counterclaim. From a judgment in favor of the plaintiff, the defendant appealed under section 953a of the Code of Civil Procedure.

[1] The defendant claims the court erred in awarding judgment for the full amount of the accrued rent as of the date of the trial. He claims that for at least a part of the time the plaintiff could have rented the premises to another party, and that it was his duty to have done so and thus reduce the amount of the damages. But the point was not presented in the trial court. During the trial, both parties stipulated that, if any rent was due, then it was agreed that the plaintiff was entitled to recover for the period of two years, and that a supplemental pleading might be filed which would bring the plaintiff's claim down to date of the trial.

[2] There were two trials. On the first trial testimony was given by Miss Clorin. The second trial commenced on Monday, December 2, 1928. On December 6, 1928, the court had taken up surrebuttal. While so engaged the defendant offered to read the testimony of Miss Clorin given on the first trial. The defendant testified that he was informed Miss Clorin left Los Angeles on Saturday, November 30, 1928. Asked if she did not leave on Tuesday, December 3, 1928, he said he did not know, she was supposed to have left on Saturday. The defendant's attorney stated he had not placed a subpoena in the hands of the sheriff, but in the hands of the defendant's brother. No showing was made of any attempt to serve it. There was no error in the order refusing the defendant permission to read the testimony given at the former trial.

[3] In his brief of thirty pages, defendant states some of the evidence contained in a transcript containing over 700 pages. The burden of his statement is that he seems to contend that the trial court should have made findings in his favor on some of his allegations of fraud, and that at least some of the findings, in favor of the plaintiff which found defendant's allegation of fraud not to be true, are not sustained by the evidence. Be that as it may, the defendant has not specified the finding, and has not quoted the evidence nor given us such references as will enable us to ascertain the facts. This court cannot undertake to read a transcript of such proportions for the purpose of discovering possible failures of proof or to group and allocate the testimony to show that an allegation was proved. Scott v. Hollywood Park Co., 176 Cal. 680, 169 P. 379. On the other hand, the plaintiff in his brief undertakes to specify the findings so attacked by the de-

defendant and to show that there was evidence in the record supporting each finding so attacked. The reply seems to be sufficient. To that brief the defendant made no reply. We assume he was not able to contradict the plaintiff.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

118 Cal.App. 231

PEOPLE v. MEYER.

Cr. 1165.

District Court of Appeal, Third District, California.

Nov. 7, 1931.

1. Robbery ⇐24(3).

Evidence *held* sufficient to identify defendant as one of robbers and sustain conviction.

2. Criminal law ⇐1137(1).

Defendant, having voluntarily withdrawn insanity plea, could not raise issue on appeal.

3. Criminal law ⇐730(9).

District attorney's calling jury's attention to appearance of defendant, who was not witness, and asserting defendant's guilt on personal authority, may, in doubtful case, require reversal, notwithstanding prompt disapproval of trial judge.

4. Criminal law ⇐1171(1).

District attorney's misconduct in calling jury's attention to appearance of defendant, who was not witness, and asserting defendant's guilt on personal authority, *held* not to require reversal; record clearly showing guilt (Const. art. 6, § 4½).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Ronald Jean Meyer was convicted of robbery and of a prior conviction of another felony, and he appeals.

Affirmed.

S. Luke Howe and Howe, Hibbitt & Johnston, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the Court.

The defendant was found guilty of robbery and of a prior conviction of another felony. At the trial, he did not become a witness in his own behalf. It is now contended the evidence fails to identify him with the robbery or to support the judgment. It is also asserted the court erred in receiving in evidence three revolvers without sufficient proof connecting them with the crime with which the defendant is charged, and that the district attorney was guilty of prejudicial misconduct by calling the jury's attention to the defendant's appearance and in asserting that officer's individual belief in the guilt of the accused.

[1] The story of this crime reads like a modern film melodrama. It was a professional performance. Frank Bechelli operated a roadhouse resort near Redding. About 12:30 in the morning of April 7, 1931, a lull occurred in the activity of business. It was a bright moonlight night. The barroom was brilliantly lighted. It was deserted except for the presence of Bechelli, the proprietor, Sylve Aussem, his "housekeeper," and Jim Bell, a faithful adherent of the joint. Bechelli was decorated with a dazzling \$450 diamond ring. Sylve also wore a valuable diamond ring and a diamond-studded wrist watch. Diamond lavalieres and eight or ten hundred dollars in cash were securely stored in a safe.

Sylve had just stepped out of the room to tuck her wire-haired fox terrier in bed. As she returned to the room, a Hudson roadster roared up to the resort, and in walked three gallant musketeers each armed with a pair of guns. They were unmasked. Tex Rambo, who led the trio, was recognized as the "hombre" who favored the resort with a preliminary visit three weeks previous to this occasion. The defendant brought up the rear. Tex said, "Hello Syl, you see, I cum back." Noticing the display of guns, Sylve thought it was a practical joke, and laughed. Then the trio promptly proceeded to business. The defendant glowered and fiercely commanded the victims to "stick 'em up." He shouted, "This is no joke, we mean business, * * * turn over to the wall, and be quick about it." They then began to prod the victims in the ribs with their guns to accelerate a compliance with orders. Bechelli was a bit slow in acting upon his cue, so Tex jabbed him viciously and said, "Come on, brown shirt, get over to the wall." They were speedily lined up facing the wall in true Capone etiquette. The defendant then ordered one of their number to get a wire clothesline from outside, with which they securely bound the hands and feet of their victims. They were gagged. Sylve was tossed upon a bed in an adjoining room and a quilt was drawn over her head. Bell was similarly disposed of. Bechelli was thrown upon a Chesterfield

couch in the front room and directed to turn his face to the wall. When he turned to take a look at the robbers, he was warned that a repetition of such conduct would make it necessary for them to "plug him." He promptly obeyed and exhibited no further curiosity in their operations.

The safe was opened and its contents were appropriated. The cash register was jimmied and looted. The diamond ring was torn from the finger of Bechelli with pliers so forcibly as to cut his finger and cause profuse bleeding. The diamond was removed from its setting. The ring was crumpled with the tweezers and thrown away. Sylve's ring was similarly treated. Her wrist watch was taken. Three slot machines were carried out and placed in the rumble seat of the machine, where they were covered with a quilt which was removed from a bed. Bechelli's revolver was discovered and taken. His car, which stood near the entrance, was disabled by cutting the wire connecting the electric starter. With a final warning to visit swift death upon "any one who squealed on them," the robbers fled, and, entering their machine, they dashed down the highway at the rate of sixty or seventy miles an hour.

After the sound of the machine had died away, the victims regained their courage. Their bonds were loosened. Bechelli was released. He borrowed a car from an occupant of an adjoining cottage. Within a few minutes after the robbery occurred, he reached Redding and notified the sheriff of the commission of the crime. Messages were sent in every direction to adjacent cities. The officers of Chico, which is situated about seventy miles from Redding, upon receiving this notice, drove their car north a mile or two and parked it beside the highway, where they remained on watch for suspicious motorists. The robbers arrived about 3 o'clock in the morning, driving at a furious rate of speed. The officers signaled and tried to stop them, but failed. They recognized the Hudson car with its three occupants, and a quilt covering the contents of the rumble seat. They immediately started in pursuit of the culprits, but were outdistanced and eluded. The robbers passed through Chico at the speed of an express train. A witness said he saw them driving south of Chico at a reckless rate of speed. Anticipating they were likely to be captured, they threw away their revolvers and changed their course westerly toward Willows. Three revolvers were subsequently found adjacent to the highway below Chico. One of them was identified by Bechelli from its serial number and caliber, as his own weapon. He so testified. In an interview with the district attorney, which the defendant requested after his arrest, the following conversation occurred:

"Q. (By the district attorney). You fellows took an awful chance when you drove

through the officers at Chico, didn't you? Why didn't you stop? A. We couldn't have stopped if we had wanted to, we were going too fast. If there had been a barricade there we would have gone right through it. * * *

"Q. After you got by, why did you throw the guns away? A. We thought they were hot on our trail, and we tossed the guns out as we thought we were caught, sure."

These admissions were not denied by the defendant. The revolvers were sufficiently identified.

About 7 o'clock that morning the defendant, Meyer, walked into the L. K. Garage at Willows, and asked William Roberts, the foreman, to go out and get his car, which was stalled on the highway about half way to Orland. The Hudson car was subsequently towed into the shop for repairs. It was a light green Hudson roadster. The engine had been ruined from excessive speed. It was found to be registered in the name of Evelyn Isabel Meyer, of Berkeley, who is the wife of the defendant. The stolen property was not discovered. The defendant's companions were not apprehended. There was some conflict regarding the color of the Hudson roadster which was seen at the roadhouse. Sylve was mistaken about saying she had previously seen the defendant at the roadhouse. It was Tex Rambo who had been there, and whom she had previously seen. These details are immaterial. Both Bechelli and Sylve testified unequivocally they clearly saw the unmasked face of the defendant in the full glare of the lighted room, and recognized him as one of the robbers. The finding and identifying of Bechelli's revolver near Chico, and the admissions of the defendant to the district attorney are conclusive of his identity. There is therefore no merit in the contention that the identity of the defendant as one of the robbers was not established. The evidence is ample to support the judgment of conviction.

[2] It was established that the defendant had been an inmate of Agnew State Hospital. His plea of "not guilty by reason of insanity" was voluntarily withdrawn by him, with his personal approval. The question of his insanity was not an issue in the case, and may therefore not be raised upon this appeal.

[3, 4] The district attorney is charged with prejudicial misconduct in calling the attention of the jury to the appearance of the defendant, since he was not a witness in his own behalf, and in asserting on his personal authority that the defendant was guilty. Both of these statements of the district attorney were indiscreet, inexcusable, and highly prejudicial. In a case where there was any reasonable doubt of the identity of an accused person or of his guilt of the crime charged, these statements would require a

reversal of the judgment of conviction. In the present case, at the request of the defendant, the challenged remarks of the district attorney were ordered to be stricken from the record, and the jury was repeatedly instructed to disregard them. Even this prompt and clear disapproval of the trial judge may not suffice to remedy the prejudicial effect of such conduct on the part of a district attorney, in a doubtful case. In this case, we feel there can be no possibility of a mistake regarding the identity of the defendant in this bold flagrant participation in one of the most heinous crimes known to the law. Courts cannot afford to trifle with those who resort to the methods of highwaymen. No crime is more detrimental to the security of our homes or the safety of our governmental institutions. In spite of the misconduct of the prosecuting officer, we believe the record clearly shows there was not a miscarriage of justice in this case. We are authorized to uphold the judgment of conviction under the provisions of section 4½ of article 6 of the Constitution of California.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 240

VILHAUER v. PACIFIC ELECTRIC RY. CO.

Civ. 175.

District Court of Appeal, Fourth District, California.

Nov. 9, 1931.

Rehearing Denied Dec. 3, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

1. Railroads ⇨327(1), 328(3).

Generally, automobile driver before crossing track must stop, look, and listen, and, if circumstances require, alight and walk ahead to see whether train is approaching.

2. Railroads ⇨330(2).

Lesser degree of care is required of automobile driver crossing railroad where warning devices are installed.

3. Railroads ⇨328(6).

Automobile driver struck by car approaching from opposite direction, after waiting for approaching car pursuant to warning of signal, *held* contributorily negligent.

The evidence was undisputed that wigwag signal was working at time automobile driver started up after stopping his machine, and that it was working when collision occurred, with a fair inference that it was working all of the intervening time, without any showing that view of

automobile driver in direction from which car which struck him was approaching, was obstructed; it rather appearing that approaching car was visible during the time it was covering 200 feet, and at the time automobile driver was approaching and crossing track.

4. Railroads ⇨330(2).

That automobile driver thought operation of automatic signal was caused by car which had just passed, was no excuse, as respected collision with car approaching from other direction.

5. Railroads ⇨347(8).

Exclusion of evidence that wigwag signal at crossing would operate after train had passed, *held* not erroneous under circumstances.

The only purpose of evidence offered would appear to be to justify automobile driver's assuming that wigwag was still working because of passing of electric car for which he had waited, rather than one approaching from opposite direction, and by which he was struck; but such fact, however, was proved by other evidence establishing that wigwag actually did work after car was 200 feet away, at which point it passed other electric car which was itself 200 feet away.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jacob P. Vilhauer against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Homer N. Boardman, of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

BARNARD, P. J.

This is an action to recover for injuries and loss sustained by the plaintiff in a collision between an automobile driven by him and an electric car operated by the defendant. The collision occurred about 5 o'clock p. m. on April 20, 1926, near the town of Cypress, in Orange county, at a point where a paved highway crosses a double track used by the railway company. An automatic signal which "wigwagged" and rung a bell upon the approach of a car or train was installed at this crossing, and, as the plaintiff approached, he observed that this signal was working. He also saw a north-bound car about 150 feet away approaching the crossing on the track nearest to him. He stopped his car about fifteen feet from the nearest track,

and waited for this car to pass. He then started forward, and, when he had reached the second track, his machine was struck by a south-bound car, causing the injuries described in the complaint. The case was tried with a jury, and, at the conclusion of the plaintiff's evidence, a motion for a nonsuit was granted upon the ground that the plaintiff was guilty of contributory negligence. From the judgment which followed, this appeal is taken.

The principal question before us is whether contributory negligence on the part of the plaintiff, as a matter of law, is shown by the evidence. The appellant testified that he had passed the crossing in question twice every day for about three weeks; that, as he approached the crossing on this occasion, he saw the wigwag working, and saw a north-bound car about 150 feet away approaching at 25 or 30 miles an hour; that he stopped his car about fifteen feet from the first track, and that the place where he was sitting was some four or five feet from the front end of his automobile; that when he stopped he looked both ways and saw only the one car, which he let go by; that when the north-bound car was about 200 feet past the crossing he started forward, proceeding in low gear at a speed of about four or five miles an hour; that he looked before he started on and "couldn't see nothing"; that he had good brakes and could have stopped in from six inches to a foot; and that there were no buildings or trees to obstruct his view. The appellant testified as follows:

"Q. After the car traveling north went by just tell the jury what you did. A. I started on slowly and when I got in between the two tracks I looked the other way and couldn't see nothing.

"Q. When you say you 'looked the other way,' which way did you look? A. I looked both ways.

"Q. And couldn't see nothing? A. And I listened.

"Q. Could you hear anything? A. I didn't hear nothing.

"Q. When you looked to the right did you look up the track? A. I looked up the track.

"Q. Was there anything there at that point that in any manner obstructed your view? A. Well, the poles.

"Q. Where were they located? A. They was right in the middle of the track.

"Q. You mean between the two tracks? A. Between the two tracks, yes.

"Q. Did you at any time see or hear the car that hit you? A. No, sir." * * *

"Q. Then what kept you from seeing this train that was coming towards Santa Ana, the one that hit you? A. It must have been the poles.

"Q. What did you see when you looked up? A. I didn't see nothing.

"Q. What kept you from seeing anything? A. Well, either the car or the poles.

"Q. Well, if the car was 200 feet away that wouldn't keep you from seeing the car coming down here any time, would it? A. I don't know.

"Q. Well, there was nothing but that car or those poles between the tracks, is that right? That is the only thing that would keep you from seeing this train coming towards Santa Ana, was it? A. Yes, sir." * * *

"Q. Now, Mr. Vilhauer, as you came up here did you see this wigwag? A. Yes, sir.

"Q. Was it working? A. Yes, sir.

"Q. It was working while you were standing there, wasn't it? A. Yes, sir.

"Q. It was working when you got hit, wasn't it? A. I don't know.

"Q. You went on by and didn't pay any more attention? A. I suppose it was. I don't know whether it was. I never looked.

"Q. But it was when you looked when you came up? A. Yes."

A diagram was introduced, showing that the trolley poles in question were between the two tracks, and that they were from 100 to 110 feet apart. The appellant also introduced a number of photographs showing the tracks and poles in question from various views, including one view from the point where appellant stopped his machine, and another view from the point between the two tracks, where appellant looked the second time. There was evidence that the poles were from eighteen to twenty inches in circumference, and it was stipulated that the electric car causing the damage was fifty-five feet six inches long, nine feet four inches wide, twelve feet nine inches high, and weighed 85,000 pounds empty. There was evidence that the wigwag was working when the appellant stopped, when he started to cross the track, and when the collision occurred. It appears that the appellant was sitting about twenty feet from the first rail of the first track when he stopped; that the rails of the first track were about five feet apart; and that the two tracks were about nine feet apart. It thus appears that the appellant traveled about thirty-four feet from the time he started forward until he was struck. An eyewitness, who was standing near the crossing in question, testified that when he first saw appellant's automobile it was stopped; that when the rear end of the north-bound electric car had gone by ten or fifteen feet the appellant started across the track; that the north-bound and south-bound electric cars passed each other about 200 feet from the crossing; that the wigwag was working; and that the appellant pro-

ceeded across the crossing at about one or two miles per hour.

[1, 2] It is a general rule that the driver of an automobile, before crossing a railroad track, must stop, look, and listen, and, where the circumstances make it necessary, must alight and walk ahead far enough to enable him to see whether a train is approaching. *Young v. Pacific Electric R. Co.*, 208 Cal. 568, 283 P. 61. This strict rule has been somewhat modified in cases where crossings are protected by automatic signals which give a warning, in addition to that given by the tracks themselves, of the approach of a train. Where such warning devices are installed, while a plaintiff may not absolutely rely upon them, a lesser degree of care is required than where such devices are not present. In a case where such a warning device is installed but is not working on a given occasion, and where some precaution has been taken by a plaintiff for his own protection, the question whether the care used was sufficient under the particular circumstances is usually one for the jury. *Ogburn v. Atchison, Topeka & Santa Fe Ry. Co.* (Cal. App.) 294 P. 491, and cases there cited. While a lesser degree of care is required where a traveler depends in part upon a signal which in a particular case happens not to be working, and while, where some precaution is taken by a plaintiff under such circumstances, the question as to the sufficiency of the care used is usually one for the jury, a somewhat different situation may arise where the traveler proceeds across a railway track when the automatic signal is working and indicating the presence of a train within the danger zone. In such a case, the mere fact that some precaution has been taken by a plaintiff, does not necessarily require that the sufficiency thereof must be submitted to the jury. For a traveler to proceed across the tracks against the warning of such a signal, if not negligence in itself, would at best seem to call for the exercise of a high degree of care on the part of the traveler. In such a case, the care actually used may be so disproportionate to the care required and called for by the circumstances as to be held insufficient as a matter of law. We think such a situation appears in the case before us.

[3, 4] The evidence is undisputed that the wigwag signal was working when the appellant started up after stopping his machine, and that it was working when the collision occurred. It is a fair inference from the evidence that it was working all of the intervening time. If it be considered that the appellant exercised some care in stopping his car and looking both ways, it would appear that the care used was not sufficient to meet the plain requirements of the situation, since he did not again look at the signal before starting forward, and after starting did not look up the track until he had arrived at a point

between the two tracks, at which time the front end of his machine would be upon the second track, and all of the time he was in fact proceeding in the face of the continued warning of the oscillating signal and ringing bell. It would almost appear that he used no care whatever with reference to the second track and the electric car which struck him, since he was familiar with the crossing, knew there were two tracks and that trains passed both ways, and he did not pay any attention to the signal after the first car passed, and did not look up the track from the time he started until he was practically upon the second track. While he now contends that he was unable to see, from his own evidence it appears that he paid no attention to the warning signal, and that he did not look after he started forward until it was too late. If it were a fact that the appellant's view was obstructed by the trolley poles, it is also a fact that he proceeded in spite of the operation of the signal. That he may have thought the operation of this signal was still caused by the car which had just passed, was no excuse. *Griswold v. Pacific Electric R. Co.*, 45 Cal. App. 81, 187 P. 65. But it does not appear to be a fact that appellant's view was obstructed. While he testified that he looked just before he started his car and could see nothing, his only explanation of why he could not see is that it must have been the poles, or that it was either the passing car or the poles. It is undisputed that the electric cars passing each other 200 feet beyond the crossing, and if, as appellant says, he did not start his automobile until the passing car was 200 feet beyond the crossing, it was not the passing car that obstructed his view. It appears that the track was straight for a considerable distance, and that there were only one or two poles within 200 feet of the crossing, and it not only seems impossible that these could have obscured his vision of a car of that size, but it conclusively appears from the photographs introduced in evidence by the appellant that these poles could not have obscured his vision during the time he was approaching and passing the first track. It therefore appears that the approaching car was visible during the time it was covering the 200 feet and during the time the appellant was approaching and crossing the first track. This fact, with the fact that the appellant did not look in that direction during that time, coupled with the fact that he was proceeding against the warning of the wigwag and the bell, conclusively shows that the care used, if any, was so disproportionate to the care called for by the circumstances that it must be held, as a matter of law, that the appellant was guilty of contributory negligence. If he had looked up the track during the time he was covering the thirty-four feet he traveled, he would have seen the car, and, according to his own testimony, he could have stopped at any time within one foot. Taking the

view of the evidence most favorable to the appellant, he proceeded against the warning signal, and, as he proceeded, he did not even look to see whether the view was obstructed or not. While he claimed he looked after it was too late, and that at that point his view was obstructed by the poles, his testimony on that point is not very satisfactory, and, in addition, it appears from the actual photographs that this could not be true. In any event, no excuse is offered for not having looked during the intervening thirty-four feet; there is no testimony that his view was obstructed during that time; it is apparent from the evidence that it was not, and the only reasonable conclusion is that the appellant assumed that the continuance of the warning signal was caused by the passing of the first car, and that he proceeded without paying any attention to the approaching car on the other track. In any view of the evidence, we think the appellant was guilty of negligence which contributed to his injuries.

The appellant relies on the case of *Forbell v. Pacific Electric R. Co.*, 200 Cal. 718, 254 P. 890. In that case, the court held that the evidence indicated that the electric car was not discernible until the bus, which figured in the collision, was well upon the tracks of the defendant railway company. Under such circumstances, a different rule was applied. A number of other cases are cited by appellant where the view of the plaintiff was obstructed by box cars and other obstructions, and in which it was held that, since the plaintiff had taken some precautions, the question of whether sufficient care was used was properly submitted to the jury. A different situation is here presented where, if the appellant's view was obstructed in the beginning, it was by a rapidly moving car which would soon remove itself as an obstruction to his view, and where the evidence shows neither an obstruction thereafter nor any effort on the part of the appellant to ascertain whether a second electric car was coming after the time he started forward. Under the circumstances here shown, we think a nonsuit was properly granted by the trial court. *Shannon v. Northwestern Pacific R. Co.*, 209 Cal. 303, 287 P. 91.

[5] The appellant complains of a ruling of the court in excluding an offer of evidence to the effect that the wigwag signal installed at this crossing would continue to operate after a train had passed for a distance of about 200 feet. The only purpose of the evidence offered would appear to be to justify the appellant in assuming that the wigwag was still working because of the passing of the first electric car. The fact sought to be proved was proved by other evidence, since it was established that the wigwag actually did work when the passing car was 200 feet away,

at which point it passed the other electric car which was itself 200 feet away. Not only was there no offer to prove that the fact sought to be established was known to the appellant, but the appellant himself admitted that, when he proceeded, he did not even notice whether the wigwag was working or not. No prejudicial error appears in the ruling.

Another claim is made that the court was in error in sustaining an objection to certain offered proof. The testimony offered went only to the question of negligence on the part of the defendant and need not be here considered, since on this appeal negligence on the part of the defendant may be assumed.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

118 Cal.App. 155
PEOPLE v. GROSS.
Cr. 1173.

District Court of Appeal, Third District, California.

Nov. 4, 1931.

Rehearing Denied Nov. 19, 1931.

Criminal law — 1071.

Failure to timely file and present application stating generally grounds of appeal, in accordance with mandatory statutory provisions, required dismissal of appeal (Penal Code, § 1247).

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Walter Gross was convicted of an offense, and he appeals.

Appeal dismissed, and proposed motion to vacate judgment denied.

Stahlman & Bennett, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Dep. Atty. Gen., for respondent.

PRESTON, P. J.

Defendant was convicted of a violation of section 288 of the Penal Code. He made a motion for a new trial, which was denied, and judgment was thereupon pronounced. Defendant prosecutes this appeal from the judgment and the order denying him a new trial.

The record reveals these facts: Judgment was pronounced on March 21, 1928. Notice of appeal from the order denying a new trial

and the judgment was given and filed on the same day. No attempt was made to comply with section 1247 of the Penal Code until March 27, 1928, which was too late.

Section 1247 of the Penal Code provides: "Upon an appeal being taken from any judgment or order of the superior court, * * * in any criminal action or proceeding where such appeal is allowed by law, the defendant * * * must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

A compliance with said section 1247 of the Penal Code, as it stood when this appeal was taken, is mandatory. *People v. Ali*, 38 Cal. App. 544, 176 P. 883. Therefore, the appeal must be dismissed, and it is so ordered. The proposed motion to vacate the judgment is denied.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

118 Cal.App. 177

PEOPLE v. GENTEKOS.

Cr. 2139.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1931.

Rehearing Denied Nov. 20, 1931.

1. Criminal law §406(7).

Defendant's contradictory statements, made during investigation concerning collecting insurance for previous fire, *held* admissible to show consciousness of guilt.

2. Arson §35.

Threats as repeated by Communists who had objected to defendant's feeding needy men, not identifying or connecting the persons uttering threats with fire, *held* inadmissible.

3. Criminal law §943.

New trial *held* properly denied, where defendant first told investigators that he went

alone to his restaurant before fire, notwithstanding later testimony of going there with friends.

4. Arson §41.

Instruction, that if defendant was solicited to obtain insurance after nearby explosion, that was insufficient circumstance to convict, *held* properly refused as unnecessary.

5. Criminal law §763, 764(6).

Instruction on right to consider specific evidence *held* properly refused, court charging that prosecution must prove defendant started fire beyond reasonable doubt.

Requested instructions called attention to alleged threats of Communists, possibility of there being an open window and defendant's bolting of a door found open at time of fire, and charged that jury might consider such facts in determining whether others set fire. The instructions given were that defendant could not be convicted on mere probabilities, but that prosecution must prove beyond reasonable doubt that defendant started the fire.

6. Criminal law §1172(6).

Instruction, quoting Penal Code, that if defendant burned "insured" property jury must find him guilty, *held* not prejudicial, notwithstanding record showed no insured property burned, evidence justifying verdict for attempt (Pen. Code, § 450a).

7. Criminal law §933.

New trial *held* properly denied, evidence establishing attempt, but not burning of insured property, and court stating that on sentencing judgment would be modified to attempt (Pen. Code, § 1181, subd. 6).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Mimis Gentekos was convicted of arson and burning of insured property, and he appeals from the judgments and order denying his motion for new trial.

Judgment and order as to count 1 affirmed, and as to count 2 order affirmed and judgment reversed and remanded.

N. D. Papa-Dakis and C. S. Mauk, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Dep. Atty. Gen., Buron Fitts, Dist. Atty., and Hugh J. McIsaacs and Tracy Chatfield Becker, Dep. Dist. Attys., all of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

This is an appeal by the defendant from judgments of conviction after verdicts or

guilty on two counts of an information charging arson and burning of insured property, respectively, and from an order denying a motion for new trial.

Defendant was charged with arson, in count one, and in count two with the burning of insured property. The first count was amended before trial, by order of the court, and, at the request of the district attorney, to charge willful and malicious burning of property under section 448a of the Penal Code; and the second count, which read "did wilfully, unlawfully and feloniously burn," etc., was amended by inserting the word "maliciously" after the word "unlawfully," and the words "set fire to and" after the word "feloniously." The jury returned a verdict of guilty on each count. Motion for new trial was made and denied. The court, however, announced in so doing that as to the second count there was no evidence that any "insured property" was burned, and that the court as to such count would "upon passing judgment modify the judgment" so as to show "attempt" to commit the crime charged. The record before us does not disclose that such was in fact done, as the judgment of conviction actually pronounced, as shown by such record, is based on the charge in the information, and the verdict as returned thereon, viz., "burning insured property, a felony."

Appellant contends that the court erred (1) in admitting certain evidence, (2) in excluding certain of defendant's evidence, (3) in denying defendant's motion for a directed verdict, (4) in refusing to give certain instructions requested by defendant, (5) in giving certain instructions, (6) in denying defendant's motion for a new trial, and also urges (7) that the verdicts are not supported by the evidence.

It appears from the evidence that defendant operated a small restaurant on East Eighth street, Los Angeles, in which fire broke out at about 10:30 p. m. on January 24, 1931. The firemen responding to the alarm found both front and rear doors locked, and, on breaking in, found the door between the kitchen and the rear hallway open and a fire burning near the east wall of the kitchen, which was back of the room where the meals were served, and at the rear of the building. This fire apparently originated at the spot where it was burning, and in its débris was found a broken drinking glass which had evidently contained alcohol, and a rag saturated therewith. Between the counter and the shelving in the front room of the place, about twenty-five feet from the site of the fire in the kitchen, there was discovered an arson "plant," reaching from the floor to about the level of the counters, consisting of a paper bag on the floor with a burning tallow candle in the center of it, surrounded by "a number of boxes, paper, etc., crumpled up newspapers, and over the whole thing was a couple of table-cloths

or table-covers. There were also four glasses containing alcohol" located at the four corners of the "plant." The defendant was found in his room a short distance from the restaurant. He told the officers that he had closed the restaurant at about five p. m. that day and went to visit a friend, returning alone to the restaurant at about eight p. m. for the purpose of using the toilet and hiding ten dollars in currency he had left there; that he turned on the lights when he entered and then turned them off for about ten minutes while he was hiding the money; that he locked the door and then left. At the trial, he testified that he returned to the restaurant as he did for the purpose of making some sandwiches to take on a hunting trip he intended to make the next day with two friends, who joined him at the restaurant and helped prepare the sandwiches and coffee; that they were there about half an hour, and that he took the sandwiches and coffee to his room, placing the former, contained in several paper bags, on the bureau in his room, put the coffee in a thermos bottle, which was then wrapped in "a little piece of wool" to keep it warm, and placed same in a closet of his room. The officers who went to the room testified that there were no sandwiches on the bureau nor any coffee in the closet or elsewhere in the room. It appears from the evidence that defendant had a policy of \$4,000 on the furniture and fixtures of the restaurant and an additional policy of \$500 on supplies; that he purchased the business for \$3,000 in October, 1929, paying \$1,500 cash and the balance in monthly payments of \$100, which he had paid for eight or nine months, when business dropped off, and thereafter he had paid at the rate of \$50 per month, but did not make payment of that amount on January 15, 1931, when it was due, and that he was owing \$450 on the purchase price when the fire occurred. Defendant also owed about \$275 for crockery placed in the restaurant in December, and for changes made the first of the year in fixtures and booths. There was likewise evidence to the effect that defendant was behind in his rent about a month and had complained to his landlord that business was not very good, asking a reduction in rent; that the landlord agreed to reduce the rent from \$85 to \$75 per month if defendant would pay up; that he had been behind in his payments each month for several months. The rear door of the restaurant was locked by bolts which were forced by the firemen on entering; the front door was opened by breaking the glass and unlocking the door from the inside. It also appears that the lock on the front door was a Sargent cylinder lock which could not be opened by a master key, but required a pick and tension bit and some experience, and that then it would take from ten minutes to half an hour to open it, depending on the condition of the lock and the skill of the operator.

There was evidence from which the jury could have concluded that at the time of the fire the value of the fixtures in the restaurant was \$1,800, and the foodstuffs \$75. The man who sold the business to defendant testified that it cost him around \$500 to \$600 to fix the place up after he took it back from the latter, and that he sold it for \$1,500 "because otherwise I couldn't sell it; nobody would take it." Defendant was asked by the police how he could explain the situation "where he was alone in the place, and he said, 'I cannot.' He said, 'it looks awfully bad for me.'" Photographs were taken of finger prints on the waterglasses used for the alcohol, and which it was testified had not been disturbed until photographed, but they were mostly blurred. One, however, had an impression corresponding to the third finger of defendant's right hand, which had a small scar on it. Concerning this, it was testified, defendant said: "Well that might be my finger print on the glass because if those glasses came from a tray up toward the front of the counter it is probably my finger prints." The evidence shows that when defendant was first seen by the investigators he said to them that he had had no trouble and had no enemies; that he "was doing a fairly good business and could not account why anyone would want to cause him trouble." A few days later he said that a short time before he had some difficulty with Communists. In the course of the investigation he was asked if he had ever collected any insurance or had any other fires, to which he replied that this was the first fire he had had. The officers testified that upon investigation they found that defendant had had a previous fire and had collected some \$2,000 on it. Asked about this, defendant said it was true, but that he didn't own the place and was only renting it from another party whose name he did not remember; that all he got out of it was \$70 in wages that the man owed him. He admitted, however, that he had signed papers showing the property was his, and that he had made the collection in his own name. Defendant introduced evidence to show that the door between the kitchen and the hall to the rear of it was locked that night by a bolt which had no metal receptacle in the door frame opposite it, but that in lieu thereof a piece of board had been nailed on the frame and that the bolt would be shot in behind the same, locking the door, and that several days after the fire such board was pulled off the frame on one end from an inch to an inch and a half, as though it had been forced from the hallway. There was testimony, however, from which the jury could infer that such condition did not prevail at the time of the fire, and that the door was then open.

[1] (1) Appellant insists that the admission in evidence of the conversation with the investigators about a previous fire was preju-

dicial error. The purpose of its admission, however, was not to prove a similar offense, as appellant urges. As a matter of fact, no offense was proven. There was nothing in the testimony objected to so indicating, nor could the jury draw any such inference therefrom. The accused had said that this was his first experience with fire, and that he had never collected any insurance. The investigators then ascertained that such was not the case and told him what had been discovered, whereupon he admitted and explained as heretofore noted. Appellant, therefore, had made contradictory statements during the investigation which appeared to be an attempted concealment of an incident in his life similar to the one then under inquiry. Such circumstance would seem to be a proper matter for the jury to consider as tending to show consciousness of guilt, for in the absence of a reasonable explanation it might well be inferred that the statement referred to was made for the purpose of misleading the investigators or avoiding suspicion.

[2] (2) Some evidence was introduced by appellant tending to show that Communists had objected to his feeding men in need and said, "All right, we will get even with you." He was again asked what threats such persons had made. Objection was made thereto and sustained. No evidence was introduced identifying such persons or showing that they ever repeated such warning, or in any way identifying them as ever having been in any way connected with the fire. Such evidence could only show that possibly there might be some persons who had a motive to commit the crime charged. The testimony sought to be elicited could do no more than afford "a possible ground of possible suspicion against another person," and consequently was inadmissible. *People v. Mendez*, 193 Cal. 39, 51, 223 P. 65. As we have shown, such evidence had already been admitted without objection, and, even if it were admissible, appellant was not prejudiced.

[3] (3 and 6) We see no error in refusing to give a directed verdict or in denying defendant's motion for a new trial so far as count 1 is concerned. The jury evidently believed that appellant told the investigating officers the truth when he said he was in the restaurant alone, and rejected the later story told by him and his two friends. The place having been securely locked by appellant before he left, there being no evidence of any breaking in by another, the fire occurring so soon after he left and his finger prints showing on one of the glasses used in the "plant," the jury might well infer, in view of the other evidence showing motive, that the accused arranged two "plants," only one of which operated as planned before the firemen arrived.

[4, 5] (4) Appellant requested several instructions which isolated certain evidence

and then asked a charge concerning it, as for instance, that if they believed defendant was solicited to obtain fire insurance shortly after an explosion had taken place in the vicinity of his place of business such fact was not in itself a sufficient circumstance to convict him. The court very correctly indorsed thereon: "Refused. Obviously unnecessary." Other requested instructions called attention to specific evidence, such as the alleged threats of Communists, the possibility of there being an open window in the side of the building which would afford access, and that the "door leading into the kitchen from the rear part of the building was bolted by defendant" and was found open at the time of the fire, and charged the jurors that they had a right to take such facts into consideration in determining whether or not some person other than defendant set the fire. The jurors were instructed that the defendant could not be convicted merely on probabilities, but that "the prosecution must establish the fact, beyond a reasonable doubt, that he, the defendant, started the fire," and that would seem to be sufficient without commenting specially on specific evidence which the jury apparently did not accept and which was largely incompetent. Other requested instructions were fully covered by those given. We find no error in the refusal to give the instructions requested.

[6] (5) We fail to see how appellant was prejudiced by the giving of an instruction which substantially quoted section 450a of the Penal Code, and then told the jurors that if they believed from the evidence beyond a reasonable doubt that the defendant "did burn insured property as charged in count 2 of the information" they must find him "guilty of burning insured property," even if the record contains no proof that any of the property burned was insured. The instruction could have had nothing to do with the verdict actually returned. It rather emphasized the fact that the jury must find that "insured property" was actually burned before it could return such a verdict. The evidence showed clearly an attempt to burn such property, and it was within the province of the jury to return a verdict for the lesser offense.

[7] (7) We have already pointed out that the trial judge agreed with appellant's contention that so far as count 2 is concerned there is no evidence that any insured property was burned, and with that we agree. The court, as we have said, properly denied the motion for new trial, stating that under the power given him by section 1181 of the Penal Code, subdivision 6, in passing sentence he would modify the judgment to an "attempt" to commit the crime charged. The evidence supports such a judgment, even though it does not the one actually entered,

and we see no error in denying the motion for a new trial as to such count.

As to count 1 the judgment and order are affirmed. As to count 2 the order is affirmed. The judgment on count 2 is reversed and the cause remanded to the trial court, with directions to enter judgment against the defendant on said count finding him guilty of attempt to burn insured property, and to pronounce judgment upon him as prescribed by law.

We concur: WORKS, P. J.; CRAIG, J.

YOLO et al. v. MODESTO IRR. DIST.*
Civ. 4357.

District Court of Appeal, Third District,
California.

Nov. 9, 1931.

Rehearing Denied Dec. 9, 1931. Hearing
Granted by Supreme Court Jan. 7, 1932.

Waters and water courses ⇨228¾.

Irrigation district cannot be sued for tort of its officers without legislative permission.

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Action by E. Yolo and another against the Modesto Irrigation District. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Philip M. Carey and Marvin B. Sherwin, both of Oakland, and Joseph D. Malloy, of Stockton, for appellants.

L. J. Maddux, of Modesto, for respondent.

PLUMMER, J.

This cause is before us upon an appeal by the plaintiffs from a judgment of nonsuit made and entered in the superior court in favor of the defendant. The action was one for damages based upon the alleged wrongful death, caused by the defendant, of a minor child of the plaintiffs.

The record shows that on or about the 7th day of April, 1926, Sylvio Yolo was employed on the farm of Louis Pometta, and that he met his death while crawling through a wire fence on the premises of his employer. The wire fence had become charged with electricity, when one of the transmission wires belonging to the Modesto irrigation district, carrying a heavy voltage of electricity, broke and fell across the wire strands of an adjoining fence. It appears that while the deceased was at work on the farm above men-

tioned, he and Pometta discovered a fire in some dry grass along or near the wire fence just referred to, and immediately went there to extinguish the flames. Pometta crawled under the wire fence without injury. Sylvio Yolo put his hands upon the wire, apparently for the purpose of climbing over the fence, and was immediately electrocuted. The record further shows that the Modesto irrigation district was created by legislative enactment. St. 1877, pp. 70 and 820. In 1919, by an act approved May 21, St. 1919, p. 778, the Legislature authorized irrigation districts to construct electric power plants and electric light and power lines in connection with irrigation systems. In pursuance of this act, the Modesto irrigation district established an electric power plant near or in the vicinity of a certain dam and reservoir called the "Don Pedro Dam and Reservoir," for the purpose of generating and transmitting electric power to and over the irrigation district, which comprised an area of some 81,000 acres of land situate in the county of Stanislaus. The record shows that after the construction of the power lines referred to in this opinion, electricity was conveyed to some 2,500 residences of the district, sold to them for light, heat, and power; that a small quantity, to wit, a trifle over \$500 worth of electricity, was sold outside of the district. The record further shows that about 34 per cent. of the power generated and transmitted was used for the purposes of pumping and drainage, and that drainage is one of the necessary activities to be conducted by an irrigation district. While not in the record, it is common knowledge that the lower acreage of an irrigation district will become more or less water-logged unless an adequate system of drainage is installed.

The electric power line involved in this action was constructed along a certain highway fronting on the premises owned by Pometta, and in certain places in front of said premises, was conveyed through and over some trees, and just previous to the accident resulting in the death of Sylvio Yolo, a rather high wind had been blowing; that one of the power wires maintained by the defendant had rubbed against the branches of one of the trees which we have referred to, and by some means was caused to break and fall to the ground. It may be here mentioned that the several wires maintained by the defendant were uninsulated, and one theory advanced for the breaking of the wire was that the swaying of the branches caused the wires to form a contact creating a short circuit so that the wire which fell was broken in two. Whatever the cause of the breaking of the wire, our attention has not been called to any fact indicating that it remained in a broken condition for any considerable length of time. The gravamen of the charge against the defendant would seem to be the negligent construction, or rather

maintenance, of the wire, without taking due precautions to trim the limbs of the trees so that no injury could be caused to the wires by reason of overhanging or swaying branches. The record shows that the branches of the trees had not been trimmed for a long time prior to the accident, and would lead to the inference that the negligence, if any, consisted in not properly maintaining supervision over the wires after the construction of the power line, and seeing that overhanging branches of trees were trimmed so as to prevent contact with the wires.

At the conclusion of the testimony the court granted a nonsuit as to the irrigation district, on the ground that a suit for tort against it could not be maintained based upon negligence of its officers or employees. This appeal involves only the liability of the irrigation district, and raises but one question: Is an irrigation district liable for torts such as involved herein, by reason of maintaining an electric power line in connection with its irrigation system?

The act of the Legislature of 1919, *supra*, authorizing the construction and maintenance of electric power plants and transmission lines, empowers the board of directors of any irrigation district and its officers and agents and employees to do all necessary and proper acts in the construction and maintenance thereof, and likewise provides that all the authority granted to irrigation districts relative to the issuance of bonds, levying assessments, etc., for raising the necessary funds to construct and maintain such plants and power lines, shall be the same as those conferred upon irrigation districts relative to the creation and maintenance of irrigation districts. There appears to be nothing in the act which extends or broadens the character of irrigation districts. Irrigation districts only are empowered to engage in additional activities. Upon this appeal it is insisted that the building of a power plant and the erection of transmission lines are not governmental activities but are proprietary in character. This may be admitted. We do not see that there is any distinction in the proprietary character of building a canal and conveying water for the purposes of irrigating a tract of land, and the erection of a power line and the installing of a pump to take care of the excess water which might otherwise render the irrigated land unprofitable. In this case, however, it is not a question of whether the act performed by the defendant was governmental or proprietary; it is simply a question of whether a state agency, or an arm or branch of the state performing certain functions which are more or less public in character, can be sued for the torts of its officers or employees, and held liable in damages without legislative permission. Before referring to the cases bearing upon this question, it may be profitable to call attention to

section 3464 of the Political Code as it now reads, which provides that the negligence of a trustee or trustees of a reclamation district shall be imputed to the district to the same extent as if the reclamation district was a private corporation, etc., and the acts of the Legislature of 1923 authorizing suits against municipalities, school districts, and other quasi corporate bodies, on account of the negligence of its officers. No section of the law relating to irrigation districts provides that the negligence of its officers or employees shall be imputed to the district. The act of 1919, empowering districts to raise funds and build power plants and transmission lines, contains no such provision. We really have, therefore, but one question to answer: Can an irrigation district be sued for a tort of its officers, without such legislative permission?

While a number of earlier cases might be cited, we need not go back further than to cite the case of *Riddoch v. State*, 68 Wash. 329, 123 P. 450, 42 L. R. A. (N. S.) 251, Ann. Cas. 1913E, 1033, where the principle is laid down that neither a state nor its agencies can be sued and held liable in damages on account of the wrongs of its officers. The principle is thus stated: "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." (Citing a number of cases.) It is then further stated: "The following authorities declare and exemplify the rule. Some of them expressly declare, and through all of them runs the controlling principle, that the exemption is based upon absence of obligation and not upon mere absence of remedy." (Citing a number of cases.) We are quoting from Ann. Cas., supra, page 1035.

In *Western Assurance Co. of Toronto v. Sacramento & San Joaquin Drainage District*, 72 Cal. App. 68, 237 P. 59, 62, this court, speaking through Mr. Justice Hart, thus summarized the law, citing a long list of authorities supporting its statements, as follows, to wit: "It has uniformly been held in this state, as we have seen, that irrigation districts, formed and organized under the general laws, of the state or by special legislative acts, are governmental agencies of the state, and it has also likewise been held that the law as to such organizations is the same as that applicable to public or governmental agencies, whose objects or purposes are similar to those of the defendant. See *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 P. 272, 675;

Jenison v. Redfield, 149 Cal. 500, 87 P. 62; *Lindsay-Strathmore Irr. Dist. v. Superior Court*, 182 Cal. 315, 187 P. 1056; *Turlock Irr. Dist. v. White*, 186 Cal. 183, 17 A. L. R. 72, 198 P. 1060; *Tormey v. Anderson-Cottonwood Irr. Dist.*, 53 Cal. App. 559, 200 P. 814; *Whiteman v. Anderson-Cottonwood Irr. Dist. et al.*, 60 Cal. App. 234, 237 et seq., 212 P. 706." The case just cited followed the opinion of this court in *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 P. 706, holding an irrigation district not liable for the tort upon which the action was founded. Some language appears in the *Whiteman Case* with reference to whether the sacks of cement mentioned therein were for the construction of works by the district, or in pursuance of any purpose which the district might legally prosecute. But had such been the case, the character of the district would not have been changed.

In *Rauschan v. State Compensation Ins. Fund*, 80 Cal. App. 754, 253 P. 173, this court had again the duty of examining into the law relative to the liability of state agencies for the torts of its officers. It would only be an unnecessary duplication of authorities to attempt to add anything to the opinion in the case just cited, where the law on the subject of the liability of state agencies is exhaustively treated, and it is there held that suits for torts cannot be maintained, based upon the negligence of officers or employees. To the same effect is the case of *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 P. 171. It is also stated in this case that the words "empowering the Board of Directors or trustees of irrigation districts to sue, appear and defend," etc., do not enlarge the liability of irrigation districts. It is there pointed out that while the law has been declared frequently that irrigation and reclamation districts are not liable for the torts of its officers or employees, the Legislature has only amended the law as to reclamation districts, making such districts liable.

We do not find anything in the recent case of *Morrison v. Smith Bros.*, 211 Cal. 36, 293 P. 53, 54, enlarging the liability of irrigation districts. In the *Morrison Case* a distinction is drawn between municipal or semimunicipal corporations and irrigation districts. After speaking of the liability of municipal corporations, when engaging in proprietary enterprises, the opinion refers to irrigation districts or state agencies as follows: "The other type of public corporation upon whose tort liability this court has already passed is typified by irrigation, reclamation, or drainage organizations, whose main purpose is to assist the state in reclaiming, improving, and aiding the productivity of farm lands. In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents,

upon the theory that they are state agencies, performing a governmental function." Citing *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 P. 706; *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 P. 171. The opinion then goes on to cite the various cases relative to the use of a proper name to designate such agencies. A résumé of these decisions would serve no useful purpose; it suffices to say that the law is well settled in this state that irrigation and reclamation districts are instrumentalities through which the state has seen fit to perform a semipublic function—the reclamation of swamp and overflowed lands, and the irrigation of arid districts—and now, in connection with the irrigation districts, it has become a like necessity that adequate drainage be had in order that the productivity of the reclaimed lands may not be destroyed.

We see no real distinction between the public character of the work in making an arid district productive, and in the activities necessary to keep it so. It is not, in fact, what the officers of the district were doing, or what the officers and employees of the district in this case failed to do, that fixes either the liability or determines the nonliability of the defendant district. It is the fact that it is a public agency or public instrumentality or an arm of the state carrying on certain work deemed semipublic and beneficial, that exempts it from liability under the cases holding that neither a state nor its agencies or instrumentalities can be sued for the torts of officers or employees, without legislative permission. This has been decided so frequently that we have been content to cite the cases which consider the principles involved extensively, rather than engage in any lengthy analysis herein.

The judgment is affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

118 Cal.App. 304

I. S. CHAPMAN & CO. v. CRAMER et al.
Civ. 548.

District Court of Appeal, Fourth District,
California.

Nov. 13, 1931.

Jury ~~6~~25(6).

Jury trial held waived by noncompliance with statute requiring announcement, when cause is first set on trial calendar, that jury is demanded (Code Civ. Proc. § 631, subd. 4).

It appeared that more than a year before case was set for trial counsel for de-

fendants filed with clerk a written demand for trial by jury, but that the fourth and last memorandum, which was served by mail on defendants' counsel, stated that a jury trial was not demanded, and defendants participated in trial and made no objection because jury was not in attendance.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by I. S. Chapman & Co. against N. V. Cramer and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

George H. Gobar and R. E. Haynes, both of Fullerton, for appellants.

Albert Launer and Harold A. McCabe, both of Fullerton, for respondent.

JENNINGS, J.

On October 30, 1928, respondent served upon counsel representing appellants a memorandum, requesting the clerk to place the above-entitled action on the civil active list. On November 2, 1928, counsel for appellants filed a written demand for a trial by jury in said action, and deposited with the court the sum of \$40 for jury fees. On January 16, 1929, and March 16, 1929, memoranda similar in all respects to that which was served on October 30, 1928, were served upon counsel for appellants and were duly filed. In each of the memoranda thus served appeared a notation that a jury trial was demanded by appellants. On January 13, 1930, a fourth memorandum requesting that the action be placed on the civil active list was served by mail upon counsel for appellants. This memorandum stated that a trial by jury was not demanded. Each memorandum contained a notice that cases would be set for trial in the department of the presiding judge on the first and third Mondays of each month at 9:30 a. m. Pursuant to the fourth memorandum for placing the case on the civil active list, it was set for trial on February 26, 1930. On said last-mentioned date counsel for appellants moved the court for a continuance of the trial of the action, which was granted, and the trial was continued to the 5th of March, 1930. At the time said motion for continuance was heard, no jury was in attendance, and it was not called to the court's attention that a jury had been demanded or that a jury would be desired by appellants. On March 5, 1930, the action was tried by the court without a jury; no request being made that a jury be impaneled and no objection being made that a jury was not in attendance. From a judgment in respondent's favor rendered after a trial in which appellants participated, this appeal is prosecuted on the sole ground

that appellants were unlawfully denied a trial by jury.

It is the contention of appellants that there was, in effect, a denial of their right to a trial by jury, due demand having been made by them for a jury in an action at law where-in a jury may be demanded, and that such denial constitutes reversible error. It is, however, established that the right to trial by a jury may be waived in such a case. *Amos v. Superior Court*, 196 Cal. 677, 680, 239 P. 317. Section 631, Code of Civil Procedure, provides that: "Trial by jury may be waived by the several parties to an issue of fact in manner following * * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice. * * *" The above-quoted language of the statute in language definite, certain, and unambiguous specifies the time, place, and manner of making a legal demand for a trial by jury in civil actions. Appellants admittedly had notice, but did not announce that a jury was required when the case was first set upon the trial calendar. If it should be held that a written demand filed with the clerk more than a year prior to the time when the case was set for trial constitutes sufficient compliance with the statute, there would be a substitution of a different time, place, and manner from that which the Legislature has plainly prescribed. It is clear that there was a waiver of the right to a trial by jury by the failure on the part of appellants to comply with the plain provisions of the statute. *Stern v. Hillman* (Cal. App.) 300 P. 972.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

118 Cal.App. 158

PEOPLE v. BASUINO.
Cr. 1641.

District Court of Appeal, First District,
Division 2, California.
Nov. 5, 1931.

1. Burglary $\S$ 41(4).

Direct evidence that defendant accused of burglary entered building is unnecessary.

2. Burglary $\S$ 42(1).

Evidence in burglary prosecution *held* sufficient to show stolen property was found in possession of each defendant.

3. Burglary $\S$ 41(1).

Evidence *held* sufficient to sustain conviction of burglary.

4. Criminal law $\S$ 723(4).

Argument of district attorney in burglary case that honest friends of defendant if on jury would bring in verdict of guilty *held* not prejudicial.

District attorney said that in his opinion the evidence was such that, if twelve honest friends of the defendant were called upon to act as jurors and would decide the case "fairly and squarely according to the evidence, they would return a verdict of guilty."

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Angelo Basuino was convicted of burglary of first degree, and he appeals.

Affirmed.

Alfred J. Hennessy and William J. Gloria, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Ralph O. Marron, Deputy Atty. Gen., and Seibert Sefton, of San Francisco, for the People.

SPENCE, J.

The defendant was convicted of having committed first degree burglary, and was sentenced to imprisonment in the state prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

On the night in question the drug store of Robert Miller, doing business as Miller Pharmacy, on Market street near Front street in San Francisco, was entered and a bag of money and also other articles, including a flash-light, a pair of gloves, a jimmy, and a towel were stolen therefrom. These facts were brought to the attention of the police on the following morning. In the meantime the defendant, Basuino, and one Itala Fulliar-esse, his codefendant, had been arrested between 2 and 3 o'clock a. m. when seen about two and one-half blocks from the drug store. At the time of their arrest all of the stolen property was in their possession, and Fulliar-esse was carrying a loaded revolver. The defendants attempted to explain their possession of the stolen property by stating that they had broken into an automobile on the Embarcadero and taken it. The officers immediately took the defendants to the Embarcadero, but the alleged automobile from which they said the property had been taken could not be located.

[1] Appellant contends that the verdict is contrary to the law and the evidence. In this connection it is stated that "there is no evidence that the defendant Basuino entered the premises in question and that the only evidence against him is that he was found in

company of the codefendant Fulliaresse who had the alleged stolen articles in his possession on the morning of the robbery." While it is true that there is no direct evidence to show that appellant entered the premises, it is well settled that such direct evidence is not required. As was said in *People v. Flynn*, 73 Cal. 511, at page 512, 15 P. 102, 103: "It was clearly proved that a burglary was committed at the time and place named in the information, and it was not necessary, in order to establish the defendant's guilt, that any of the witnesses should have actually seen him break and enter the premises, or should have seen him in the vicinity of the premises about the time the burglary was committed. It rarely happens that an offense, like that here complained of, can be proved by witnesses who saw and recognized the defendant in the act, and resort must, therefore, ordinarily be had to circumstantial evidence."

[2] Appellant is in error in stating the evidence relating to the possession of the stolen property, as it did not appear that the property was found solely on the person of appellant's codefendant. There is some confusion in the testimony of the two police officers relating to what property was taken from the possession of each of the two defendants. Nevertheless one of the officers testified that the towel with the money wrapped in it was in the possession of appellant and that appellant attempted to pass it to his codefendant, Fulliaresse, while in front of the booking desk at the police station. Whatever confusion may be said to exist in the officers' testimony relating to which of the defendants was in possession of the money, there is no conflict in their testimony to the effect that the towel was in the possession of appellant and that he attempted to pass it to Fulliaresse at the police station. The evidence was sufficient to show that some of the stolen property was in the possession of each of the defendants.

[3] Appellant further cites and relies upon authorities to the effect that evidence of the unexplained possession of stolen property standing alone is insufficient to justify a conviction, but all these authorities recognize that such possession is a circumstance that may be considered where other incriminating circumstances are shown. In the present case the evidence showed that appellant had worked for some time at the bootblack stand adjacent to the pharmacy; that he was arrested at a late and unusual hour on the night that the crime was committed at a place but a short distance from the scene of the crime; that at the time of his arrest appellant and his codefendant had in their possession all of the stolen property and that appellant's codefendant was armed with a loaded revolver; that while at the police station appellant endeavored to pass some of the stolen property to his codefendant and when asked "what was

the idea of passing the towel," neither defendant made any reply; that defendants were unable to authenticate their attempted explanation of the manner in which they obtained possession of the stolen property; and that their story with respect thereto was entirely unworthy of belief. The foregoing brief summary shows that appellant's conviction did not rest solely upon the evidence of the possession of stolen property, but rested upon evidence of such possession and evidence of other incriminating circumstances which, taken together, were ample to sustain the verdict.

[4] Appellant further contends that there was prejudicial misconduct in the remarks of the district attorney and that the trial court committed error in ruling upon his objection to said remarks. He asserts that the district attorney "told the jury in so many words that if they did not bring in a verdict of guilty they would be dishonest." In making this assertion appellant does not state the language used, but places his own interpretation on the remarks of counsel. The district attorney, after summing up the circumstances in evidence, stated in effect that in his opinion the evidence was such that, if twelve honest friends of the defendant were called upon to act as jurors and would decide the case "fairly and squarely, according to the evidence, they would return a verdict of guilty." Counsel for appellant objected to the statement, assigned it as misconduct, and requested the court to instruct the jury to disregard it. The trial court overruled the objection and stated to the jury, "If counsel, in his argument, goes beyond the evidence, it is your duty, members of the jury, to disregard it." The line of argument employed is not to be commended, but it is not analogous to that in *People v. Hail*, 25 Cal. App. 342, 143 P. 803, 809, relied upon by appellant. There the jury was told, "Should you do it [acquit the defendant] you would be afraid to go out on the street and meet your fellow men." The court there points out on page 357 and 358 of 25 Cal. App., 143 P. 803, 809, that the effect upon the jury of the statement of the district attorney "was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence" and that "the language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney. * * *" Although that case was reversed, the court clearly stated in its opinion that even the argument there employed would not necessarily require a reversal under all circumstances. In the present case we are of

the opinion that there was nothing in the remarks of the district attorney which directly challenged the honesty and integrity of the jurors or which would intimidate them or cause them to return a verdict regardless of their own views of the evidence. The district attorney merely adopted this rather unusual manner of expressing his own opinion concerning the strength of circumstances to prove the guilt of the defendants. A reading of the record leads to the conclusion that there was no prejudicial error in the remarks of the district attorney nor in the ruling of the trial court upon the objection thereto.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

THOMAS v. LAVERY et al.*
Civ. 8045.

District Court of Appeal, First District,
Division 2, California.

Nov. 13, 1931.

Rehearing Denied Dec. 12, 1931. Hearing
Granted by Supreme Court Jan. 11, 1932.

1. Appeal and error ⇨882(3).

Where parties stipulated and evidence disclosed that plaintiff suing on real estate contract was duly licensed broker, fact not being pleaded nor found by court, *held*, parties made issue on subject, so that neither can complain on appeal.

2. Appeal and error ⇨1071(6).

Where, if finding be made on record, it would be against party bringing appeal, judgment will not be reversed solely because of trial court's failure to make finding on that particular issue.

3. Brokers ⇨86(1).

Evidence did not sustain allegations of broker, suing on contract of employment to sell lots, that he had performed all things to be performed under contract.

4. Evidence ⇨596(3).

Oral evidence by broker on modification of written contract employing him to sell lots, without written modification or consideration therefor, *held* not sufficient proof of modification.

5. Brokers ⇨85(1).

Where broker, under contract to sell lots, did not offer to take over lots purchasers defaulted on as he agreed, defaulted contracts *held* immaterial in construing contract.

6. Brokers ⇨86(1).

Broker's failure to tender to owner any portion of payments made by purchasers of lots sold under contract to sell real estate *held* evidence of nonperformance.

7. Brokers ⇨86(1).

Evidence, in action by broker on contract employing him to sell lots, *held* not to disclose that contract sued on was invalid, because not in writing (Civ. Code, § 1624).

8. Brokers ⇨87.

Trial court's failure in measuring damages to provide against broker's expenses in action by broker on contract to sell lots, it not appearing he had expenses, *held* not error.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. D. Thomas against Jessie E. Lavery and others. From a judgment for plaintiff, defendant Jessie E. Lavery appeals.

Reversed.

Paul Friedman, of Los Angeles, for appellant.

Charles E. Hobart, of Los Angeles, for respondent.

STURTEVANT, J.

The defendant Jessie E. Lavery has appealed from a judgment awarding damages against her for a breach of a contract of employment of the plaintiff as an agent to sell real estate.

[1-2] In her opening brief, the defendant makes the point that the plaintiff's complaint is fatally defective, because it is not alleged that the plaintiff was during the life of the contract a duly licensed real estate broker, and the trial court made no finding on that subject. The same points were made on the motion for a new trial. On the hearing of that motion, the plaintiff presented an affidavit made by one of his attorneys in which the attorney stated that during the trial, and when the plaintiff was on the stand as a witness, the attorney for this defendant stipulated " * * * that Mr. Thomas was a licensed real estate broker at all the times necessary or involved in this action." Furthermore, in the affidavit it was alleged, and the reporter's notes also show, that without objection the plaintiff was asked if he was a duly licensed real estate broker in this state at all times involved in this action, and he answered he was. Whether the pleadings made an issue on the subject it is clear the parties did, and neither can complain at this late hour. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 P. 90. There was not introduced any evidence that the plaintiff

was not a duly licensed real estate broker. If a finding should now be made on the record as made, such finding must necessarily be against the defendant. When that is the condition of the case, the judgment will not be reversed solely because of the failure to make a finding on that particular issue. 2 Cal. Jur. p. 1033, note 14.

[3, 4] In his complaint the plaintiff pleaded that he was at all times ready, willing, and able to perform the terms of his contract, and that he had done and performed all things to be done and performed under the terms of the contract. The defendant asserts that the judgment should be reversed because those allegations were not proved. The plaintiff asserts that there was an abundance of evidence to support his allegations. In this assertion we think he is clearly in error when one searches the record for evidence that is both material and competent. By the terms of his contract, the plaintiff undertook to sell fifty-seven lots. He further covenanted that he would sell three in January, 1926, the same number in February, 1926, and the same number during each month thereafter until all of the lots had been sold. Time was expressly made of the essence of the contract. The contract was signed November 12, 1925. By virtue of the covenants just recited its term expired nineteen months from January 1, 1926, or July 31, 1927. Mrs. Lavery never discharged the plaintiff. Mrs. Barnett caused a letter to be written on August 6, 1927, notifying him that by its terms his contract was terminated. Such is the effect of the clear wording of the contract. It is not claimed that the plaintiff sold all of the lots. However, he testified that he made fifty-six sales, although the contract covered fifty-seven. The fifty-six sales so claimed included certain resales. If the resales are not counted in measuring the term of the contract, then he was not discharged till the end of the term, and the contract was not breached. The contract included a passage as follows: "J. It is further hereby agreed by and between the said parties hereto that in case the purchasers of said lots, or any of them, or the purchasers of parts of said lots, shall be unable to make the payments thereon when due, said party of the second part may, at his option, pay the balance of said purchase price in accordance with the terms and conditions of said agreement for the sale of said lots, or parts of lots, and said parties of the first part agree to execute and deliver a deed and certificate of title to said party of the second part." However, the trial court over the objection of the defendant received a vast amount of oral evidence to prove that the written contract was modified. No written modification was offered. No consideration for a contract of modification was proved. It follows that no modification was proved. 12 Cal. Jur. 925.

[5] No claim was made by the plaintiff that he offered at any time to take over any lot pursuant to the covenant of the contract quoted above. Having failed to do so, the subject of defaulted contracts ceased to be a material factor in estimating the terms of the contract.

[6] In what we have said above we have given the plaintiff full credit for certain contracts, eleven in number, for which he claimed credit. Those documents were signed by the defendant. True, she conveyed to her daughter, Mrs. Barnett, on May 26, 1926, by an unrecorded and unacknowledged deed. However, the plaintiff knew of the transfer when it occurred, and also knew that said deed was executed for the purposes of settling family matters and not for the purpose of preventing performance by the plaintiff. By its terms the contract between the plaintiff and the defendant bound the "assigns" of both parties. It was recorded May 17, 1926. The deed from the plaintiff to her daughter was made May 26, 1926, at a time when the daughter had full knowledge of the contract. The plaintiff treated the act of the defendant as no act of prevention, and acted accordingly. However, for those eleven contracts the plaintiff did not at any time tender to the defendant any part or portion of the payments made by the purchasers. Such omission was evidence of another failure of performance on his part.

[7] In the brief of the defendant, there is the suggestion that the plaintiff holds no written contract signed by the defendant, and that therefore he has no cause of action. Civ. Code, § 1624. The point is more fully set forth in her reply brief. We think the point is not well taken. Prior to November 12, 1925, the parties arranged their plan. This defendant owned the ground which had been mapped for sale in subdivisions, and the map had been recorded. Some of the streets were paved, some of the pipes were in place, and some other subdivision work had been done. They prepared a written form of contract for sales on the instalment plan. Each contract had a list of blanks for payments of (1) interest, (2) principal, (3) balance, and (4) by whom paid. On each contract was a map showing each lot by number. They also prepared a power of attorney by which the defendant authorized her son-in-law, W. C. Barnett, to act as her selling agent and to enter into a secondary selling contract. She signed and delivered that power on November 12, 1925. On the same day the defendant made, executed, and delivered to the plaintiff a selling contract which contained a list of all the lots, stated the price on each one, designated the terms on which they could be sold and, in subdivision (c), it included an appropriate reference to the blank form of sales contract above mentioned, and authorized the

plaintiff to make the sales. The latter instrument was signed by W. C. Barnett and by the plaintiff. We see no frailty in the plaintiff's contract.

[8] The defendant complains because the trial court, in applying the rule as to measuring damages, did not provide against plaintiff's expenses. It does not appear he had any expenses. It does not appear the trial court did not inquire into the subject and then deduct those expenses. The point is without merit.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

WILLIS v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.*

Civ. 4505.

District Court of Appeal, Third District, California.

Nov. 7, 1931.

Rehearing Denied Dec. 7, 1931. Hearing
Granted by Supreme Court Jan. 4, 1932.

1. Judgment ⇨215, 270.

Judgment is effective only when rendered; that is, pronounced in open court or filed in writing with clerk.

2. New trial ⇨163(1).

Order granting new trial signed in judge's chambers and mailed before, but entered in court's minutes after, sixty-day period expired, *held* nullity (Code Civ. Proc. § 166, as amended, and § 167 as added by St. 1929, pp. 850 and 853).

Order was a nullity despite the provisions of Code Civ. Proc. § 166, as amended, and section 167 as added by St. 1929, pp. 850 and 853, authorizing judges of the Superior Court to determine, at chambers, all motions made pursuant to section 657, relating to motions for new trial, and anywhere within the state to exercise all of the powers and perform all of the functions and duties which a judge of such court may exercise or perform in chambers, since the order was not operative when signed, because an order granting a new trial is an order of the court, which may be made only on notice, and becomes effective only on pronouncement in open court or filing in writing with clerk, as distinguished from an order of the judge, which is made *ex parte*.

3. Motions ⇨46, 56(1).

Order of court can be made effective and rendered only by pronouncement in open court or filing in writing with clerk.

4. New trial ⇨165.

Respondent could not complain of petition for annulment of order granting respondent new trial on ground that petitioner's quiescence deprived respondent of right of appeal.

Respondent could not complain because respondent's counsel was presumed to know the law, and, if there were any doubt, respondent should have filed a notice of appeal.

Application for a writ of certiorari by Allo Willis, a minor, by A. B. Willis, her guardian ad litem, for the purpose of determining the jurisdiction of the Superior Court in and for Mendocino County, R. M. Rankin, Judge, in granting a motion for a new trial, in an action wherein applicant recovered judgment against Carrie A. Van Voast.

Order granting motion for new trial annulled.

Wayne P. Burke, of Ukiah, for petitioner.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an application for a writ of review for the purpose of determining the jurisdiction of the trial court in granting a motion for new trial.

There is no question about the facts. On May 27, 1931, in the superior court of Mendocino county, Allo Willis recovered judgment for \$5,000 against Carrie A. Van Voast, and said judgment was duly entered upon said date, and notice of entry of judgment served. A motion for new trial was made by defendant, and submitted to Hon. R. M. Rankin, who was sitting under an assignment of the judicial council in Mendocino county. On July 24th, Judge Rankin, in his chambers at Willows, signed an order granting a new trial in said cause and mailed the same. This order did not reach Ukiah until July 27th, on which date it was entered in the minutes of the court of Mendocino county.

It is the contention of petitioner that the power of the court to pass upon this motion expired upon July 25th, and that the purported order granting the motion was a nullity, because it was not entered in the minutes of the court on or before that date.

It is admitted by all parties that, as July 26th was a Sunday, the sixty-day period expired on July 25th. *Holquin v. Allison*, 97 Cal. App. 126, 274 P. 1037. To the same effect is the case of *Lauritzen v. Judell* (Cal. App.) 292 P. 536.

Section 660 of the Code of Civil Procedure provides that: "The power of the court to

pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment. * * * If such motion is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court."

In 1929 (St. 1929, p. 850) section 166 of the Code of Civil Procedure was amended to read (in part) as follows:

"The judge or judges of a superior court, or any of them, may, at chambers: * * *

"2. Hear and determine all motions made pursuant to sections 657 or 663 of this code." (Sec. 657 relates to motion for new trial.)

A new section was also added (section 167), which reads as follows: "A judge of the superior court may, anywhere within the state, exercise all of the powers, and perform all of the functions and duties, which a judge of such court may exercise or perform in chambers." (St. 1929, p. 853.)

Prior to 1929, section 166 did not expressly confer upon a judge the right to determine a motion for new trial in chambers, but, nevertheless, it was definitely decided by the Supreme Court that such an order could be made out of court, and in chambers, before said amendment was enacted. On December 28, 1925, decision was rendered in the case of *United Railroads of San Francisco v. Superior Court of the County of San Mateo*, 197 Cal. 687, 242 P. 701, 703. There Judge Hudner of San Benito county, while presiding in San Mateo county, heard a motion for new trial. He returned to San Benito county, and wrote out and mailed to the clerk of San Mateo county an order granting the motion. The case was set for retrial, and thereupon a writ of prohibition was applied for to restrain further proceedings upon the ground that the order was not made in open court, but by the judge in chambers, and therefore void. In upholding the validity of the order, the court said: "We are of the opinion that, when all of the elements antecedent to such an order have been duly performed, and when the issue after a hearing thereon duly had has been submitted to the court for its decision, the order of the court thereon may be rendered in either one of two ways: (1) By the pronouncement thereof in open court in the manner above suggested; or (2) by the filing with the clerk in the action of a written order of court signed by the judge. Of course, when the latter method is followed, the signing of the order by the judge does not constitute its rendition; neither does the act of sending it or mailing it to the clerk. It is the filing of the written order, authenticated by the signature of the judge, which constitutes the rendition thereof."

The amendment, therefore, merely gave legislative sanction to a procedure which had already been held valid by the Supreme Court.

[1-3] But one question remains: Did the Legislature, in providing that the order might be made in chambers, intend that the order should be operative when it was signed? If it did, then the decision in the *United Railroads Case* is no longer the law.

We believe that respondent has lost sight of the fundamental distinction between an order of the court and an order of the judge. An order of court is one made only upon notice, whereas an order of a judge is one which is made *ex parte*. An order of this character is clearly one by the court, and differs in no manner from the rendition of a judgment. This distinction is clearly pointed out in the *United Railroads Case*. It requires no citation of authorities to sustain the position that a judgment is effective only when rendered; that is, pronounced in open court or filed in writing with the clerk. It was within the province of the Legislature to provide that a court order could be signed in chambers. The fundamental principle is that an order of court can be made effective and rendered in two ways, which are clearly pointed out in the *United Railroads Case*.

Great stress is laid by respondents upon the case of *Finkle v. Superior Court*, 71 Cal. App. 97, 234 P. 432. There the judge who heard the motion for a new trial signed an order granting the same in his home county and mailed it to the county where the action was pending. The order was signed within the statutory period, but it was not received at the latter county until the statutory period had expired. It was held that the order was void, but the court went on to state that, if the order was one which could be made in chambers, it would doubtless have been operative when signed, and filing would not have been essential to its validity. That case was decided some months prior to the *United Railroads Case*. It is at once apparent the language relied upon by respondent was not necessary to the decision. If it were not dictum, then it is overruled by the Supreme Court in the *United Railroads Case*.

[4] Respondent complains that the petition here is unconscionable, and that he has been "lulled by petitioner into the belief that technical requirements were met." He states that the quiescence of petitioner has deprived him of the right of appeal. (By respondent we refer to the defendant in the original action.) The answer to this is that counsel is presumed to know the law, and, if there were any doubt whatever, respondents should have filed their notice of appeal. They are attempting to shift the responsibility to shoulders where it does not justly belong.

If the condition of respondents is to be upheld, a most chaotic result would ensue. A judge might write out an order granting the motion, and it could remain in his possession for an indefinite period. Meanwhile, so far

as the record would show, the motion for new trial would be denied by operation of law. If the order were not filed until thirty days thereafter, innocent third parties would have the right to assume that the judgment had become final. One might acquire title to real property which had presumably been settled by the action only to find that the court had granted a new trial therein. Such a situation would be intolerable, and it is the duty of the court to give a reasonable construction to the statute.

In conclusion, the amendments made in the last few years to section 660 of the Code of Civil Procedure indicate the legislative intent to expedite the determination of motions for new trial. First, there was no limitation; then ninety days were allowed, and now the period is sixty days. To follow the rule contended for by respondents would throw open the door to unlimited delay, and clearly contravene the evident policy of the law.

It follows that the Superior Court exceeded its jurisdiction in rendering the order granting the motion for new trial, and it is adjudged that said order be annulled.

We concur: PLUMMER, Acting P. J.;
R. L. THOMPSON, J.

Such a trust was not charitable, because under it trustees could have distributed Bibles to private schools and libraries conducted entirely for a profit, since nothing in trust limited the distribution to persons or institutions serving a charitable purpose.

[Ed. Note.—For other definitions of "Charitable Trust," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceedings between Frederick W. Farr and Irwin A. Moon, executors of the last will and testament of Fanny P. Vance, deceased, and Champ S. Vance, James G. Vance, Gibson P. Vance, James B. Vance, David P. Vance, Champ Vance, and Charles Vance. From an order and decree of distribution, the former parties appeal.

Affirmed.

Hugh A. McNary, of Los Angeles, for appellants.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The sole question presented by this appeal is whether or not the following provision of the will of the testatrix is sufficiently definite to create a trust: "I hereby give * * * all the rest * * * of my estate * * * to my executors * * * in trust, however, to be invested in Bibles, to be distributed in home and foreign lands in such quantities and in such places as may to my said executors seem best."

If this wish of the testatrix should be given effect, the order and decree of distribution, by which the balance of her estate was divided as though she had died intestate, must be reversed. The decree must be affirmed, on the other hand, if we find the language of the will too indefinite to be a valid disposition of her property. We agree with the conclusion reached by the trial court that the attempted creation of a trust failed for indefiniteness.

[1-3] Tested by the standard required for a private trust, the attempt of the testatrix fails to establish a trust, because of the uncertainty as to beneficiaries. *Barker v. Hurley* (1901) 132 Cal. 21, 63 P. 1071, 64 P. 480. Appellants do not question this conclusion, but rest their claim to the balance of the estate on the theory that a charitable trust was created. In such a trust, the persons constituting the beneficiaries need not be certain—indeed, should not be. *Estate of Hinckley* (1881) 58 Cal. 457; *Collier v. Lindley* (1928) 203 Cal. 641, 652, 266 P. 526. But, in order that a trust may be valid as a charitable

118 Cal.App. 163

In re VANCE'S ESTATE.

Civ. 8028.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1931.

1. Charities ☞21(5).

Trust giving residue of estate to executors in trust to invest in Bibles for distribution in home and foreign lands in quantities and places thought best by them held not to create private trust because of uncertainty of beneficiaries.

2. Charities ☞21(1).

Persons constituting beneficiaries of charitable trust need not be certain.

3. Charities ☞1.

To be valid, charitable trust objects must be limited to those of charitable nature.

4. Charities ☞13.

Will leaving residue of estate to executors in trust to purchase and distribute Bibles, not confining distribution to charities, held not to create "charitable trust."

trust, its objects must be limited to those of a charitable nature. *Estate of Sutro* (1909) 155 Cal. 727, 102 P. 920, 922. Two short quotations in the *Sutro* Case express its thought. The first is from *Estate of Hinckley*, *supra*: "Where a bequest is made for charitable purposes, and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void." These words from the opinion in *Kendall v. Graner*, 5 Beav. 300, are also given: "It is not a question whether the trustees may apply it (the fund) to a charitable purpose, but whether, by the words of the will, they are bound to do so. The decisions go to this further extent that they must have no option between a charitable and any other purpose."

[4] A distribution of the Bibles to private schools and libraries, conducted entirely for profit, would not be in furtherance of a charitable purpose. *Estate of Sutro*, *supra*; *Estate of Dol* (1920) 182 Cal. 159, 187 P. 428. The trustees, however, could limit the distribution to just such institutions, without a qualm of conscience occasioned by any limitation put upon their actions by the terms of the will. There is not one word to indicate an object of the distribution, which would serve as a guide and check on its character; nor a hint as to the class of beneficiaries, which would serve to limit the distribution to persons or institutions serving a charitable purpose. We are constrained to affirm the order and decree, and it is so ordered.

We concur: CONREY, P. J.; YORK, J.

118 Cal.App. 272

ARBUCKLE v. CLIFFORD F. REID, Inc.
Civ. 4447.

District Court of Appeal, Third District, California.

Nov. 10, 1931.

1. Judgment $\hookrightarrow$ 249.

Party cannot be sent out of court merely because not entitled to relief at law, or because not entitled thereto in equity (Code Civ. Proc. § 307).

Since in California there is no distinction between actions at law and actions in equity, party cannot be sent out of court unless facts do not entitle him to relief either in law or equity, and not merely because the facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity.

2. Account $\hookrightarrow$ 14.

If court has jurisdiction and determination of rights necessitates accounting, it may

be done regardless of whether equity would have jurisdiction (Code Civ. Proc. § 307).

Where court of general jurisdiction has jurisdiction both at law and in equity, and plaintiff has cause of action of which that court has jurisdiction, and where it is necessary to have accounting to determine his rights, such accounting may be had in that court, regardless of whether facts would have given jurisdiction to court of equity.

3. Principal and agent $\hookrightarrow$ 89(3).

Where relation between parties is fiduciary, or transactions are so involved that remedy at law is incomplete, equity will entertain agent's bill for accounting.

This is exception to general rule that agent cannot demand accounting from his principal for commissions due agent

4. Principal and agent $\hookrightarrow$ 89(3).

In sales director's action for commissions, where court could not do justice without taking account and where parties agreed to appointment of referee to take account, ordering accounting *held* not error.

5. Brokers $\hookrightarrow$ 43(2).

Contract employing sales director on commission basis for realty company did not require writing (Civ. Code, § 1624, subd. 6).

Contract contained no authorization to purchase or sell property of employer, but simply made employee director of sales and manager of employer's real estate salesmen for purpose of aiding and assisting salesmen in disposing of land, and hence was not within Civ. Code, § 1624, subd. 6, which provides that agreement authorizing or employing agent or broker to purchase or sell realty for compensation or commission is invalid unless it or some note or memorandum thereof is in writing and subscribed by party to be charged, or his agent.

6. Brokers $\hookrightarrow$ 43(2).

Agreement between realty company's sales director and salesmen to share commissions would not require writing (Civ. Code, § 1624, subd. 6).

Appeal from Superior Court, Los Angeles County; Louis F. Russill, Judge.

Action by F. A. Arbuckle against Clifford F. Reid, Inc. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

McAdoo, Neblett, O'Connor & Claggett, of Los Angeles, for appellant.

J. Karl Lobdell, Harold L. Watt, and Chas. E. R. Fulcher, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff commenced this action to recover from defendant an alleged balance owing to him by defendant for commissions arising from a contract pertaining to the sale of real estate. The complaint sets forth: That at the date of said contract, defendant was engaged in the business of subdividing and improving tracts of real estate in the county of Los Angeles, and had in its employment salesmen for marketing the same; that pursuant to said contract plaintiff entered the employment of defendant, as director of sales and manager of real estate salesmen, and, as such director and manager, fully and fairly performed his duties as such; that by the terms of said contract defendant agreed to pay plaintiff for said services one-half of one per cent. commission as overriding charge on the first \$100,000 of business closed each calendar month by said defendant, and one per cent. commission as an overriding charge on all business done by said defendant over \$100,000 each calendar month, to be paid to plaintiff in cash on all sales when one-fourth of the purchase price was paid to defendant by the purchasers of said real estate; that as plaintiff is informed and believes there were a large number of sales of said real estate negotiated and closed and one-fourth of the purchase price paid during the time of plaintiff's employment under said contract, for which plaintiff has never been paid his said commission; that the records of said sales and the amounts paid by purchasers to defendant, with dates of payments and the original sales receipts and contract for such sales, are in the custody and control of defendant; that plaintiff does not have the said records or copies thereof from which the amounts of his commissions can be determined; that defendant fails and refuses to account to plaintiff for said commissions, though often requested by plaintiff so to do, and refuses to pay said commissions; and that an accounting is necessary in order to determine the amount of said commissions owing to plaintiff from defendant.

Defendant demurred to the complaint, the main ground thereof being that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered admitting that plaintiff was employed by it under said contract as director of sales and manager of real estate salesmen employed by defendant, denied owing plaintiff any commissions, and alleged that it had furnished plaintiff from time to time statements of all closed business during the period of plaintiff's employment, and that, therefore, plaintiff was in position to calculate the exact amount of his compensation.

Judgment was rendered in favor of plaintiff, from which defendant appeals.

Appellant urges two points for reversal of the judgment: (1) That respondent has no

right to seek an accounting on a contract for the payment of wages, but his action is one at law on the contract. (2) The contract sued upon and set up in plaintiff's complaint comes within the terms of section 1624 of the Civil Code, and the plaintiff is barred from recovering upon the contract.

Appellant contends that inasmuch as respondent was to receive a certain commission on the gross business closed by appellant, and that the amount of said commission was definite, as was also the amount of the closed business under which the percentage was to be computed, that therefore the court had no jurisdiction, under the complaint, to order an accounting, for the reason that respondent had a plain, speedy, and adequate remedy at law; that is to say, that while equity gives to the principal the right to require an accounting from the agent, the agent cannot require an accounting from his principal.

[1] In support of this contention, he cites an English Case, that of *Smith v. Leveaux*, 2 De G. L. & S. 1; (46 reprint 274) and *Lynch v. Willard*, 6 Johns. Ch. (N. Y.) 342, and *Skilton v. Payne et al.*, 18 Misc. Rep. 332, 42 N. Y. S. 111. All of these cases hold that an agent is not entitled to file a bill in equity for an accounting against his principal for commissions due the agent, and that his remedy was by an action at law.

These cases were determined in jurisdictions where the distinction between actions at law and actions in equity was recognized and enforced. In this state, we have but one form of civil action for the enforcement and protection of private rights. Code Civ. Proc. § 307; *Estate of Cook*, 205 Cal. 581, 271 P. 1083.

A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity. He can be sent out of court only when, upon his facts, he is not entitled to relief, either in law or equity. *Burd v. Downing*, 60 Cal. App. 493, 213 P. 287. See, also, *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

[2] Where a court of general jurisdiction has jurisdiction both at law and equity, and the plaintiff has a cause of action of which that court has jurisdiction, and where it is necessary to have an accounting to determine his rights, such accounting may be had in that court regardless of whether or not the facts would have given jurisdiction to a court of equity. *Bancroft's Code Practice and Remedies*, Vol. 6, p. 5812.

If the plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done. *Coward v. Clanton*, 122 Cal. 451, 55 P. 147.

In the instant case, respondent produced

evidence to the effect that on September 15, 1926, he entered into a contract with appellant by which he agreed to act for appellant in the capacity of director of sales and manager of its real estate salesmen; that his duties were to employ salesmen and saleswomen, and to aid and assist them in closing their deals and selling appellant's property, and to act as lecturer each day to the groups of prospective purchasers that the salesmen brought to the property; that the number of salesmen and women under his management would average 200; that a sale was deemed closed when the customer signed a contract for the purchase of the tract selected by him and made a payment thereon of at least ten per cent. of the purchase price; that the records of all sales made were kept in the office of appellant's auditor, and that respondent kept no record of them, nor of payments thereafter made, and, therefore, had no means of knowing on how many of the closed deals made, while he was in the employment of appellant, one-fourth of the purchase price was actually paid, though he assumed that the said closed deals, upon which one-fourth of the purchase price had been paid and for which he had not been paid his commission, amounted to about \$1,300,000.

The contract provided that either party might terminate the contract for just cause. On September 19, 1927, appellant wrote respondent making a reduction of his compensation, and thereupon respondent terminated his employment under said contract. Repeated demands were made by him upon appellant for a statement of his account, but appellant refused to furnish the same; merely stating in reply to respondent's demands that it owed him nothing.

At the close of respondent's testimony appellant declining to introduce any testimony, arguments of counsel began, and thereupon it appears from the record the court suggested the appointment of a referee to audit the account for the purpose of ascertaining upon what sales made during respondent's employment, one-fourth of the purchase price had been paid, and upon the result thereby obtained rendered its judgment in favor of respondent.

Appellant cites the case of *California Raisin Growers' Ass'n v. Abbott*, 160 Cal. 601, 117 P. 767, as sustaining his contention that an agent has no right to an accounting against his principal. It is true that in that case the court held that, generally speaking, an agent may not demand an accounting from his principal where the matters for which an accounting is sought are peculiarly within the knowledge of the agent.

But, in the instant case, the matters for which an accounting is sought were not within the knowledge of the agent but wholly within the knowledge of the principal.

[3] The general rule that the agent cannot demand an accounting from his principal is subject to the modification that where the relation between the agent and the principal is of a fiduciary character or the transactions between them are so involved or complicated that the remedy at law is insufficient to administer complete justice, a court of equity will entertain a bill by an agent for an accounting. *Ann. Cas. 1914B, 1028, note; Fenno v. Primrose et al. (C. C.) 116 F. 49; Hapgood v. Berry et al. (C. C. A.) 157 F. 807; Miller v. Russell, 224 Ill. 68, 79 N. E. 434; San Pedro Lumber Co. v. Reynolds, 111 Cal. 588-596, 44 P. 309.*

[4] It is apparent that the trial court found that it would be impossible for it to render its decision in this case and do justice between the contending parties without first having had an account taken and it appears that both respondent and appellant agreed to the appointment of a referee to take the account.

We are of the opinion that the trial court did not err in overruling the demurrer and in ordering the accounting.

[5, 6] The next contention of appellant is to the effect that the complaint comes within the terms of section 1624 of the Civil Code and is invalid. Subdivision 6 of said section provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation, or a commission, is invalid unless the same or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent.

The contract entered into between appellant and respondent was as follows:
"September 15th, 1926.

"Mr. Arbuckle. In accordance with our previous verbal understanding we wish to start you on override basis beginning Friday, September 10th, 1926 as per the following schedule, ½% (one half per cent) commission on the first \$100,000.00 closed business each calendar month.

"1% (one per cent) override commission on all business done over \$100,000.00 each calendar month; to be paid in cash on all closed business with a quarter down. This arrangement may be terminated for just cause by either party at any time in writing, but shall remain in force from tract to tract unless otherwise arranged.

"Clifford F. Reid, Inc.

"By Clifford F. Reid, President."

Appellant contends that, as the contract contains no description of the property to be sold, it comes within the statute and is invalid, and, in support of this contention, cites *Proulx v. Sac. Val. Land Co.*, 19 Cal. App. 529, 126 P. 509, which holds that a contract authorizing or employing an agent or

broker to sell real estate for a commission must not only be in writing, but must also contain a description of the property to be sold.

This contract, as we view it, is not the kind of contract or agreement to which reference is made by said section 1624. It contains, no authorization to respondent to either purchase or sell the property of appellant, but, on the contrary, simply makes him the business manager of appellant for the purpose of aiding and assisting its salesmen in disposing of its lands. As was said in the case of Pettibone v. Lake View Town Co., 134 Cal. 227, 66 P. 218, 219, in holding that said section 1624 had no application, "The contract here involved is for the personal services of the plaintiff," and so in the case at bar the compensation or commission agreed to be paid was in lieu of salary or wages for the personal services to be performed by respondent.

Appellant produced no evidence to the effect that the 200 salesmen, who sold appellant's land under the supervision of respondent, did not have the necessary contracts required by section 1624. Even though it be conceded that respondent participated in sharing the commissions which the salesmen received from the sale of the lands, any agreement for that purpose between himself and the salesmen was not required to be in writing. Cornelius v. Holland, 102 Cal. App. 136, 282 P. 539; Gorham v. Helman, 90 Cal. 346, 27 P. 289.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

118 Cal.App. 21

UNITED STATES OF MEXICO v. RASK.
Civ. 471.

District Court of Appeal, Fourth District, California.

Oct. 29, 1931.

Rehearing Denied Nov. 24, 1931. Hearing Denied by Supreme Court Dec. 28, 1931.

1. International law §10.

Except in direct actions against government, vessel or property of a sovereign government, to be immune from process, must be in its possession at time of seizure.

2. Maritime liens §11.

Common-law lien, dependent upon possession of boat, existed upon vessel in favor of shipwright repairing vessel.

3. International law §10.

Foreign government, filing claim and delivery action for recovery of patrol boat, submitted to jurisdiction of court.

4. International law §10.

Foreign government bringing claim and delivery action to recover patrol boat, and recovering possession upon filing bond, could not, by claiming sovereign immunity, divest court of jurisdiction to hear and determine defenses.

In such action, foreign government, having submitted to jurisdiction of court when filing action, could not, while retaining fruits of action, divest court of jurisdiction to hear and determine defense of defendant shipwright who claimed that he was entitled to possession of boat by virtue of lien for general overhauling and repair.

5. International law §10.

Plaintiff foreign government's private attorneys could not claim sovereign immunity against defenses without showing authority to represent sovereignty.

6. International law §10.

Foreign government filing claim and delivery action to recover patrol boat impliedly consented to affirmative adverse judgment within issues presented by its pleadings and affecting subject-matter of action.

7. Maritime liens §60.

In claim and delivery action, state court had jurisdiction to adjudge defendant shipwright's common-law lien for furnishing materials and labor in repairing vessel.

The state court had jurisdiction as against contention that state had no jurisdiction in such action, since only forum competent to consider lien of such shipwright, if any, is admiralty court of United States.

8. Maritime liens §71.

Shipwright having common-law lien for repairs had right to retain possession of vessel until released by payment or judicial process.

9. Maritime liens §71.

Statute providing special remedy for enforcing liens on vessel held not exclusive (Civ. Code § 3051; Code Civ. Proc. § 813 et seq.).

Such remedy, as provided by Code Civ. Proc. § 813 et seq., was not exclusive, and did not preclude defendant shipwright, in claim and delivery action, from enforcing common-law lien under Civ. Code § 3051, by answering in action and asserting his lien.

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action in claim and delivery by the United States of Mexico against Peter Rask, wherein a bond was given by plaintiff and the vessel involved in the action delivered to it. From a judgment directing the return of the vessel to defendant, or, if return could not be had, that defendant recover from plaintiff a certain sum, plaintiff appeals.

Affirmed.

See, also, 293 P. 108.

Frank H. Heskett, of San Diego, for appellant.

Sawyer & Cluff, of San Francisco, and Ward, Ward & Ward, of San Diego, for respondent.

Stearns, Luce & Forward, of San Diego, *amicus curiæ*.

MARKS, J.

This is an action in claim and delivery brought by the United States of Mexico to recover the possession of one of its patrol boats from Peter Rask. A bond was given by appellant and the boat delivered to it. Respondent answered and alleged that he was a shipwright and that the boat was brought to him as such by appellant for a general overhauling and repair; that he furnished labor and materials in performing this work and was entitled to a lien upon the vessel and its possession until his account was paid.

The facts are undisputed, and may be briefly summarized from the findings of fact as follows: That appellant has been and is now a sovereign, independent, and friendly nation, recognized as such by the United States of America, and was, and now is the owner of the oil screw patrol boat S. A. F. No. 2, formerly known as the Tecate, subject to a special interest of respondent therein. For several years prior to June 12, 1929, this vessel was owned and used by appellant in its sovereign capacity for the purpose of advancing the trade of its people, providing revenues for its treasury, and as a patrol boat on and along the Pacific Coast of Mexico in connection with and incident to the protection and enforcement of its customs and revenue laws.

Respondent was a boat builder and repairer and conducted a yard for the construction and repair of boats at San Diego, Cal. On June 12, 1929, appellant, through its duly authorized agent and officer, J. L. Sepulveda, fish and game commissioner for the Pacific Coast of Mexico, delivered the S. A. F. No. 2 to respondent at San Diego for the purpose of having repairs made to it. Sepulveda was authorized by appellant and had authority to deliver the boat to respondent for the purpose of repair, and to contract for such repairs, and respondent, under the terms of a contract with Sepulveda made repairs to the

boat. After the repair of the patrol boat, a controversy arose as to the value of the labor and materials furnished and as to the balance due to respondent. The parties were unable to agree upon this balance, and appellant demanded possession of the boat from respondent, who refused to surrender the same unless and until the amount of his claim for repairs was paid.

The reasonable value of the labor and materials so furnished in the repair of the patrol boat was the sum of \$17,811.61, upon which \$4,850 had been paid, leaving the sum of \$12,961.61 due, owing and unpaid to respondent.

From June 12, 1929, to October 31, 1929, respondent was in exclusive possession of the patrol boat. On October 31, 1929, the sheriff of the county of San Diego, pursuant to appellant's claim of delivery in this action, took possession of the patrol boat from respondent and delivered it to appellant, and appellant ever since has been in possession thereof and has continuously used it as an instrument of its sovereignty. By reason of the taking of the patrol boat from the possession of respondent, and the retention thereof, respondent has been damaged in the sum of \$463.62, being interest on the amount and value of his special interest therein.

It was the conclusion of the trial court that at the time of the commencement of this action respondent had, and now has, a lien upon and a special interest in the patrol boat to the extent of the unpaid balance for the repairs in the sum of \$12,961.61, by virtue of which he was and now is entitled to hold it in his possession. Judgment was entered directing the return of the patrol boat to respondent, or, if return could not be had, that he recover from appellant the sum of \$13,424.23 and costs. The bond was ordered delivered to respondent. Appellant is here on appeal from this judgment.

After appellant had concluded its case and rested, its attorneys filed the following in the court below:

"The plaintiff at this time most respectfully objects to the jurisdiction of this court and the exercise of such jurisdiction as to or in regard to the claim interposed in this action by the defendant in his answer and amended answer filed herein to the plaintiff's complaint and to the plaintiff's amended complaint, both as to the alleged existence of a lien upon the boat in question and to his claim or asserted claim against the plaintiff for repairs to said patrol boat, as set forth in the defendant's answer and his amended answer filed herein, or otherwise; and in this connection most respectfully asserts and claims immunity and exemption from such claims and all and every subject and matter set forth in said answer and said amended answer, so far as this action is concerned, and so far as the jurisdiction of this court is concerned relative thereto,

or in any connection therewith, and as to each and every subject connected therewith.

"The plaintiff further most respectfully states and represents to the court that it came into this court for the sole and exclusive purpose of obtaining possession of said patrol boat and for no other purpose whatsoever, and has not and does not consent to this court entertaining jurisdiction as to any other controversy between the plaintiff and defendant, or as to any claim or claims of any character whatsoever which the defendant has inserted in his answer or amended answer filed herein; that this court has no jurisdiction, over the plaintiff's objection as herein asserted or otherwise, to entertain or assume or to exercise jurisdiction over the subject matter or any part thereof set forth in the defendant's answer or his amended answer, and that the plaintiff is immune and exempt from the jurisdiction of this court or the exercise thereof relative thereto.

"That plaintiff further most respectfully asserts and states to the court that because of the denials in the defendant's answer and amended answer these objections and claims could not be appropriately asserted prior hereto, but are now appropriate and timely in view of the stipulation between the plaintiff and defendant just now filed herein.

'Frank H. Heskett, Weinberger & Miller,
"Attorneys for plaintiff."

In addition to this written objection, counsel for appellant orally objected to the trial court taking or receiving any evidence in support of the lien upon the patrol boat asserted by respondent. These objections were overruled, and the trial court proceeded with the case.

The briefs filed by respective counsel are able and exhaustive. The attorney for appellant relies upon a single ground for a reversal of the judgment, which he states as follows: "It is the appellant's contention that by virtue of it being a sovereign nation on friendly terms with the United States of America and having brought said boat into an American port as one of its instruments of sovereignty, that said boat was exempt from the jurisdiction of this country; that none of the laws of this country were applicable to the appellant or its said boat, under the circumstances."

Amicus curiæ, who admittedly represents the Independence Indemnity Company, which furnished the undertaking upon which the patrol boat was released to appellant, is more resourceful. In addition to the ground relied upon by appellant, which is presented in several different forms, it is urged that the written and oral objections made by counsel for appellant were a claim of sovereign immunity which divested the trial court of jurisdiction to entertain the defense of a lien on the vessel by respondent and a bar to the rendition of an affirmative judgment against ap-

pellant; that, even though respondent was entitled to a lien upon the boat, he was not entitled to possession of it, because the lien, if any, was maritime under the federal laws, or floating under the provisions of section 813 et seq., Code of Civil Procedure, assuming such sections to be constitutional; that the courts of California have no jurisdiction in this action, as the only forum competent to consider the lien of respondent, if any, is the admiralty court of the United States; that, if the state courts have any jurisdiction over liens of the nature here presented, it must be under the provisions of section 813 et seq., Code of Civil Procedure; that, if these sections be held constitutional, they furnish an exclusive right and remedy, superseding any other statutory or a common-law lien or suit to enforce them.

The questions presented to us have not been decided by the courts of California, and we must look to other jurisdictions for legal precedent to guide us in our decision. A most comprehensive review of the decisions of the courts of the maritime nations of the world is contained in a report to the League of Nations in 1927 by the committee of experts for the codification of international law, which committee was composed by M. Matsuda and professors Diena and De Vesscher. Further extended discussion of many of these authorities may be found in 22 Journal of International Law, 566.

Appellant, but not amicus curiæ, confidently rests its case upon the decisions of the Supreme Court of the United States in the cases of the Exchange v. M'Faddon, 7 Cranch, 116, 143, 3 L. Ed. 287, and Berizzi Bros. Co. v. The Pesaro, 271 U. S. 562, 46 S. Ct. 611, 612, 70 L. Ed. 1088.

In the case of The Exchange, supra, it appears that on August 24, 1811, John M'Faddon and others filed their libel in the District Court of the United States for the District of Pennsylvania, against the schooner Exchange, alleging that they were her sole owners on the 27th day of October, 1809; that on December 30, 1810, while she was peacefully and lawfully pursuing a voyage from Baltimore to St. Sebastians in Spain, she was violently and forcibly taken by persons acting under the orders of The First Napoleon, Emperor of the French, and returned to the United States, fitted as a vessel of war, and manned by a crew of the French Empire. On September 20, 1811, the attorney of the United States for the district of Pennsylvania, appearing for the Department of Justice at the instance and request of the Executive Department of the United States government, suggested to the court that a state of peace and amity existed between the United States of America and Napoleon, the Emperor of the French, that the vessel libeled was a public war vessel belonging to and in the possession of Napoleon, and therefore was not subject to seizure, arrest,

detention, or molestation. The Supreme Court of the United States, in an opinion written by Mr. Chief Justice Marshall, upheld the protest, discharged the libel, and freed the vessel from restraint, and said: "To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation. The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act. * * * It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."

In the case of *The Pesaro*, supra, it appears that this steamship transported merchandise from Italy to New York. Berizzi Bros. Company, filed a libel in rem against her upon a claim for damages arising out of a failure to deliver goods consigned to them. The Italian ambassador to the United States appeared on behalf of the Italian government and set forth that the vessel was owned and possessed by that government and was operated by and in its service, and that therefore it was immune from process of the courts of the United States. This was the first case in which the doctrine established in the case of *The Exchange* was sought to be extended to vessels of a foreign government engaged in commerce. Mr. Justice Van Devanter delivered the opinion of the court, in which it was said: "The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention. We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no in-

ternational usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force."

The following cases support this rule of sovereign immunity and hold that neither a friendly foreign power nor our own government may be sued in a court of the United States or one of the states without its consent, express or implied, and that an instrumentality of sovereignty owned and used as such may not be taken from its possession by judicial process without such consent. *Oliver American Trading Co., Inc. v. Government of United States of Mexico* (C. C. A.) 5 F.(2d) 659; *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N. E. 24; *Mason v. Intercolonial Railway of Canada*, 197 Mass. 349, 83 N. E. 876, 16 L. R. A. (N. S.) 276, 125 Am. St. Rep. 371, 14 Ann. Cas. 574; *Briggs v. A Light Boat*, 11 Allen (93 Mass.) 157; *United States ex rel. Cardashian v. Snyder*, 59 App. D. C. 387, 44 F.(2d) 895; *The Roseric* (D. C.) 254 F. 154; *The Maipo* (D. C.) 252 F. 627; *The Maipo* (D. C.) 259 F. 367; *The Carlo Poma* (C. C. A.) 259 F. 369; *The Santissima Trinidad*, 20 U. S. (7 Wheat.) 283, 5 L. Ed. 454; *The Gul Djemal*, 264 U. S. 90, 44 S. Ct. 244, 68 L. Ed. 574.

In England the rules governing the question of sovereign immunity were first laid down in the case of *The Parlement Belge*, L. R. 5 P. D. 197. The question presented was whether a vessel belonging to Belgium, and used by that government in carrying mail and transporting passengers and freight for hire, could be subjected to a libel in rem in the admiralty courts of Great Britain. The conclusion was reached that, as the vessel was the public property of a friendly foreign sovereign and was in use by him for national purposes, it could not be subjected to the process of the English court without his consent. This ruling has been consistently followed without deviation in the British courts, both as to vessels of friendly foreign governments and vessels of the British crown. *Young v. Scotia*, [1903] A. C. 501; *The Jassy*, L. R., [1906] P. D. 270; *The Gagara*, L. R., [1919] P. D. 95; *The Porto Aleandre*, L. R., [1920] P. D. 30; *The Jupiter*, L. R., [1924] P. D. 236; *Wadsworth v. Queen of Spain*, 17 Q. B. 171; *Vavassuer v. Krupp*, L. R. Ch. Div. 351; *De-Haber v. Queen of Portugal*, 17 Q. B. 171.

It should be observed that claims of exemption in the British courts were always made through the Crown where British owned ships were involved. The courts permitted a libel to be filed against a vessel of the Crown, and a representative of the court would then ask the admiralty for permission to proceed with the suit. If this were given, the exemption of the sovereign was considered waived and the suit continued; otherwise it was abated.

[1] A marked distinction between the doctrine of sovereign immunity as adopted in England and in the United States clearly appears from the decisions of the courts of the two countries. In England the exemption has been universally held to apply where the vessel was the property of a sovereign and in use as an instrument of sovereignty. In the United States the further condition must exist, except in direct actions against the government, that the vessel or property was not only the property of and an instrumentality of sovereignty of the government, but that it was in its possession at the time of the seizure.

This question was considered in *United States v. Alexander M. Douglas (The Davis)*, 10 Wall. (77 U. S.) 15, 18, 19 L. Ed. 875, where it was said: "Two questions are raised by the record in this case, both of which are of importance. The first is whether personal property of the United States on board a vessel for transportation from one point to another, is subject to a lien for salvage services rendered in saving the property. The second is, under what circumstances, if any, can the lien be enforced, if one exists. * * * The second of the questions above stated presents the more difficult problem. Perhaps the two most authoritative and well-considered cases on that subject are *The Siren*, 7 Wall. 152 [19 L. Ed. 129], and *Briggs v. The Light Boats*, 11 Allen [Mass.] 157. Both these cases assert the doctrine, after a full review of the authorities, that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring a suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done. They also both assert the proposition that no suit in rem can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court."

In *The Johnson Lighterage Co. No. 24 (D. C.)* 231 F. 365, 368, it was said: "I therefore conclude that the property in question, although it belonged to the Russian government and was destined to its public use, was subject to a lien for salvage services rendered in saving it, and that as it was not at that time, or at the time of its seizure by the marshal, in the actual possession of an officer of the Russian government, the lien may be enforced in this court by a proceeding in rem."

In *The Carlo Poma (C. C. A.)* 259 F. 369, 370, the same rule was announced, as follows: "We are concerned in this case only with property of a foreign sovereign. The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in car-

rying cargo commercially is not entitled to immunity from suit. The English courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge*, Law Reports, 5 P. D. 197; *The Jassy* (1906) P. 270. The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Long v. The Tampico (D. C.)* 16 F. 491; *The Attualita*, 238 F. 909, 152 C. C. A. 43."

The following cases support this doctrine which is now so well established that it is not open to question: *Long v. The Tampico (D. C.)* 16 F. 491; *United States v. Wilder*, 3 Sumn. 308, 1 Law Rep. 189, 28 Fed. Cas. 601, No. 16694; *Union Pac. R. R. Co. v. United States of America*, 2 Wyo. 170; *The Siren*, 7 Wall. 152, 19 L. Ed. 129.

It is strongly urged upon us that the written objections which we have quoted, filed by counsel for appellant, and the oral objections made by them to the introduction of any evidence in support of respondent's special defense of a lien upon the patrol boat, divested the court below of any jurisdiction to proceed with the case in so far as these defenses are concerned. Counsel for appellant takes the position that they could invoke the jurisdiction of a state court to recover possession of the patrol boat and restore it to the United States of Mexico and thereafter by a plea of sovereign immunity and at their own pleasure divest the court of jurisdiction to hear the defense, and at the same time retain the fruits of the action, possession of the patrol boat, without a trial of the real issues of the case. He virtually contends that a friendly foreign sovereign can walk in the doors of our courts and by the process of our laws take what it desires, walk out of the doors at will, and close them upon any further consideration of the case and any adjudication of the rights of the sovereign and the citizen of this country whom the sovereign has named as its adversary.

Appellant relies upon *Beers v. Arkansas*, 20 How. 527, 15 L. Ed. 991; *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen (C. C. A.)* 43 F. (2d) 705, and *Kingdom of Roumania v. Guaranty Trust Co. (C. C. A.)* 250 F. 341, Ann. Cas. 1918E, 524, in support of its contention that it may invoke the doctrine of sovereign immunity at any stage of the litigation and thereby shut off the defense of respondent.

The case of *Beers v. Arkansas*, supra, involved the question of the right of a state to establish or change rules of procedure under which an individual might sue it in its own

courts. The opinion of the court was delivered by Mr. Chief Justice Taney in 1858. The Constitution of Arkansas provided that its General Assembly should direct by law in what manner and in what courts suits may be commenced against the state. Under this authority the General Assembly of Arkansas provided that suits might be instituted against the state to collect upon certain of its bonds. After the action had been instituted, and on December 7, 1854, a bill was passed providing that in such suits, before any judgment or decree could be entered, the bonds sued upon should be produced and filed in the office of the clerk of the court and not withdrawn until final determination of the suit and payment of the bonds, and that any suit should be dismissed in which such deposit was not made before the first term of court after the commencement of the action. The plaintiffs refused to deposit the bonds with the clerk, and their action was dismissed. This judgment was affirmed in the Supreme Court of the state and a writ of error brought in the Supreme Court of the United States, where the judgment of the state court was upheld. The Act of the Legislature of Arkansas, of December 7, 1854, merely changed certain rules of court procedure in a pending case. The right of a Legislature so to do affecting pending litigation between individuals has never been seriously doubted, and furnishes sufficient reason for the conclusions reached in the Beers Case. This case differs from the one we are considering, as Arkansas had not submitted herself to the jurisdiction of her courts by bringing an action therein, and the question of jurisdiction under such circumstances was not involved in the case nor considered by the court.

The case of *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, supra, must be considered with other cases involving the same issues between the same and additional parties. In the case relied upon by appellant [*Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen* (C. C. A.) 43 F.(2d) 705], an action was brought in the District Court of the United States for the Southern District of New York against *Dexter & Carpenter, Incorporated*, for breach of contract. *Dexter & Carpenter* sought affirmative relief upon a counterclaim. At the first trial, judgment went against *Kunglig Jarnvagsstyrelsen* on its complaint, and against *Dexter & Carpenter* upon the counterclaim. This judgment was reversed. *Kunglig Jarnvagsstyrelsen v. National City Bank of New York and Dexter & Carpenter* (C. C. A.) 20 F.(2d) 307. Before a second trial was had the plaintiff filed a reply to the counterclaim in which it was specially alleged that it was an agency of the Swedish government and that the counterclaim could not be maintained against a sovereign government without its consent. This special defense to the counterclaim was stricken out; the District Court

being of the opinion that, where a sovereign government or one of its agencies files an action in the United States courts, it submits itself to the jurisdiction of the courts, which includes the jurisdiction to entertain and dispose of affirmative relief against such sovereign or its agency by way of counterclaim. *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 300 F. 891. A second special claim of sovereign immunity against the counterclaim of *Dexter & Carpenter* was filed and was also stricken out by the United States District Court. This ruling was one of the issues presented on the appeal of the case to the United States Circuit Court of Appeals [32 F.(2d) 195], which upheld the ruling of the District Court in striking the special defense principally upon the ground of the lack of authority on the part of counsel to make a claim of sovereign immunity.

Kunglig Jarnvagsstyrelsen petitioned the Supreme Court of the United States for a writ of certiorari directed to the United States Circuit Court to review this decision. This petition was denied. *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 280 U. S. 579, 50 S. Ct. 32, 74 L. Ed. 629.

The case was again before the United States Circuit Court of Appeals [*Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F. (2d) 705], which is the decision relied upon by appellant. It there appears that *Kunglig Jarnvagsstyrelsen* was also known as the Royal Administration of the Swedish State Railways, which were owned by the Crown and were admittedly property of the sovereign used in a governmental capacity. Judgment in the United States District Court had been rendered against *Kunglig Jarnvagsstyrelsen* upon the counterclaim of *Dexter & Carpenter*. One of the questions presented on appeal was whether or not it could claim sovereign immunity in an action brought by it. The United States Circuit Court of Appeals adhered to its prior decision that there was a valid unsatisfied judgment against *Kunglig Jarnvagsstyrelsen* on the counterclaim of *Dexter & Carpenter*.

The main question considered in this decision [43 F.(2d) 705] was whether or not *Dexter & Carpenter*, as the successful litigants could levy an execution upon money belonging to the Swedish government in the National City Bank of New York, and also against the debts owing to the Swedish government by private corporations. After a careful review of authorities upon this question, the court held that, although the Swedish government submitted to the jurisdiction of the United States courts and that a valid judgment could be rendered against it in an action which it had instituted, it had not thereby consented that other property belonging to it could be taken upon execution issued on the judgment. The effect of the decision is to hold that the bringing of an ac-

tion by a friendly foreign sovereign, or its agency, in courts of the United States, is a consent by such government or its agency to the rendition of a judgment against it, but not a consent to a levy upon its property within the United States and the taking of such property in satisfaction of the judgment.

Were the respondent in the instant case seeking to take the S. A. F. No. 2 from the possession of the Mexican government on an execution issued on his judgment in the court below, then the case of *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, supra, might be authority for holding that such possession could not be had. No such question is presented to us, and we need not consider it.

In the case of *Kingdom of Roumania v. Guaranty Trust Co. (C. C. A.)* 250 F. 341, 345, Ann. Cas. 1918E, 524, *Morris Arditti* commenced an action in the Supreme Court of the state of New York against the Guaranty Trust Company and the kingdom of Roumania, seeking to recover damages against the latter for breach of contract and to establish a lien upon the trust funds belonging to it in the possession of the other defendant. Before the kingdom of Roumania had been served with process, it brought suit in the District Court of the United States for the Southern District of New York against the Guaranty Trust Company to recover the balance of its deposits with that company. 244 F. 195. The Guaranty Trust Company secured an order to pay the amount of the deposit into court and substituting *Arditti* as defendant in its place. An appeal from this order was taken to the United States Circuit Court, where it was held that, while the kingdom of Roumania had subjected itself to the jurisdiction of the United States District Court in its action to recover its deposit from the Guaranty Trust Company, such procedure on its part could not be held to be a consent to a substitution of defendants, and litigation of a cause of action against it separate and distinguished from and not connected with its original cause of action. This case was distinguished from the cases elsewhere cited in this opinion, which hold that, where a sovereign brings an action in court, it submits to the jurisdiction of the court and in a proper case to affirmative relief against it. The court said: "In the present case there is no specific fund. The relation between the Kingdom of Roumania and the Guaranty Trust Company being the usual one of debtor and creditor existing between banks and depositors, we are clear that the action by the Kingdom of Roumania to recover a debt owed it by the Guaranty Trust Company was not a waiver of its immunity as a sovereign to be sued by other parties."

It has been repeatedly held that, where our own government or a foreign friendly power seeks redress in the courts of this coun-

try they waive the claim of sovereign immunity and subject themselves to the jurisdiction of the courts and impliedly consent to the granting of affirmative relief against them within the demand or concerning the property in controversy.

In *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129, it appears that the steamer *Siren* was captured in the harbor of Charleston, S. C., in February, 1865, while it was attempting to violate the blockade of that port by the government of the United States. A prize master and crew were placed aboard her, and she was ordered to the port of Boston for adjudication. During the voyage she put into the port of New York for coal, and, in proceeding thence through the Hurlgate, ran into and sank the sloop *Harper*. On her arrival at Boston a libel in prize was filed against her and she was condemned and sold. The proceeds of the sale were deposited with the Assistant Treasurer of the United States. The owners of the sloop *Harper* and of her cargo intervened in these proceedings, claiming to have a lien upon the *Siren* and her proceeds for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds of the sale. The United States District Court held that the intervention could not be allowed, and dismissed the petition, from which order an appeal was taken to the Supreme Court of the United States. It was held that, although the property of the United States, used by it in its governmental functions, was exempt from the process of the courts, "yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy." *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899; *United States v. Macdaniel*, 7 Pet. 16, 8 L. Ed. 587. * * * For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose. * * * The inability to enforce

the claim against the vessel is not inconsistent with its existence. * * * The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained."

The foregoing rules announced in *The Siren*, supra, have been consistently followed by the United States courts. *The Sao Vicente* (C. C. A.) 295 F. 829; *The Sao Vicente*, 260 U. S. 151, 43 S. Ct. 15, 67 L. Ed. 179; *The Gloria* (*The Thekla*, *The F. J. Luckenbach*, *Kingdom of Norway v. Federal Sugar Refining Co.*), 286 F. 188, 192 (D. C.); *The Nuestra Senora de Regla*, 108 U. S. 92, 2 S. Ct. 287, 27 L. Ed. 662; *The Jane Palmer* (D. C.) 270 F. 609; *Union Pacific Railroad Co. v. United States*, supra; *United States v. Wilder*, supra; *United States v. Douglas*, supra; *People of Porto Rico v. Bonocio Ramos*, 232 U. S. 627, 34 S. Ct. 461, 462, 58 L. Ed. 763.

In *The Gloria*, supra, the court said: "The principle of immunity of a sovereign state from suit without its consent has a long history in our law, yet there are many new and unsettled problems in regard to its application in modern law to-day. Precedent and logic, while important, afford no infallible guide to the correct solution of these. All the important interests involved must be carefully weighed and balanced. * * * A sovereign state, generally speaking, is not obliged to go into court; but, if it seeks the assistance of the court, it would seem to be in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction of the court in respect of any set-off or counterclaim properly assertable as a defense in a similar suit between private litigants. Although, perhaps, the defendant should not be permitted to assert any counterclaim which would not be, in whole or part, a defense to the action brought by the state, yet, if it is necessary to examine a counterclaim for the purpose of determining whether there is a defense to the original action, it would seem inconsistent with the duty of a court of general jurisdiction to do complete justice for the court not to determine the whole nature and extent of the counterclaim, even though it involved incidentally a determination that a sovereign state was indebted or obligated to the defendant. There is no principle of public law exempting a sovereign state from its obligations under the law. It should not be assumed that a state desires to deny or evade its obligations. There may be sound reasons of public policy why a state should be im-

mune from the harassment of litigation in forums and under conditions not agreeable to the state. But, once the state has chosen its forum, there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."

People of Porto Rico v. Bonocio Ramos, supra, was an action brought by Bonocio Ramos to eject Eduardo Wood from certain lands in Porto Rico. Porto Rico intervened in the action, claimed ownership in the lands and sought affirmative relief. It also pleaded that it had attributes of sovereignty which exempted it from suit that would prohibit the court from entering a judgment in favor of the plaintiff and against it. The court held as follows: "But one contention is argued, that is, that the district court had no jurisdiction to entertain the suit against Porto Rico 'without its consent and against its active opposition.' *Porto Rico v. Rosaly y Castillo*, 227 U. S. 270, 57 L. Ed. 507, 33 S. Ct. 352, is cited to sustain the contention. It was said in that case that the government 'established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from suit without its consent.' This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy, and, against the opposition of the plaintiff (defendant in error), it was made a party defendant. And this action was not improvident. Its attorney general took time to consider. He applied for and obtained a continuance of the case to determine the best course to secure the interests of the people of Porto Rico,—whether to assert its rights in the then litigation, or attempt to keep them under the immunity of its sovereignty from attack. His decision had the support of substantial reasons. * * * But, whatever his reasons, he certainly asked for time, as we have seen, 'to enable him to ascertain if the people of Porto Rico should be made a party defendant' in the cause; and having been granted the time, he appeared again in the cause and represented to the court that Porto Rico was an interested party to the action, and the court, having heard the arguments of opposing counsel, ordered Porto Rico to be made a party, and directed plaintiff to amend his complaint in execution of the order. Porto Rico, therefore, through its attorney general, not only gave its consent to be a party to the cause, but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause. The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view; but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action in-

voked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."

The rule thus uniformly adopted in the United States is in complete accord with that prevailing in England. In *The Newsbottle*, 10 Prob. Div. 33, it appears that the Belgian government filed a libel against a privately owned British vessel for damages sustained by one of its ships used as an instrument of sovereignty; the damages resulting from a collision between two vessels. The British owners filed a cross-libel for damages against the Belgian ship and moved the court for a stay of proceedings until security was given by the Belgian government. The Court of Appeals was unanimous in holding that the original proceedings instituted by the Belgian government should be stayed until it gave security to answer the cross-action as it had voluntarily submitted itself to the jurisdiction of the English courts. In the opinion the following pertinent language was used: "It seems to me that this case is clearly within the words of the act of Parliament. What is there to take it out of the section? It is said that this order ought not to have been made on a sovereign prince. There are some orders which ought not to be made on a sovereign prince, but there are some which ought. In the case of *The Parlement Belge*, *ubi supra*, the defendant, who was a sovereign, appeared under protest, and the question there raised was whether the admiralty court could seize a sovereign's ship carrying the insignia of sovereignty. It, however, has always been held that, if a sovereign comes into an English court as plaintiff, and avails himself of its procedure, the court may make all proper orders against him. How far that will go I do not know. In this case, the plaintiff having instituted his action in the English admiralty court, an order that he shall be restrained from proceeding until he gives security to answer the defendant's counterclaim is not in my opinion an order which touches his dignity. The court may very well do that within the comity of nations. The plaintiff has submitted himself to the jurisdiction of the court by instituting his action, and therefore the court says, 'We will not exercise our jurisdiction in your favor unless you give security.' What may be the result as to execution or seizing the ship afterwards is quite another thing. We, however, do not anticipate that if the judgment goes against the king of the Belgians he will not pay."

It has been consistently held that a claim of sovereign immunity can only be made by a representative of the sovereign having authority to represent and speak for the sovereignty. *The Exchange v. M'Faddon*, *supra*; *Berizzi Bros. v. The Pesaro*, *supra*; *In re Muir*, 254 U. S. 522, 41 S. Ct. 185, 65 L. Ed.

383; *The Roseric* (D. C.) 254 F. 154; *The Maipo* (D. C.) 252 F. 627.

It has been expressly held that a claim of sovereign immunity cannot be made by the master of a ship, a consul, or a private attorney. *Lyders v. Lund* (D. C.) 32 F.(2d) 308, 309; *The Sao Vicente*, 260 U. S. 151, 43 S. Ct. 15, 67 L. Ed. 179; *The Sao Vicente* (C. C. A.) 295 F. 829; *In re Muir*, *supra*; *The Anne*, 3 Wheat. 435, 4 L. Ed. 428; *The Gul Djemal*, 264 U. S. 90, 44 S. Ct. 244, 68 L. Ed. 574.

In *Lyders v. Lund*, *supra*, it was said: "The question then remains as to whether sovereign immunity is sufficiently claimed by the present special appearance of *Fin Lund* as consul of Denmark, and his motion to dismiss. The Supreme Court of the United States has had occasion to discuss the proper channels through which such a claim may be made, where the foreign state is not a party to the suit, in a series of late cases. [Citing cases.] In *Ex parte Muir*, representations made on behalf of the British Embassy, by private counsel appearing as *amici curiae* to suggest the immunity of a steamship from libel as being a public vessel, were held insufficient as a claim of sovereign immunity. In *The Pesaro* [255 U. S. 216, 41 S. Ct. 308, 65 L. Ed. 592] 'suggestions' by the Italian ambassador, not appearing formally in the suit, were rejected as an insufficient basis for recognizing a similar claim. The *Sao Vicente* expressly holds that the counsel general of Brazil was not competent to claim sovereign immunity on behalf of a seized vessel. A special appearance by the master of the Turkish ship *Gul Djemal*, setting up the fact that his vessel, which had been libeled, was a public vessel of Turkey, was not a valid claim of immunity. It was only in the last case, *Berizzi Bros. Co. v. The Pesaro*, *supra*, that a claim of sovereign immunity was sustained. In that case the claim was by the Italian ambassador, who appeared in the suit, and, on behalf of his government, set forth the public character of a vessel which had been taken under process of the United States District Court. In *Ex parte Muir*, 254 U. S. 522, 532, 41 S. Ct. 185, 187 (65 L. Ed. 383) the Supreme Court points out the methods by which claims of sovereign immunity may be made: 'As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question. *The Sapphire*, 11 Wall. 164, 167, 20 L. Ed. 127; *The Santissima Trinidad*, 7 Wheat. 283, 353, 5 L. Ed. 454; *Colombia v. Cauca Co.*, 190 U. S. 524, 23 S. Ct. 704, 47 L. Ed. 1159. Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*, 3 Wheat. 435, 445, 446, 4 L. Ed. 428. And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the assert-

ed public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. [Citing cases.] And in *The Sao Vicente*, 260 U. S. 151, 155, 43 S. Ct. 15, 16, 67 L. Ed. 179, in holding a foreign consul not to be clothed with authority to vindicate the prerogatives of the sovereign (of which immunity from suit is one), the following passage from the opinion of Mr. Justice Story in *The Anne*, 3 Wheat. 435, 445, 4 L. Ed. 428, is quoted with approval: 'And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign? We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives.'

We must now pass to the questions of (1) the jurisdiction of our state courts in this case; (2) whether or not respondent was entitled to the possession of the patrol boat by virtue of any lien for its repair; and (3) whether section 813 et seq. of the Code of Civil Procedure furnish an exclusive remedy in cases involving the questions under consideration.

Section 2 of article 3 of the Constitution of the United States provides that the judicial powers of the federal government shall extend to all cases of admiralty and maritime jurisdiction to the exclusion of the state courts in actions strictly in rem. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. The maritime laws of the United States have always recognized the jurisdiction of the state courts in actions not strictly in rem or in admiralty, involving liens upon vessels where such lien existed under the common law. Obviously, the answer to the question of the jurisdiction of the state in this case is to be found in the answer to the question of whether or not a common-law lien existed in favor of a shipwright who furnished labor and materials used in the repair of a vessel.

[2] In the case of *Pendergast v. The Kalorama*, 10 Wall. 204, 210, 19 L. Ed. 941, the

question of the common-law lien was considered by the Supreme Court of the United States. A libel was filed upon the steamship *Kalorama* for repairs made and supplies furnished by the libellant. The United States District Court held in favor of the libellants, which judgment was reversed by the Circuit Court of Appeals. This judgment was reversed by the United States Supreme Court, which affirmed the judgment of the District Court. The court said: "By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her home port or abroad, when the repairs and supplies were made and furnished. Dig. 14, 1; 1 Valin, Com. 363; 3 Kent, Com. 168; W. & B., Adm. Pr., 155. But the only lien which the common law recognizes in such cases, independent of statutory regulations, is the possessory lien, which arises out of, and is dependent upon, the possession of the ship, as in cases where goods are delivered to an artisan or tradesman to be repaired or manufactured. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege which it conferred was that he might retain the ship in his possession until he was paid the money due him for the repairs made and the supplies furnished. Until paid he might refuse to surrender the ship, but if he relinquished the possession of the ship his lien was displaced and extinguished. *Westerdell v. Dale*, 7 T. R. 312; *Justin v. Ballam*, 1 Salk. 34; *Walkinson v. Bernadiston*, 2 P. Wms. 367; 3 Kent, Com. 169; *Maude & P. Ship*, 64; *The Zodiac*, 1 Hagg. Adm. 320; *Spartali v. Bencke*, 10 C. B. 223."

That a common-law lien existed upon a vessel in favor of a shipwright who performed labor and furnished materials in its repair, which lien was dependent upon his possession of the boat, is well settled. It is also well settled that the shipwright does not need to surrender the possession of the vessel until his lien is satisfied by payment. *The Marion*, 16 Fed. Cas. 751, No. 9087; *The F. B. Woolsey* (D. C.) 7 F. 108; *Park v. The Hull of The Edgar Baxter* (D. C.) 37 F. 219; *The Ulrica* (D. C.) 224 F. 140; *The John J. Freitas* (D. C.) 252 F. 876; *The City of Miami* (D. C.) 265 F. 427; *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609.

The question of concurrent jurisdiction of the federal and state courts in cases involving seagoing vessels was considered in the case of *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274, 277, 68 L. Ed. 582, where it was said: "By reason of the saving clause, state courts have jurisdiction in personam, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties.

Judiciary Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Judicial Code, § 24, par. 3. (Comp. St. § 991 [28 USCA § 41]); [Garcia y] Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74; Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. Ed. 95; Chappell v. Bradshaw, 128 U. S. 132, 9 S. Ct. 40, 32 L. Ed. 369; De Lovio v. Boit, 2 Gall. 398, 475, Fed. Cas. No. 3,776. The 'right of a common-law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 644, et seq., 20 S. Ct. 824, 44 L. Ed. 921; Rounds v. Cloverport Foundry & Machine Co., 237 U. S. 303, 35 S. Ct. 596, 59 L. Ed. 966. A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. The Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451; The Glide, 167 U. S. 606, 17 S. Ct. 930, 42 L. Ed. 296. But otherwise the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit."

The entire question was again carefully considered by the Supreme Court of the United States in the case of Knapp, Stout & Co. v. John McCaffrey, 177 U. S. 638, 20 S. Ct. 824, 825, 44 L. Ed. 921. This case is decisive of the question we are now considering, and is so well considered that quotations at length from it may be excused.

The following statement of facts appears: "This was a bill in equity filed in the circuit court for the county of Mercer, Illinois, by the defendant in error, John McCaffrey, against the Knapp, Stout & Co. Company (hereinafter called the Knapp Company), and the Schulenburg & Boeckler Lumber Company (hereinafter called the Schulenburg Company), and its assignees, to enforce a lien for towage upon a half raft of lumber then lying at Boston Bay, in Mercer county. The suit arose from a contract made April 6, 1893, by McCaffrey with the Schulenburg Company, in which, after reciting that McCaffrey had purchased of this company three steam towboats for the sum of \$17,500, it was agreed that McCaffrey was to tow all the rafted lumber such company would furnish him at or below their mill at Stillwater, Minnesota, to St. Louis, and deliver the same there to the company in quantities not exceeding one half a raft at a time, for which service he was to be paid \$1.12½ per thousand feet, board measure, for the lumber contained in the raft.

The other provisions of the contract, of which there were many, were not material to the present controversy. After towing a number of rafts for the company, the charges for which remained unpaid, one of McCaffrey's steamers, known as the Robert Dodds, left Stillwater October 13, 1894, with raft No. 10 of that year. The river being low and navigation difficult, McCaffrey was instructed to divide the raft, to bring one half to St. Louis, and to lay up the other half in some safe harbor. In compliance with these instructions McCaffrey divided the raft on October 20 at Boston Bay harbor in Mercer county, leaving one half there, while the other half was towed to St. Louis and delivered to the lumber company on November 2. The company paid the clerk of the boat \$1,250 without directions as to its application, and McCaffrey applied it on the amount due him for the towage of other rafts. The steamer returned to Boston Bay the morning of November 4, and laid up outside the raft for the winter. On the next day, November 5, the Schulenburg Company sold the half raft in Boston Bay to the Knapp Company for \$15,000, part in cash and the remainder in a note due in four months, which was paid at maturity. A bill of sale was given for the lumber, and a letter written to the watchman in charge of the raft informing him of the sale. On November 9 the Schulenburg Company made a voluntary assignment in St. Louis for the benefit of creditors. McCaffrey, hearing of the assignment offered both companies to tow the half raft to St. Louis under his contract, but the Knapp Company informed him that they did not wish him to do so, saying that they did their own towing; whereupon McCaffrey, claiming to be still in possession of the half raft and believing that the company was about to take it from him by force, filed this bill to foreclose his lien for towage. The Knapp Company gave a bond for the amount of the claim and took the raft away. The case came on for hearing in the circuit court upon pleadings and proofs, and resulted in a decree dismissing the bill without prejudice. McCaffrey appealed to the appellate court, which reversed the decree of the circuit court, and remanded the cause with directions to enter a decree for the sum of \$3,643.17, with interest thereon. The Knapp Company appealed to the supreme court of the state, which affirmed the judgment of the appellate court (178 Ill. 107, 52 N. E. 898 [69 Am. St. Rep. 290]); whereupon defendant sued out a writ of error from this court."

Under this statement of facts the Supreme Court of the United States held: "Defendants set up in their answers and insisted, both before the appellate court and the supreme court of Illinois, that, if plaintiff had any lien upon the raft at all for his towage services, it was a maritime lien, enforceable only in the

district court of the United States as a court of admiralty. This is the only Federal question presented in the case. By article 3, § 2, of the Constitution, the judicial power of the general government is declared to extend to 'all cases of admiralty and maritime jurisdiction;' and, by § 9 of the original judiciary act of 1789 (1 Stat. at L. 76, chap. 19), it was enacted 'that the district courts shall have, exclusively of the courts of the several states, * * * exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.' This language is substantially repeated in subdivision 8 of Rev. Stat. § 563, wherein it is expressly stated that 'such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts.' * * *

To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit in rem within the cases above cited, and not within the exception of a common-law remedy, which § 563 was never designed to forestall. The first of these conditions may be readily admitted. That a contract to tow another vessel is a maritime contract is too clear for argument, and there is no distinction in principle between a vessel and a raft. Whether the performance of such a contract gives rise to a lien upon the raft for the towage bill admits of more doubt; indeed, the authorities, as to how far a raft is within the jurisdiction of admiralty, are in hopeless confusion, but for the purposes of this case we may admit that such lien exists. But, if existing, it would not oust or supplant the common-law lien dependent upon possession. The real question is whether the proceeding taken is within the exception of 'saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.' It was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an action at common law, but of a common-law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as 'the means employed to enforce a right, or redress an injury.' While, as stated by him, remedies for non-fulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a sim-

ilar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action. Some of the cases already cited recognize the distinction between a common-law action and a common-law remedy. Thus, in *The Moses Taylor*, 4 Wall. 411, 431 [18 L. Ed. 397], sub nom. *The Moses Taylor v. Hammons* [4 Wall. 411], 18 L. Ed. 397, 402, it is said of the saving clause of the judiciary act: 'It is not a remedy in the common-law courts which is saved, but a common-law remedy.' To same effect is *Moran v. Sturges*, 154 U. S. 256, 276, 38 L. Ed. 981, 987, 14 S. Ct. 1019. In the case under consideration the remedy chosen by the plaintiff was the detention of the raft for his towage charges. That a carrier has a lien for his charges upon the thing carried, and may retain possession of such thing until such charges are paid, is too clear for argument. We know of no reason why this principle is not applicable to property towed as well as to property carried. While the duties of a tug to its tow are not the duties of a common carrier, it would seem that his remedy for his charges is the same, provided that the property towed be of a nature admitting of the retention of possession by the owner of the tug."

It therefore conclusively appears that a common-law lien existed in favor of a shipwright who furnished labor and materials used in the repair of a vessel, which lien was dependent upon his possession of the ship. By section 3051 of the Civil Code this common-law lien has been written into the statute law of California. It therefore follows that the courts of California have jurisdiction in this case.

Counsel for appellant contends that the remedies given by section 813 et seq. of the Code of Civil Procedure for enforcing liens upon vessels for supplies and materials furnished and labor performed are exclusive and must be followed in the courts of this state, and that, as this procedure is provided by statute, no other liens attach to the vessels and no other remedies exist. This was considered in the case of *Graham v. Annis*, 28 Cal. App. 754, 153 P. 981, 984, and was decided adversely to the contention of appellant. The court said: "It is true that the law gives the lien, but it makes no provision for its enforcement other than by an action brought or attachment sued out as therein directed. As between the party who performs labor or furnishes materials in the building or repair and the owner of the vessel, the lien and the right to enforce

it continue for one year, but, unless fixed and determined by action brought, it is but a floating right; and we do not think the law relating to vessels is or was intended to be exclusive of all remedies afforded for the enforcement of payment for the labor performed or materials furnished in the building or repair of such vessels. Plaintiff had a right of action independent of this special statute and was not barred from availing himself of the general law relating to attachments on the assumption that the debt was 'secured by mortgage or lien upon real or personal property, or pledge of personal property.' The reasoning in *Porter v. Brooks*, 35 Cal. 199, seems to apply with controlling force to the case here."

While we cannot assume that a friendly foreign nation will not satisfy a judgment against it, it may be that, in so far as the actual parties in interest in this case before us, who can be reached by a judgment of our courts, are concerned, they are now limited to respondent and to the bonding company represented by *amicus curiæ*, both residents of the United States. The situation thus presented is almost an exact replica of that in the case of *The Luigi* (D. C.) 230 F. 493, 496. A libel was filed against *The Luigi*, and it was attached by the United States marshal. An attorney appeared as *amicus curiæ* and suggested to the court that *The Luigi* was under requisition by the Italian government and was being used by it as an instrumentality of its sovereignty and therefore was exempt from attachments under the doctrine of sovereign immunity. This plea was overruled by the court on the ground of the lack of authority of the private counsel to make it. The master of the boat thereupon appeared on behalf of its owners and posted a bond to release the ship from the attachment. She was thereupon released and proceeded upon her way. Sovereign immunity was again claimed through the Department of Justice, this time in accordance with the established practice. The court said: "As the case now stands, therefore, the court possesses authority only over the obligors' bond, and none over the vessel. Nothing remains, therefore, through which, directly or indirectly, the court can exercise or attempt to exercise any authority to implead the Italian government in this suit. After the release of the *Luigi*, she was as to this suit as completely freed of any authority of this court as though she were upon her voyage across the Atlantic, or lying at her dock in an Italian port. It was urged by Mr. Rawle at the hearing that the court should take cognizance of the matter in the same manner as though

these facts had come to its knowledge at the time the order for process was issued. The reasons which existed at that time for the application of the rule of comity, which would have moved the court to refuse the order for an attachment because of the universal consent to immunity of a sovereign state to being impleaded in a cause, no longer exists; and the suit from now on is between private individuals. I am unable to reach the conclusion that the rule of comity, notwithstanding its vast importance and unanimous recognition by the courts, should have retroactive effect and be applied where the necessity for its application no longer exists."

The foregoing authorities make the following conclusions inevitable:

[3-5] Sovereign immunity cannot avail the appellant here, because (1) the United States of Mexico submitted to the jurisdiction of the court below when it filed its action for the recovery of the patrol boat; (2) it could not divest the court below of jurisdiction to hear and determine the defenses interposed by respondent while it retained the fruits of its action; (3) the claim of sovereign immunity was made by private attorneys without a showing of any authority on their part to represent the sovereignty of appellant.

[6] Appellant having waived its sovereign immunity, impliedly consented to the rendition of an affirmative judgment against it within the issues presented by its pleadings and affecting the subject-matter of its action.

[7] As a lien at common law existed in favor of a shipwright furnishing materials and labor used in the repair of a vessel dependent upon its possession, the state courts have jurisdiction in this case.

[8] The common-law lien being written into the statute law of California, respondent had a right to retain the possession of the patrol boat until it was released by payment or by judicial process and the giving of a bond as provided by law.

[9] The provisions of section 813 et seq. of the Code of Civil Procedure do not provide an exclusive remedy which respondent must follow in this case.

The trial court having found facts sufficient to support the lien of respondent, its judgment is supported by the findings and law of the land.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

118 Cal.App. 145

LEHMAN v. NEWCOMER.

Civ. 6933.

District Court of Appeal, Second District, Division 1, California.

Nov. 4, 1931.

1. Limitation of actions **146(1).**

Statute requiring promise to pay barred debts to be in writing and signed establishes rule of evidence (Code Civ. Proc. § 360).

Code Civ. Proc. § 360, providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the operation of the statute of limitations, unless contained in some writing, signed by the party to be charged thereby, had for its object and effect the establishment of a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved.

2. Limitation of actions **196(4).**

Extrinsic evidence is admissible to make certain references in signed writing allegedly containing promise to pay barred debt (Code Civ. Proc. § 360).

3. Limitation of actions **146(3).**

Letter referring, in light of extrinsic evidence, to payment by debtor, and acknowledging that writer considered herself indebted to creditor, *held* sufficient to create new obligation, without statute of limitations (Code Civ. Proc. § 360).

Evidence showed that "the money we have of yours," referred to in the letter, was that for which the notes representing the debt had been given, and the statement that "I gave (named person) the twenty-five dollars," referred to a sum given creditor's daughter for the creditor as a payment of interest on the notes.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Lizzie Lehman against D. S. Newcomer, administrator of the estate of Ella F. Lehman, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Allard, Mitchell & Stead, of Pomona, for appellant.

J. E. Burnham and Nichols, Cooper & Hickson, all of Pomona, for respondent.

BISHOP, Justice pro tem.

If the letter sent by deceased to plaintiff is a sufficient acknowledgment or promise of a new contract, by which to take this case out of the operation of the statute of limitations, then the judgment giving recovery on two promissory notes, long outlawed but for the letter, must be affirmed. We find the letter sufficient. Its pertinent part follows: "Now about the money we have of yours. I gave Clara the twenty-five dollars and I wish you would tell me how much interest is due yet and just when the notes are due. And I want to ask you if you would be willing for me to have the money another year, the same as before. We have it invested in the orange grove and I would like to keep the grove as it is doing so well. We bought it on the payment plan, and from now on we expect it will take care of itself and in just a few years will be paid up and make me a very nice income."

[1-3] The provisions of section 360, Code of Civil Procedure, that "no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of [the statute of limitations], unless the same is contained in some writing, signed by the party to be charged thereby," have for their object, and effect, the establishment of "a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved." *Ferguson v. Fonner* (1927) 87 Cal. App. 590, 262 P. 337, 338; *Barron v. Kennedy* (1861) 17 Cal. 574. The writing in this case was so signed, and was addressed to the plaintiff. Extrinsic evidence, to make certain the references in such a writing, is proper. *Searles v. Gonzalez* (1923) 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78; *Shirley v. Shirley* (1927) 83 Cal. App. 386, 256 P. 823. So it appears, without question, that "the money we have of yours" was that for which the notes had been given. The statement that "I gave Clara the twenty-five dollars," the evidence sufficiently shows, referred to a sum given the plaintiff's daughter for the plaintiff, as a payment of interest on the notes. We have, then, the fact of payment, itself referred to in the writing, and a clear acknowledgment that the writer considered herself indebted to the plaintiff. This suffices to create a new obligation, without the statute. *Minifie v. Rowley* (1921) 187 Cal. 481, 202 P. 673; *Shirley v. Shirley*, *supra*; *Ferguson v. Fonner*, *supra*.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

118 Cal.App. 312

MOREHEAD et ux. v. ROEHM et ux.
Civ. 503.

District Court of Appeal, Fourth District, California.

Nov. 13, 1931.

1. Automobiles ☞245 (80).

Whether plaintiff's failure to give statutory signal, before turning left at intersection, contributed to collision, *held* for trial court (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

2. Automobiles ☞245 (80).

Failure of driver first entering intersection at lawful speed to see car approaching from left, *held* not contributory negligence as matter of law.

Such conduct is not contributory negligence as matter of law because, where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume he will be given the right of way and be permitted to pass through the intersection without danger of collision, for he has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Fred Morehead and Freda Morehead, his wife, against Elon R. Roehm and Sadie A. Roehm, his wife. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana, for appellants.

Chas. D. Swanner, of Santa Ana, for respondents.

MARKS, J.

Respondents are husband and wife, as are appellants. At about six o'clock on the afternoon of May 21, 1930, Freda Morehead was injured in a collision between an automobile which she was driving and one being driven by Sadie A. Roehm, at the intersection of Newport road and East First street, public roads in Orange county. Newport road runs in a northeasterly and southwesterly direction, and is intersected from the west by First street at an angle of about forty-five degrees. First street terminates in Newport road. At the time of the accident, there was a boulevard stop sign on East First street just east of Newport road.

Freda Morehead, driving easterly on First street, brought her car to a full stop at the

boulevard stop sign and entered Newport road, making a left turn. When she had proceeded between seventy-five and a hundred feet beyond the stop sign, the right front wheel of her automobile was struck by the right front wheel of the car driven by Mrs. Roehm. The collision occurred on the easterly half of Newport road, which was the left half of the road from the southwesterly direction in which Mrs. Roehm was traveling.

The evidence in this case is not conflicting. Appellants were satisfied with the account of the accident as given by respondents and their witnesses, and rested their case without introducing evidence. The trial court made findings of fact and conclusions of law, from which it appears that the negligence of Mrs. Roehm was the proximate cause of the accident, without any contributory negligence on the part of respondents.

From the judgment rendered in favor of respondents, appellants prosecute this appeal. They contend that the evidence shows that Mrs. Morehead was guilty of contributory negligence as a matter of law, for the following reasons: First, that she did not make any arm signal signifying her intention to make a left turn before proceeding into the intersection and turning to her left; and, second, that she did not look to her left for approaching vehicles before entering and while proceeding into and across the intersection, or that if she did look, it was with unseeing eyes, which was equivalent to not looking at all.

[1] Mrs. Morehead made no arm signal before entering the intersection as required by the provisions of the California Vehicle Act (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a). Whether or not her failure so to do contributed in any way to the subsequent accident and her injury was a question of fact to be determined by the trial court. It having resolved this question against the appellants, its finding is binding upon us, and cannot be disturbed.

In the case of Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132, 133, it was said: "It is clear from the physical conditions shown by the evidence that plaintiff's view of the traffic along Soledad street during the last 100 feet of his approach to the intersection was not clear and uninterrupted for a distance of 200 feet either north or south of the intersection. Where the view is thus obstructed, a failure to observe the statutory requirement as to speed will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury (Mathes v. Aggeler & Musser, etc., Co., 179 Cal. 697, 178 P. 713; Dewhirst v. Leopold, 194 Cal. 424,

229 P. 30; *Williams v. Southern Pac. Co.*, 173 Cal. 525, 160 P. 660; *Thomas v. German, etc., Society*, 168 Cal. 183, 141 P. 1186, and, when the evidence is conflicting or any reasonable man might differ as to the inferences which ought to be drawn from the evidence, this question is one for the jury (*Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462, 34 P. 84). * * * Granting that the speed of the plaintiff's automobile was 3 miles per hour in excess of that permitted by the statute, it does not follow with certainty that this proximately contributed to his injury."

[2] In the instant case, the trial court was justified in concluding that Mrs. Morehead entered the intersection first and at a lawful rate of speed, while Mrs. Roehm was approaching it from her left. Under recent decisions of the Supreme Court, we are compelled to hold that the failure of Mrs. Morehead to see the Roehm car approaching from her left was not contributory negligence as a matter of law.

The facts of the instant case bearing upon the failure of Mrs. Morehead to see the Roehm car until just before the collision are somewhat similar to those of the case of *Page v. Mazzei* (Cal. Sup.) 3 P.(2d) 11, 12. In the *Page Case*, the accident happened in the intersection of Clovis avenue, a street running north and south, and Belmont avenue, a street running east and west. Page and his wife were traveling west on Belmont avenue, and Mazzei south on Clovis avenue. Mazzei approached the intersection from the right of Mr. and Mrs. Page. Page testified that he looked in both directions before entering the intersection; that he saw an automobile on Clovis avenue approaching the intersection from the south at a distance of three hundred feet or more; that he did not see the Mazzei car until just before the collision; that the Page car had proceeded across the center of the intersection, where it was struck by the Mazzei car; that the Page car was traveling at no more than eight miles per hour in entering and crossing the intersection. Mazzei and his wife testified that they also looked but did not see the Page car until just before the collision, and that they entered the intersection at no more than fifteen miles per hour. Under this state of facts, the Supreme Court held: "Under proper instructions, and on ample evidence to support its verdict, the jury awarded the plaintiffs substantial damages for injuries sustained by Mrs. Page when the automobile of defendant crashed into the automobile of plaintiffs at the intersection of two roads. The case, in all material respects, is so similar to the case of *Couchman v. Snelling* (Cal. App.) 295 P. 845, 847, recently decided, that we approve and adopt the language of Mr. Presiding Justice Tyler in the opinion handed down in that case, viz.: 'Where a car has actually entered an intersection before the other approaches it,

the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. *Keyes v. Hawley*, 100 Cal. App. 53, 60, 279 P. 674. Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection. *Whitelaw v. McGilliard*, 179 Cal. 349, 176 P. 679.'"

The case of *Skaggs v. Willhour*, 210 Cal. 524, 292 P. 649, has an important bearing upon the legal question of the negligence or contributory negligence of a plaintiff who looks but does not see danger which he is approaching. In this case, the plaintiff Skaggs was traveling north on the state highway across the Tejon pass in Kern county. In front of him were two trucks, one traveling south and the other traveling north. The trucks met more than 150 feet ahead of Skaggs. When Skaggs approached within about that distance from the trucks, he was completely blinded by the headlights of the one south-bound. In his testimony, he described the effect of the lights as follows: "As I approached the trucks, the headlights of this truck facing me were very bright—I could not see the highway for the rays of light." * * * "It was impossible for me to see anyone within the rays of the headlight." * * * "After I came within the rays of the light facing me I was continually in the rays of the light until I passed the rays, and I hit the rear end of the trailer." * * *

"Q. Prior to that time could you see any tail-lights or any lights of that kind? A. You could not see anything past the rays of these lights.

"Q. Couldn't you even see the road there? A. I could not see the highway there."

Skaggs further testified that he did not see the rear of the north-bound truck until he was within about fifteen feet from it, and too late to avoid a collision. The appellant contended that this evidence established contributory negligence on the part of Skaggs as a matter of law. The Supreme Court held: "According to the evidence favorable to the plaintiff, the defendant's truck and trailer were parked entirely on the paved portion of the highway. Directly opposite the defendant's truck and trailer, on the other side of the highway, facing southerly, stood another parked truck, the property of a third person. The headlights on this second truck were shining brightly and blinded the plaintiff for a distance of about 150 feet behind the defendant's trailer. The plaintiff was traveling at a speed of about 25 miles per hour when his car entered the blinding rays of light from the second truck and he slowed his speed

down to 15 miles per hour, at which rate he was traveling when he first saw the defendant's trailer. He then swerved to the left and applied his brakes to the utmost of their capacity. He was within about 4 feet of coming to a dead stop when he ran into the pipes extending from the rear end of the defendant's trailer. The defendant's negligence is clearly shown, and, under the facts appearing in the record, a brief outline of which is given above, we are of the opinion that it was a question of fact for the jury whether the plaintiff did everything that a reasonable man would have done under like circumstances to safeguard the life and property of others and to avoid injury to himself."

Under the authorities cited, we are of the opinion that the question of the contributory negligence of Mrs. Morehead was a question of fact to be decided by the trial court. This being the case, its findings and judgment cannot be disturbed here.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

McCOMAS v. AL G. BARNES SHOWS CO.
et al. *
Civ. 6831.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1931.

Rehearing Denied Dec. 1, 1931. Hearing Granted by Supreme Court Dec. 31, 1931.

1. Master and servant ☞301(4).

Studio hiring elephant and trainer from circus was liable for injuries of studio's actress, sustained in fall from elephant caused from trainer's negligence, if at time of accident studio had complete control over trainer.

2. Stipulations ☞14(4).

Parties' agreement that question, whether circus, hiring elephant with trainer to studio, owned elephant, should not be submitted to jury, did not preclude court considering question of studio's liability for trainer's negligence.

3. Appeal and error ☞766.

Brief of appellant bona fide attempting to comply with court rule will not be dismissed in case of substantial compliance therewith (District Courts of Appeal, Rule 8).

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Lila McComas against the Alliance Investment Company and others. From a judgment for plaintiff named, defendant appeals.

Reversed.

Arthur S. Guerin and A. Feldman, both of Los Angeles, for appellant.

William C. Ring, of Los Angeles, for respondents.

HOUSER, J.

The main facts herein appear to be that the defendant Alliance Investment Company, a corporation, was the owner of an elephant, and certain riding furnishings and equipment therefor, which, with a trainer or attendant for said elephant, at an agreed daily compensation, were rented to William Fox Studios, a corporation: that plaintiff was an actress employed by the latter to ride said elephant; and that by reason of alleged negligence on the part of the former corporation, plaintiff was thrown from the elephant, and thereby sustained personal injuries for which she recovered judgment against the Alliance Investment Company; from which judgment the appeal herein is prosecuted.

[1] The first point urged by appellant relates to the refusal of the trial court to give to the jury a certain instruction requested by defendant Alliance Investment Company, in part, "that one who is the general servant or employee of another may be loaned or hired by the master for some special service, so as to become as to that special service the servant of such third party; and where a general servant or employee is so loaned or hired to another, and as regards the particular service, for which he is so loaned or hired, is subject wholly to the direction and control of the other, the latter, and not the general employer, is the master, so far as the particular or special service is concerned, and is liable for injuries caused by the negligent and wrongful acts of the servant, while engaged in the duties pertaining to such service." In substance, the remainder of said requested instruction was to the effect that one of the questions of fact to be determined by the jury was whether, at the time of the accident in question, the trainer of the elephant was the servant of the William Fox Studios or of the Alliance Investment Company; and that if the jury should find from the evidence that the said trainer was employed generally by the defendant Alliance Investment Company in a capacity as trainer of its elephants, and was hired out by that company, together with the elephant in question, to the William Fox

Studios, and that said trainer was thereupon and thereafter, and at the time when the accident occurred, subject wholly to the direction and control of said latter corporation while performing the duties for which he was hired, or that at said time said latter corporation had the right of such direction and control, then said William Fox Studios would be liable for any injury caused to plaintiff by the negligent and wrongful act or acts of said trainer while he was engaged in the duties pertaining to the services for said corporation.

In principle, the authorities of this state indicate that the instruction offered by defendant and refused by the trial court is a correct statement of the law (*Stewart v. California Imp. Co.*, 131 Cal. 125, 63 P. 177, 724, 52 L. R. A. 205; *Billig v. Southern Pacific Co.*, 189 Cal. 477, 209 P. 241; *Umsted v. Scofield Eng. Const. Co.*, 203 Cal. 224, 263 P. 799; *Peters v. United Studios*, 98 Cal. App. 373, 277 P. 156; *Valdick v. LeClair*, 106 Cal. App. 489, 289 P. 673), and that, in the instant case, it should have been given to the jury.

[2] The claim presented by respondent herein that at the time of the commencement of the trial of the action, by stipulation of the parties the point now urged by appellant was removed from consideration by the jury, and hence may not now be considered by this court, cannot be sustained. On examination of the record herein, it satisfactorily appears that the implied stipulation to which respondent refers related only to whether the Alliance Investment Company or Al G. Barnes Circus Company was the owner of the elephant, etc., and not to whether liability (if any) existed against William Fox Studios.

Since said instruction was vital to the defense interposed by the defendant Alliance Investment Company, it becomes unnecessary to consider any other alleged error on the part of the trial court.

[3] Respondent's motion to dismiss the appeal for the reason that the opening brief filed by appellant was not presented to this court in accordance with the requirements of rule 8, is denied. An examination of said brief discloses the fact that, although not prepared in strict compliance with the provisions of said rule, nevertheless it sufficiently appears that an attempt in good faith was made by appellant to do so, with the result that in substance, if not in form, the brief as presented may not be said to be in flagrant, if any, violation of the rule in question. *Pacific States Corp. v. Rosenshine*, 107 Cal. App. 626, 290 P. 609.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

KLEMKO v. RYER.

Civ. 7508.

District Court of Appeal, First District, Division 1, California.

Nov. 9, 1931.

Rehearing Denied Dec. 9, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

1. Evidence ⇨14.

As matter of common knowledge, conclusion is inescapable that where two automobiles collide on open intersection, one or other of drivers is negligent, and possibly both.

2. Automobiles ⇨245(14).

In action for damages sustained in collision between two automobiles on open intersection, question as to which driver was negligent is for jury.

3. Automobiles ⇨171(9).

Motorist approaching intersection must proceed with circumspection so as not to collide with other vehicles.

4. Automobiles ⇨244(11).

Finding that defendant motorist colliding at intersection with plaintiff motorist, approaching intersection from defendant's right, was negligent, *held* supported.

5. Trial ⇨296(4, 5).

Instruction that, for purposes of defense of contributory negligence, defendant admitted his own negligence, *held* not prejudicial requiring reversal, in view of circumstances and other instructions.

Circumstances disclosed that defendant was negligent, and the court instructed that if defendant motorist was not negligent, plaintiff motorist could not recover, and further that if defendant was negligent and plaintiff was also negligent, and that his negligence contributed proximately to his injury, then plaintiff could not recover.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by J. Klemko against Marshall B. Ryer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles W. Haswell, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

TYLER, P. J.

Action for damages.

The case involves an intersection collision

between plaintiff's and defendant's automobiles. On April 27, 1928, at the hour of 1:30 a. m. plaintiff, respondent herein, was driving his automobile in a westerly direction along Post Street toward Larkin. At said time and place, defendant drove and operated an automobile in a northerly direction on Larkin street. The complaint alleges that defendant so drove and operated his machine that it collided with the car operated by plaintiff, in consequence of which he was seriously injured. A jury awarded plaintiff damages in the sum of \$4,000. No claim is here made that the amount is excessive.

[1-4] The first point relied upon for a reversal is that the evidence is insufficient to sustain the verdict. It is further urged that the court erred in giving and refusing to give certain instructions to the jury. We do not consider there is merit in either contention. As a matter of common knowledge, the conclusion is inescapable that, where two automobiles collide upon an open intersection, one or the other of the drivers is negligent, and possibly both. The question as to which driver is negligent is one for the jury. *Tyson v. Burton* (Cal. App.) 294 P. 750. Here there is evidence to show that defendant did not exercise ordinary care in operating his machine, as he testified that he did not see plaintiff until the moment he collided with him. There is also evidence to indicate that defendant was traveling on the wrong side of the street and at an excessive rate of speed. It is the duty of a motorist approaching at right angles to avoid a collision, and in approaching an intersection he must proceed with circumspection, so as not to come in collision with other vehicles. The evidence is ample to show that defendant failed to exercise ordinary care, and the accident would not have occurred but for his negligence. This was the conclusion of the trial judge, for a motion for a new trial when made was denied.

[5] In his answer, defendant traversed the allegations of the complaint, and, as a special defense, pleaded contributory negligence on the part of plaintiff. The trial court instructed the jury, in effect, that defendant, for the purpose of this defense, admitted his own negligence. It is urged that this instruction was prejudicial and requires a reversal of the judgment. Instructions of a similar character have not received the unqualified approval of our Supreme Court, and they are better omitted. *Sheets v. Southern Pacific Co.* (Cal. Sup.) 299 P. 71. However, before such an instruction justifies a reversal, it must appear that it prejudicially affected the rights of a defendant. *Jackson v. Lactein Co.*, 209 Cal. 520, 288 P. 781; *Dullanty v. Smith*, 203 Cal. 621, 265 P. 814. Moreover,

the court instructed the jury that an injury might be sustained either through the negligence of the plaintiff, or the defendant, or both, and that if the jury found that defendant was not negligent plaintiff could not recover, and further, that if defendant was negligent, and plaintiff also negligent, and that his negligence contributed proximately to his injury, then plaintiff could not recover; that such negligence on the part of plaintiff, if found to exist, constitutes contributory negligence. Considering all the circumstances, including the acts of negligence on the part of defendant as above recited, we cannot say that the giving of the instruction affected the substantial rights of appellant.

Certain instructions offered by defendant. In regard to the law applicable to the speed and right of way of automobiles at crossings, were refused by the trial court, and such refusal is assigned as error. The court fully and fairly instructed the jury upon these subjects.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

120 Cal.App.(Supp.) 771
JOHNSON v. TAYLOR et ux.
No. 136.

Appellate Department, Superior Court, City and County of San Francisco, California.

Oct. 28, 1931.

Husband and wife ⇄268(1).

Husband is liable out of community property for wife's debts contracted before their marriage while wife was living apart from former husband.

Appeal from Municipal Court of City and County of San Francisco; Leo A. Murasky, Judge.

Action by M. Johnson against Robert R. Taylor and wife. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Before her marriage to the defendant Robert R. Taylor, in June, 1930, Mrs. Taylor was the wife of J. Chandler Smith, from whom she obtained an interlocutory decree of divorce on April 1, 1927, wherein she was awarded for her maintenance \$75 per month for thirteen months. During the interval

between the interlocutory and the final decree of divorce, and while the parties to the divorce action were living apart, said defendant, then known as Mrs. Smith, contracted the obligation here sued on for services rendered her in May and June, 1927, in the amount of \$147.80.

Her individual liability having been admitted, the only matter in controversy is the liability of her present husband, Robert R. Taylor.

Judgment was rendered in the trial court against both defendants, with the proviso that the judgment against Robert R. Taylor should be subject to satisfaction out of the community property only. From that judgment he appealed.

Hubbard & Hubbard, of San Francisco, for appellant.

Clayton H. Garvey, of San Francisco, for respondent.

JOHNSON, P. J.

When a man takes to himself a wife, he takes her for better or for worse and with her debts and incumbrances. As is said in *Heyman v. Heyman*, 19 Ga. App. 634, 92 S. E. 25, 26, "If the wife is indebted before marriage, the husband is bound afterwards to pay the debt, for he has adopted her and her circumstances together."

At common law the husband, though the wife came to him without any property of her own, became immediately liable for her debts because of his right to all that she might earn during the marriage. Where the community property law prevails, the wife is supposed to be an equal contributor to the community estate over which the husband has control. So the antenuptial debts of the wife become debts of the husband also to the extent of the community property in his hands. *Van Maren v. Johnson*, 15 Cal. 308; *Vlautin v. Bumpus*, 35 Cal. 214. And even though a debt was contracted by a wife during an earlier marriage, while she and her former husband were living apart, both she and the husband of a subsequent marriage may be charged with payment, the wife in this state out of her separate property, and the husband out of the community funds. *Prescott v. Fisher*, 22 Ill. 390, 393.

The judgment in this case makes the husband, Robert R. Taylor, liable only to the extent of the community property, as is proper, and thus leaves his separate property exempt. He has therefore no legal ground of complaint. His liability is merely one of his matrimonial obligations.

The judgment is affirmed.

We concur: GOODELL, J.; CONLAN, J.

